



**Waichari (Suing as an Administrator of the Estate of Francis Albert Waichari)
v Kairu (Practicing as Kimani Kairu & Co Advocates) (Environmental and Land
Originating Summons E007 of 2024) [2025] KEELC 3751 (KLR) (13 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3751 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E007 OF 2024**

JA MOGENI, J

MAY 13, 2025

BETWEEN

**ALEX NDUNGU KARANJA WAICHARI (SUING AS AN ADMINISTRATOR
OF THE ESTATE OF FRANCIS ALBERT WAICHARI) PLAINTIFF**

AND

**PETER KIMANI KAIRU (PRACTICING AS KIMANI KAIRU & CO
ADVOCATES) RESPONDENT**

RULING

1. This Court in its Judgment dated 06/06/2024 which was against the Applicant ordered the Applicant to pay the Respondent the sum of Kesh 52,665,880. Following this Court's Judgment, the Applicant filed this Notice of Motion dated 18/06/2024 seeking to have the Court's Judgment stayed. The Applicant sought to have execution of the Court's Judgment stayed for at least 90 days to give him ample time to comply with the Court's Order.
2. The Applicant is apprehensive that if the stay order is not granted then the Plaintiff/Respondent will proceed to ruthlessly execute the Judgment and this will serve to embarrass the Defendant yet he is committed to the resolution of the underlying issue. That the Respondent will not suffer any prejudice.
3. The Plaintiff/Respondent filed a Replying Affidavit dated 22/07/2024 opposing the Application and averred that the Application for stay is an afterthought. Further that the Application is pegged on giving room for an out of Court settlement which however was tried and the Applicant was uncooperative.
4. He further avers that the Application is brought in bad faith and is meant to deny the Respondent his rights which have been pending for fourteen months.



5. In the Judgment issued by this Court on 6/06/2024, it was not denied by the Applicant that he had sold the suit property for Kesh 90,000,000 and only submitted to the Applicant/Defendant herein Kesh 35,000,000. Further that the parties appeared before this Court on 22/04/2024 where the Defendant/Respondent informed the Court that the Plaintiff/Applicant had not paid up the balance despite having sought for time to transfer the balance.
6. The Applicant Plaintiff did not at any time deny acting for the Defendant/Respondent and having been paid Kesh 90,000,000. He also did not deny not depositing the sums owed to the Plaintiff/Respondent amounting to Kesh 52,663,880 or such other sums owed into the Defendant/Respondent's account which he had been requested to do vide letters dated 20/11/2023, 5/12/2023, 8/12/2023 and 16/01/2024 and even after the delivery of the Judgment.
7. Instead the Defendant /Applicant has filed an Application seeking stay of the Judgment dated 6/06/2024 and the gist of the Application is that whereas the Applicant wrote to the Respondent's Lawyer offering to settle the amount due within Ninety (90) days they did not respond. That even after the delivery of the Judgment the Defendant/Applicant wrote to the Defendant/Respondent and offered to pay the decretal sum within 90 days but still there was no response.
8. That the Defendant/Applicant is now apprehensive that the Plaintiff/Respondent is intent on commencing execution proceedings against him. Thus the Applicant invokes the discretionary power of this Court to stay the execution of its Judgment.
9. When the parties appeared in Court on 25/07/2024 the Court gave directions on disposal of the Application by way of written submissions. By the time of writing this Ruling none of the parties had complied and filed their written submissions. None the less the Court has gone ahead and considered the pleadings and the annexures.

Analysis and Determination

10. I have perused carefully the Applicant's Application herein, the Affidavits annexures and pleadings filed by both parties and one issue arise for determination namely; whether this Court should grant the order of stay of execution as prayed in the Notice of Motion dated 18/06/2024.
11. The said Application having been brought under the provisions of Order 42 of the Civil Procedure Rules, it is necessary to consider the requirements which an Applicant for stay of execution has to meet in order to be entitled to such order of stay.
12. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provides that:

“6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appeal from except in as far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order;

And whether the Application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on Application being made, to consider such Application and to make such order of thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) unless –



- (a) the Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the Application has been made without unreasonable delay; and
- (b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”(Emphasis added).

13. It is clear from Order 42 Rule 6(1) and (2) that the Applicant was required to satisfy the following conditions: -
- i. Show sufficient cause.
 - ii. Demonstrate that he will suffer substantial loss unless the order for stay is granted.
 - iii. Offer security.
 - iv. File the Application without unreasonable time.
14. The Court of Appeal in the case of Kenya Shell Ltd v Kibiru & Another [1986] KLR 410 where an Appellant had sought stay of execution of a monetary decree issued by the High Court in favour of the Respondent, in dismissing the said Application, the Court of Appeal observed as follows:
- “It is usually a good rule to see if Order XL1 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence, it is difficult to see why the Respondents should be kept out of their money.”
15. The Court of Appeal also held in the said case that while considering Applications for stay of execution the Court should balance the two competing interests of the parties, that is, that a successful litigant should not be deprived of the fruits of his Judgment, and that execution of a Decree should not render a proposed appeal nugatory.
16. In this case however there is no pending Appeal. The Applicant has not filed any Appeal but has sought to have a stay without preferring an Appeal. The Applicant is apprehensive that the successful litigant will proceed to execute and this will deny him adequate time to comply with the Judgment. This is not sufficient cause to warrant a grant of stay of the Court’s Decree.
17. Secondly, has the Applicant in this matter demonstrated the element of substantial loss unless stay of execution is granted? I am not persuaded that from the material on record the Applicant has demonstrated such loss. The fact that the Defendant/Respondent has evinced his intention to proceed with execution is based on a legal order issued by this Honorable Court. Therefore the apprehension by the Applicant does not aid in demonstrating or substantiating the “substantial loss” contemplated under Order 42 of the Civil Procedure Rules.
18. The Applicant despite stating at paragraph 8 of the Supporting Affidavit he is committed to remit the subject funds within 90 days hence there is no need of the matter degenerating to execution. There is no Application to date that has been made for payment of the decretal amount by instalments or at all. Also, no Appeal has ever been preferred against the said Decree.



19. In the circumstances of this case, it is not tenable for the Applicant to allege that he is apprehensive that the Defendant/Respondent has evinced an intention to proceed with execution and that he is apprehensive. I say so because there is no Appeal against the Decree for payment of the money which was found to be due to the Respondent.
20. It is also very doubtful if a stay of execution of a Decree is available to a litigant who has not appealed against that Decree. It would not serve any useful purpose to grant such stay when the main decree has not been appealed against. Justice G.V. Odunga in his book “Digest on Civil Case Law and Procedure” LawAfrica (2006) in para 956A states as follows:

“A party cannot be allowed to appeal from execution process when he failed to appeal from the Judgement which gave rise to the proceedings which he intends to appeal from.”
21. The case attributed to that proposition is an unreported case of Sophia Lenya v Kenya Armed Forces C. Association, per Warsame J (as he then was) in Kisumu High Court Misc Appeal No. 1 of 2004.
22. Further, in the case of Raymond M. Omboga v Augustine Pya Maranga, Kisii HCCA No 15 of 2010, Makhandia J (as he then was) made the following observation in a matter whose facts were very different from the current one:

“The Court cannot see how it can order the stay of a decree that is not the subject of the appeal”
23. The ultimate effect of granting a stay of execution process would be to stay execution of the primary Decree which has not been challenged on Appeal. It would be a way of obtaining stay of a Decree through the back door when such Decree is not subject to challenge by way of Appeal.
24. In addition, the issue of substantial loss, was described by Platt Ag J.A (as he then was) where he stated in the case of Kenya Shell Ltd v Benjamin Kibiru & Another 1986 KLR 410, that it is the “cornerstone” for the jurisdiction for granting stay.
25. On his part Gachuhi Ag J.A (as he then was) stated in the same case: -

“It is not sufficient by merely stating that the sum of Kshs. 20,380/= is a lot of money and the Applicant would suffer loss if the money is paid ... In an Application of this nature, the Applicant should show the damages it would suffer if the order for stay is not granted.”
26. Further the Court in Machira T/A Machira & Company Advocates v East African Standard (No 2) 2002 KLR, added thus: -

“If the Applicant cites as a ground substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given Where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay Indeed, remote contingencies would not warrant the Court’s interference with the ordinary course of justice and the process of the law.”
27. The Applicant also had a recourse under Order 21 rule 12 (1) and (2) of the Civil Procedure Rules which provides as follows: -
 - “1. Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment



of the amount decreed shall be postponed or shall be made by installments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

2. After passing of any such decree, the Court may on the Application of the Judgment-debtor and with the consent of the decree-holder or without the consent of the decree-holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by installments on such terms as to the payment of interest, the attachment of the property of the Judgment-debtor or the taking of security from him, or otherwise, as it thinks fit.”

28. In view of the above, under Order 21 rule 12(2) the Court has power and discretion to order payment of the decretal sum in instalments on Application by the Judgment-Debtor with or without the consent of the Decree Holder. The Judgment-Debtor however has to show sufficient cause as to why he should be allowed to pay the decretal sum in instalments and/or why the payments should be postponed. Further in my opinion, this Court’s discretion to order payment in instalments and/or on such terms it deems fit must be exercised judiciously having regard to the facts and circumstances of each individual case and only if the Judgment Debtor has invoked the referenced provisions.
29. In the case of *Diamond Star General Trading LLC v Ambrose D O Rachier* carrying on business as *Rachier & Amollo Advocates* [2018] eKLR, G L Nzioka J relied on Order 21 rule 12(2) to exercise her discretion to allow the Applicant pay the decretal sum in instalments. The Judge cited with approval the case of *Kshs.Vaji Jethabhai & Bros Limited v Saleh Abdulla* [1959] EA 260 which laid down the principles that should guide the Court in exercising its discretion as follows: -
 - a. Whilst creditors’ rights must be considered each case must be considered on its own merits and discretion exercised accordingly;
 - b. The mere inability of a debtor to pay in full at once is not a sufficient reason for exercise of the discretion;
 - c. The debtor should be required to show his bona fides by arranging prompt payment of a fair proportion;
 - d. Hardship of the debtor might be a factor, but it is a question in each case whether some indulgence can fairly be given to the debtor without prejudicing the creditor.
30. In the present case, the Defendant/Applicant has not demonstrated any reason for its inability to settle the decretal sum in one lump sum. There is no iota of evidence save the statement that it was apprehensive that the Plaintiff/Respondent is intent on commencing execution proceedings against him a scenario he verily believes can be avoided. He is not telling the Court why he is not willing to pay or not to pay the decretal sum. One must demonstrate sufficient reason so as to attract the Court’s discretion. In this regard this Court is unable to do so for these observations.
31. The upshot of the foregoing is that the Applicant has failed to satisfy the first requirement for the grant of stay of execution under Order 42 Rule 6 of the Civil Procedure Rules on substantial loss. In that case, it is not necessary to consider the issue of security for the due performance of the Decree because both requirements must be satisfied for one to succeed on such Application.
32. It is therefore my opinion, and I so hold that the Application dated 18/06/2024 has no merit and the same is hereby dismissed with costs to the Respondent.
33. It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 13TH DAY OF MAY 2025
VIA MICROSOFT TEAMS.**

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MOGENI J

JUDGE

In the presence of:

Ms. Muriithi holding brief for Mr. Marete for the Applicant

Ms. Filsan holding brief for Mr. Mahamood Salim for the Respondent

Mr. Melita – Court Assistant

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MOGENI J

JUDGE

