



**Kimutai & another (Suing as personal representative of Estate of Jeremiah Cheruiyot Kimutai) v Kenindia Assurance Company Ltd (Civil Case 56 of 2006) [2024] KEHC 10001 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 10001 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL CASE 56 OF 2006  
SM MOHOCHI, J  
JULY 25, 2024**

**BETWEEN**

**PHYLIS JEROTICH KIMUTAI ..... 1<sup>ST</sup> APPLICANT**

**HENRY KIPKORIR KIMUTAI ..... 2<sup>ND</sup> APPLICANT**

**SUING AS PERSONAL REPRESENTATIVE OF ESTATE OF JEREMIAH  
CHERUIYOT KIMUTAI**

**AND**

**KENINDIA ASSURANCE COMPANY LTD ..... RESPONDENT**

**RULING**

1. Before Court for consideration is the Notice of Motion Application dated 28<sup>th</sup> March, 2024, brought under Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 22 Rule 22, 42 Rule 6 and 51 Rule 1 of the [Civil Procedure Rules](#). The Application seeks the following:-
  - i. Spent
  - ii. That the Honourable court be pleased to issue a stay order on the realization of the security and/or sale of property known as Nakuru Municipality Block 11/125 by the Respondent pending the inter-partes hearing and determination of the Application
  - iii. That this Honourable Court be pleased to issue a stay order on the realization of the security sale and/or any dealing of property known as Nakuru Municipality Block 11/125 by the Respondent pending the inter-partes hearing and determination of the appeal filed.
  - iv. That costs of this Application be provided for.



2. The grounds in support of the Application are found on the face of the Application and in the Supporting Affidavit sworn by Henry Kimutai on the same date. He averred that the Applicant being dissatisfied by the Judgement of this Court of 29<sup>th</sup> February, 2024 filed an Appeal on 7<sup>th</sup> March 2024 and is in the process of preparing the record of appeal.
3. The Applicant is apprehensive that without stay orders, the Respondent in order to realize the security, will commence the process and the auction he argues will cause them irreparable harm and loss. That if the appeal is successful they may never recover their property back. He averred that the application is not intended to deny the Respondent fruits of its judgement but a way of exhausting all available remedies. That the appeal is arguable and if stay is not granted then the appeal will be rendered nugatory.
4. He deponed further that the Kshs. 5,700,000 that is held in the joint interest earning account be held as security. That the Respondent will not suffer prejudice should the stay be granted as interests are still accruing and can recover its amount.
5. Opposing the Application, the Respondent filed a Replying Affidavit sworn by Pauline Kalibo on 8<sup>th</sup> May, 2024. She deponed that, the purpose of the application is to delay realization of the security. Since the charge and loan are not disputed, the realization of the security is pursuant to a valid charge. The Late Jeremiah Cheruiyot Kimutai understood the terms of the agreement and subsequent advancements.
6. Also, the effect of the Court vacating the interim orders was that the Respondent was at liberty to proceed with realization of the charge and that a negative order is not capable of being stayed. For the Court to issue stay orders the Applicant ought to demonstrate substantial loss, the application was made without delay and that security has been offered.
7. The Applicants have not demonstrated any effort in repaying the loan and the estate is in straw and may never be able to repay the loan. The monies held in the joint account belong to the Respondent and the Applicant cannot use those funds as security. The Applicant ought to offer new an independent security. She advanced that the estate has been collecting rental income from the property and is no hurry to finalize the proceedings.
8. She however stated that, should the Court be inclined to the grant stay of execution, then the Applicant should deposit the entire outstanding loan amount at the time of delivery of judgment of Kshs 1,581,947.10 as a precondition for granting of the order. Further, that if the Respondent realizes the charge, the estate will not suffer prejudice as the Respondent is able to make any refunds if any Court reverses the judgement. The alleged irreparable harm has not been demonstrated or that the appeal is arguable or that the Respondent will not remit the excess amounts.
9. The Application was canvassed by way of written submissions.

### **Applicant's Submissions**

10. In the Applicant's submissions dated 21<sup>st</sup> May, 2024 he submitted on two (2) issues.
11. For starters, on whether the application is seeking injunction pending appeal or stay of execution pending appeal, the Applicant submitted that the Application is seeking an injunction against the Respondent from realization of its security pending the determination of the appeal. The Respondent misapprehended the wording or the structure of prayer No.3. According to the Applicant, prayer No. 3 is seeking to injunct the Respondent from realizing the security by way of sale or in any form of dealings.



12. It was his argument that the Court has jurisdiction and discretion to grant injunction pending appeal. Reliance was placed in the Court of Appeal case in Mombasa HCCC 235 of 2010 *D.J Lowe & Co. Ltd vs Credit Agricole & 3 Others* as cited in *Julius Musili Kyunga vs KCB & Another* [2012] the Court held thus;  

.....the object of the injunction pending appeal is to preserve the subject matter to ensure that the appeal is successful will not be rendered nugatory.....”
13. The second issue as to whether the appeal is arguable and whether it will be rendered nugatory should the orders sought not issue, he relied on the pronouncement in the *Julius Musili Kyunga vs KCB & Another* (*supra*). The Court in this case held that it would be useful to demonstrate an arguable appeal through a draft memorandum of appeal and that a trial court should examine whether there are serious questions to be put before the appeal Court.
14. The Applicant submits that the appeal is arguable there is an annexed draft memorandum of appeal “HK4” with 4 grounds and a notice of appeal has also been filed.
15. The Court the *Julius Musili Kyunga vs KCB & Another* (*supra*) further propounded and relied on the *Githunguri vs Jimba Credit* [1988] case where it was held  

..... that if the charged premises were to be sold during the pendency of the proceedings the whole objects of the suit and the intermediate appeal would be defeated.
16. It was submitted that the suit property is about to be sold by the Respondents and the Applicants will never recover their property if their appeal is successful thereby rendering the appeal nugatory.

### **Respondent’s Submissions**

17. The Respondent in its written submissions dated 4<sup>th</sup> June, 2024 submitted on three (3) issues
18. Firstly, it was submitted that the Applicant has failed to demonstrate that any substantial loss will befall them. It was propounded that it is not in dispute that the loan was taken 33 years ago or that the Chargor defaulted in payment, the party that is likely to suffer loss is the Respondent since it continues to suffer as a result of the delay. The Estate has not demonstrated that it is capable of paying the outstanding balance nor made any attempts to settle the loan with its accruing interests. It relied on the case of *Sanvir Trustee Limited v Gurdian Bank Limited* Nairobi Milimani HCC 795 of 1997 and *Machira t/a Machira & Co. Advocates v East African Standard (No.2)* [2002] eKLR. It was not enough to put the assertion of substantial loss
19. As regards the proposed security of Ks 5,700,000 held in the interest earning joint account, it was the Respondent’s argument that the Court has already pronounced itself on the issue of the monies and money pronounced in favour of the Respondent cannot be used as security. With that the Respondent submitted that no security has been offered to warrant grant of the orders sought.
20. The second issue is on whether the orders issued by Court are capable of being stayed. Counsel submitted that the dispute on the loan amount and interest cannot be a basis for granting an injunction restraining the exercise of a statutory power of sale when it arises. It was further submitted that there is danger for the Respondent not being able to recover the amounts due by virtue of the accruing amounts outstripping the value of the suit property hence a stay order is prejudicial to the Respondent.



21. The Respondent also submitted that the orders issued were negative orders and therefore not capable of being stayed. Reliance was placed in *Kaushik Panchamatia & 3 Others v Prime Bank Limited & Another* [2020] eKLR where the Court held;

“.....that a negative order is incapable of being stayed because there is nothing to stay. It therefore follows that in light of the above threshold we, have no mandate to grant a stay order in the manner prayed for by the applicants”

22. According to the Respondent, the Applicant is attempting to amend the Application by arguing that the application is seeking an injunction and not stay of execution. Nothing prevented the Applicant from seeking an injunction in the Application and thus that argument in the submissions is an afterthought. That order 42 Rule 6 does not contemplate a situation where an application for injunction is made to a Court that rendered the judgment therefore this Court lacks jurisdiction to grant an injunction at this stage.

23. Thirdly that costs be awarded to the Respondent

### **Analysis**

24. I have considered the Application, the grounds of opposition and the submissions of parties on record and I find that the issue for determination is whether this court should issue orders of stay of execution.

25. On the issue of stay, Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules*, 2010 provides as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so 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 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.”

26. The first issue is whether the application has been filed without unreasonable delay. This application was filed on 28<sup>th</sup> March, 2024 thus I find that there is no inordinate delay in filing.



27. Secondly, the Applicant has stated that she stands to suffer loss if the orders sought are not granted but has not demonstrated how exactly they will suffer. Substantial loss was discussed in the case of [James Wangalwa & Another vs. Agnes Naliaka Cheseto](#) [2012] eKLR, as:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

28. Similarly, in the case of [James Wangalwa & Another v Agnes Naliaka Cheseto](#) [2012] eKLR, it was observed that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

29. On the ability of the Respondent financial incapability of paying back the decretal sum being one of the reasons the orders should be granted, I beg to differ. The onus of proving the Respondent’s inability goes beyond throwing an allegation without evidence. It is upon the Applicant who alleges the same to go ahead and prove it. Nonetheless, the court has settled this matter and stated that this should not be the reason an order of stay is granted. This was held in *Stephen Wanjohi vs. Central Glass Industries Ltd.* Nairobi HCCC No. 6726 of 1991, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonorable miscreant without any form of income.

30. On the issue of security, furnishing of security is key in getting orders of stay pending appeal. The Applicant has indicated that the 5,700,000 in the joint interest earning account be held as security in essence the Applicants have not offered any security.

31. In [Machira T/A Machira & Co Advocates vs. East African Standard \(No 2\)](#) [2002] KLR 63 it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or



execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court”.

32. Regarding security for the performance of the Decree, Gikonyo J in the case of *Arun C Sharma Vs. Ashana Raikundalia T/A Raikundalia & Co. Advocates & 2 Others* (2014) eKLR held that: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.

Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

33. This Court recalls its judgment dated 29th February 2024 dismissed the Applicants suit, vacated an injunction from realizing the Respondent’s security that subsisted for over Thirty-two (32) years.
34. As to whether this court can grant temporary injunction from realizing the security pending Appeal, this court is of the view that a temporary injunction pending Appeal would issue where the Appeal challenges a ruling and not a judgment of the court.
35. No judgment can be enjoined and stay of execution is only a temporary disruption from realization of the fruits of judgment upon basis.
36. I am unpersuaded of the substantial loss to be occasioned should the Respondents realized their security.
37. I am equally unpersuaded on the arguability of the Appeal to warrant grant of stay.
38. The Judgment was in the nature of negative orders incapable of being stayed.
39. I am thus unpersuaded and find that the Notice of motion dated 28th March 2024 is without merit and is accordingly dismissed.
40. The Temporary order of stay of execution dated 28<sup>th</sup> March 2024 are hereby vacated and the costs of the Application are awarded to the Respondents.

It is So Ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 25<sup>TH</sup> DAY OF JULY, 2024.**

**MOHOCHI S.M.**

**JUDGE**

