



**Thiong’O & another v Aberdare Safari Hotels Limited (Miscellaneous Civil Case E022 of 2023) [2024] KEHC 8753 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8753 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
MISCELLANEOUS CIVIL CASE E022 OF 2023  
MA ODERO, J  
JULY 19, 2024**

**BETWEEN**

**JOHN MAINA THIONG’O ..... 1<sup>ST</sup> APPLICANT**

**HARRISON KIHARA T/A HARIKI AUCTIONEERS ..... 2<sup>ND</sup> APPLICANT**

**AND**

**ABERDARE SAFARI HOTELS LIMITED ..... RESPONDENT**

**RULING**

1. Before this Court for determination is the Notice of Motion dated 13<sup>th</sup> June, 2023, by which the Applicants John Maina Thiong’o and Harrison Kihara T/a Hariki Auctioneers seek the following orders;-

- “1. Spent
2. Spent
3. Spent
4. Spent
5. Spent
6. That pending the hearing and determination of the intended appeal this Honourable Court be pleased to order stay of proceedings in Nyeri CMCC No.394 of 2019.
7. That pending the hearing and determination of this Intended Appeal this Honourable court be pleased to order a stay of execution of the orders issued on 31<sup>st</sup> May, 2023 in Nyeri CMCC No. 394 of 2019



8. That this Honourable Court be pleased to grant such other further orders and/or directions in this case as may be expedient and in the interest of justice.
  9. That the costs of this application be in the cause.”
2. The application which was premised upon Order 42 rule 6 of the *Civil Procedure Rules* and Sections 1A, 1B 3 and 3A of the *Civil Procedure Act* and all enabling provisions of the law was supported by the Affidavit of even date sworn by the 1<sup>st</sup> Applicant.
  3. The Respondent Zakayo Kairu opposed the application through his Replying Affidavit dated 27<sup>th</sup> June, 2023.
  4. The matter was canvassed by way of written submissions. The Applicant did not file any written submissions whilst the Respondent relied upon their written submissions dated 15<sup>th</sup> April, 2024.

### **Background**

5. The lower court in CMCC No. 394 of 2014 gave judgment against the Defendant Zakayo Kairu Waiganjo for Kshs. 2,049,025.00.
6. Following the judgment a decree was issued against the Defendant for Kshs. 2,631,652. A warrant of attachment for moveable property was issued and on the basis of that warrant the 1<sup>st</sup> Applicant instructed the 2<sup>nd</sup> Applicant to attach the Defendants moveable property.
7. The 2<sup>nd</sup> Respondent then proclaimed the motor vehicle Registration KCS 345B Toyota Hiace (Matatu) and issued a Notice for sale. Thereafter the Defendant sought a stay of execution in the lower court proceedings and the court vide orders made on 3<sup>rd</sup> August, 2022 the lower court granted a stay of execution, of the intended sale of a Motor vehicle Registration No. KCS 345B in satisfaction of the Decree. The Court further ordered the release of the said motor vehicle, set aside the Ex Parte judgment entered against the defendant and granted the defendant leave to defend the suit.
8. It would appear that notwithstanding the said orders, the 2<sup>nd</sup> Applicant proceeded to sell the said vehicle by way of auction and transferred the said motor vehicle Toyota Hiace (matatu) to one Gabriel Hiuhi Nyamu the Interested Party).
9. The Defendant then moved back to court vide an application dated 12<sup>th</sup> October, 2022 seeking to have the Respondents cited for contempt and also seeking to have the sale of motor vehicle declared null and void and to have the said vehicle restored back into his possession.
10. That application was duly heard and on 30<sup>th</sup> May 2023 the learned trial magistrate delivered a ruling in favour of the Respondent and issued the following orders;-
  - “ 1. . That leave is hereby granted to the firm of M/s Mathea Gikunju & Co. Advocates to come on record for the Defendant/Applicant and the said firm of advocates is deemed to be properly on record for the Defendant/Applicant.
  2. That this honourable court holds and declares that the sale and transfer of Motor vehicle registration number KCS 345B Toyota Hiace (Matatu) by the Respondents to the interested party herein was and is unlawful, illegal, null and void abnatio and the sale is set aside.
  3. That this honourable court orders and declares that the Defendant/Applicant is the lawful and legitimate owner of the subject motor vehicle registration



number KCS 345B Toyota Hiace (Matatu) and that the interested party to transfer back the said motor vehicle to the applicant forthwith.

4. That the respondents shall bear the costs of this application.”

11. Being aggrieved by the ruling of the lower court the Applicants purposed to file an appeal against the same. To that end the Applicant wrote to the Court Registry seeking typed proceedings and prepared a draft Memorandum of Appeal (Annexure TMT 5(a) and JMT 5(b) to the supporting Affidavit dated 13<sup>th</sup> June 2023. The Applicants also sought to stay execution of the ruling delivered on 30<sup>th</sup> May, 2023 pending the hearing and determination of their Intended appeal.
12. The Applicant submitted that they stood to suffer substantial loss if the orders of stay were not granted. That the conditions for grant of stay of execution have been met.
13. In opposing the application the Respondent submitted that the application for stay lacked merit and that the Applicants had failed to demonstrate what substantial loss they stood to suffer if no stay was granted. The Respondent also submitted that the Applicants do not have an arguable appeal.

### **Analysis and Determination**

14. I have carefully considered this application for stay, the reply filed thereto as well as the written submissions filed by the Respondent.
15. It is not the duty of this court to determine at this stage the merits or otherwise of the Intended Appeal. All the court is required to determine is whether the application for stay of execution is merited.
16. Order 42 Rule 6 which sets out the principles for stay of execution provides as follows;-
  - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appeal 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 to appeal is preferred may apply to the appellate court to have such order set aside. 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.
      - (c) .....
17. Therefore in order to merit the orders being sought the applicants must satisfy the court.
  - (a) That the application for stay was filed without unreasonable delay.
  - (b) That they stand to suffer substantial loss unless the stay order is granted.
  - (c) That security for the performance of the decree or order has been given by the Applicants.



18. The impugned ruling which I note was not annexed to this application for stay was delivered on 30<sup>th</sup> May, 2023. This application for stay was made on 13<sup>th</sup> June, 2023 a few weeks after delivery of the ruling. I am therefore satisfied that the application for stay was made in a timely manner.
19. The decision whether or not to grant an application for stay of execution has squarely at the discretion of the court concerned. The court must consider each case on its own merits and the likely effect of granting or declining an application for stay. The court ought to act conscientiously not capriciously in determining an application for stay.
20. In *Global Tours & Travels Nairobi HC Winding up Cause No. 43 of 2000*, Hon Justice Aaron Ringera (as he then was stated as follows:-

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice..... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is so, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

21. Similarly in *Butt -vs- Rent Restriction Tribunal* [1979] eKLR, the court set out the principles to be considered in determining whether or not to grant a stay as follows;-

- “ (i) The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- (ii) The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
- (iii) A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.
- (iv) The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

22. The Applicants submit that they are likely to suffer substantial loss if the stay sought is not granted. The question of what constitutes “substantial loss” is one which has engaged our courts over a long period and there exist a plethora of decisions on the issue. In *RWW v EKW* [2019] eKLR the Court stated as follows

“Demonstrating what substantial loss is likely to be suffered is the core to granting a stay order pending appeal”



23. The fact that the vehicle in question had been sold does not in itself amount to substantial loss. A vehicle is an asset whose value is quantifiable. If the Applicant succeeds in appeal the value of the vehicle may assessed and he can be adequately compensated in monetary terms.

24. In the case of Wangal Wa& Another v Agnes Naliaka Chesoto [2012] eKLR the court held as follows:-

“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.”

25. I find that the Applicant has not demonstrated that he stands to suffer substantial loss if the prayers sought are not granted. Accordingly I find no merit in this application and the same is hereby dismissed in its entirety. Costs are awarded to the Respondents.

**DATED IN NYERI THIS 19TH DAY OF JULY, 2024.**

.....

**MAUREEN A. ODERO**

**JUDGE**

