



**Startruck Auctioneers Investments Yard Ltd v Gaturu & another (Civil Appeal E072 of 2023) [2024] KEHC 10985 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10985 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E072 OF 2023  
MA ODERO, J  
SEPTEMBER 20, 2024**

**BETWEEN**

**STARTRUCK AUCTIONEERS INVESTMENTS YARD LTD ..... APPELLANT**

**AND**

**PETER MACHARIA GATURU ..... 1<sup>ST</sup> RESPONDENT**

**PETER NJUGUNA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before this court for determination is the Notice of Motion dated 20<sup>th</sup> November 2023 filed by the Applicant/Appellant Startruck Aucitoneers Investments Yard Ltd, seeking the following orders:-
  - a. Spent.
  - b. Spent.
  - c. That this court be pleased to order the stay of execution of the judgment and the decree made by the Honourable senior principal magistrate's court on the 13<sup>th</sup> October 2023 pending the hearing and final determination of this appeal.
  - d. That the costs of this Application be in the cause.
2. The application which was premised upon Order 42 Rule 6 as read with Order 51 Rule 1 of the *Civil Procedure Rules* 2010 was supported by the Affidavit of even date sworn by Gerald Mutahi the Proprietor of the Applicant Company.
3. The Respondents did not file any Replying Affidavit to the Motion. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 15<sup>th</sup> May 2024 whilst the Respondent relied upon their written submissions dated 29<sup>th</sup> May 2024.



4. This application arises from the Ruling delivered in the lower court on 13<sup>th</sup> October 2023 in Miscellaneous Civil Application No. 31 of 2023. In that Ruling the court dismissed the application dated 27<sup>th</sup> September, 2023 in which the Applicant Star Truck Auctioneers Investments Yard Ltd sought to be paid storage fees and costs in respect of a motor vehicle Registration KCQ XXXX. The Auctioneer also sought to have their Bill of Costs assessed.
5. Being aggrieved by said Ruling this Appellants filed a Memorandum of Appeal dated 13<sup>th</sup> November 2023. They now seek a stay of execution of the Ruling pending hearing and determination of the appeal.

### **Analysis And Determination**

6. I have considered this application seeking stay of execution as well as the written submissions filed by both parties.
7. At this point the court is not required to determine the merits or otherwise of the intended appeal. All the court has to determine is whether the application for stay of execution is merited.
8. Stay of Execution pending Appeal is provided for under Order 42 Rule 6 (2) of the Civil Procedure Act sets out the principles that the court should consider while deciding whether to grant it or not. These are:-

“No order for stay of execution shall be made under subrule (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.”
9. In this case the Ruling was delivered on 13<sup>th</sup> October 2023. This application for stay was filed on 20<sup>th</sup> November 2023 barely one month after the ruling was delivered. I find that the application was filed in a timely manner.
  10. The order which the Applicant seeks to stay was an order dismissing his application. In other words it was a ‘negative order’. A negative order is incapable of execution and cannot be stayed.
  11. In the case of Co-operative Bank of Kenya Limited -v- Banking Insurance & Finance Union (Kenya) [2015] eKLR, the Court held as follows:-

“An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with.

12. Likewise in the case Kanwal Sarjij Singh Dhiman -v- Keshabi Juraj Shah [2008] eKLR the court of Appeal in dealing with an application for stay of a negative order stated thus

“The order of 18<sup>th</sup> December 2006 merely dismissed the application for setting aside the judgment with costs. By the order the superior court did not order anything or refrain



from doing anything or to pay any sum. It was thus a negative order which is incapable of execution save in respect of costs only..... [own emphasis]

13. In the same case the court of Appeal continued to cite the case of *Raymond M. Ombuga -v- Austine Pyan Maranga* where it was held that

“The order dismissing the application is in nature of a negative order and is incapable of stay of execution, save perhaps for costs and such order is incapable of stay. Where there is no positive order made in favour of the Respondent which is capable of execution, there can be no stay of execution of such an order-----. The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal [dismissal] simply means that the applicant stays in the situation he was in before coming to court and therefore the issue of substantial loss that he is likely to suffer and/or the appeal being rendered nugatory does not arise-----“

14. The orders made by the learned trial magistrate on 13<sup>th</sup> October, 2023 were ‘negative orders’ dismissing the Application filed by the Auctioneer. Based on the cited authorities I find that such an order is not capable of being stayed as no party was ordered to do or to refrain from doing anything.

15. In the premises I find no merit in this application for stay. The same is hereby dismissed in its entirety. Costs will be borne by the Applicant.

**DATED IN NYERI THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

.....

**MAUREEN A. ODERO**

**JUDGE**

