



**Brixton Estate Limited v Gichuhi (Civil Appeal E040 of 2022)  
[2023] KEHC 1020 (KLR) (14 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1020 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL E040 OF 2022  
SM GITHINJI, J  
FEBRUARY 14, 2023**

**BETWEEN**

**BRIXTON ESTATE LIMITED ..... APPELLANT**

**AND**

**SHEILA WANGARI GICHUHI ..... RESPONDENT**

*(An Appeal against the Ruling and Order of Hon D.Wasike - Senior Resident Magistrate delivered on 23rd March, 2022 in Malindi Cmcc No.102 of 2019)*

**RULING**

**CORAM: Hon. Justice S. M. Githinji**

**Mr Abubakar Advocates for the Appellants**

**Mr Kilonzo Advocate for the Respondents**

1. For determination is the appellant's notice of motion dated May 23, 2022 seeking the following orders;
  1. Spent.
  2. This honourable court do issue a stay of the execution of the trial court's judgment of August 18, 2021 pending the hearing and determination of the appeal.
  3. That this honourable court do grant an order compelling Misa M Auctioneers to release to the appellant/applicant its Motor Vehicle Registration Number KCJ 149T.
  4. Costs of this application.
2. The application is anchored on the sworn affidavit of Renzo Quaciari the director of the applicant who stated that the applicant shall suffer substantial loss if the stay is not granted as the respondent is incapable of refunding to the applicant the decretal sum in the event it succeeds in its appeal.



3. It was stated that the respondent is in the process of executing for the decretal sum and unless the stay is granted the appeal shall be rendered nugatory.
4. It was further deponed that the appeal raises triable issues and it is in the interest of justice that the orders sought be granted. Further that the applicant is ready to deposit the decretal amount to the court as security for the appeal.
5. The respondent filed a replying affidavit dated June 22, 2022 sworn by Geoffrey Kilonzo counsel for the respondent who deponed that judgment was delivered 18/8/2021 in favour the respondent against the applicant for Kshs. 315,400 plus costs and interest. Further, in performance of the trial court's judgment, the respondent attached and sold by public auction the Appellant's motor vehicle registration number KCA 342K on 14/10/21 where the respondent received proceeds of Kshs. 150,000 being part payment of the decretal sum. He added that the appellant filed an application in the trial court dated 26/11/21 seeking stay of execution of the judgment and release of the motor vehicle registration number KCA 342K and the court observed that the same had been overtaken by events.
6. Mr. Kilonzo further deponed that the appellant having failed to satisfy the whole decree, the respondent applied for re-issue of the warrants which were issued on 25/3/22 and the respondent through Misa Auctioneers served the appellant with a proclamation notice and therefore the attachment of motor vehicle registration number KCJ 149T is in order. Therefore, the order seeking to compel auctioneers to release the motor vehicle fails for reason that the attachment was lawful and procedural in accordance with the Auctioneers rules.
7. In addition, it was deponed that the respondents have not met the conditions warranting stay as on the limb of substantial loss, the applicants must clearly state what loss, if any, they stand to suffer. Further, the respondent will be able to refund the decretal sum should the appeal succeed.

#### **Analysis and determination.**

8. At the time of writing this ruling, the applicant had not filed their submissions. The respondent filed their submissions which I have considered as well as the authorities relied upon. The issue arising for determination is whether the appellant has met the legal threshold for grant of orders of stay of execution pending appeal.
9. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides:
  - “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.
10. Section 1A(2) of the [Civil Procedure Act](#) provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”



11. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the court stated the following as regards substantial loss:

“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.”

12. The applicant avers that it shall suffer substantial loss if the stay is not granted as the respondent is incapable of refunding the applicant the decretal sum in the event it succeeds on its’ appeal. Further, that the applicant is ready to deposit the decretal sum to court as security. On his part, the respondent stated that the application is overtaken by events as execution had already commenced and motor vehicle registration number KCA 342K was attached and sold by way of public auction and he received Kshs. 150,000 as partial payment of the decretal sum.

13. The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellant with those of the respondent.”

14. In the instant application, execution has already commenced including the attaching and sale by public auction of Motor vehicle registration number KCA 342K. As stated in the above case, the purpose of stay of execution pending appeal is to preserve the subject matter in dispute. In my view, the subject matter has already been interfered with and I am inclined to agree with the respondent that the application has been overtaken by events. In the circumstances, it is my finding that the application dated May 23, 2022 lacks merit and the same is hereby dismissed with costs to the respondent.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2023.**

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**S.M. GITHINJI**

**JUDGE**

In the absence of; -

Mis Bujra for the Applicant



Mr Wambua Kilonzo for the Respondent

Parties be notified.

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**S.M. GITHINJI**

**JUDGE**

