



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwaura v Wachira & 4 others (Civil Appeal E251 of 2022)  
[2023] KEHC 19217 (KLR) (Civ) (22 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19217 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E251 OF 2022**

**CW MEOLI, J**

**JUNE 22, 2023**

**BETWEEN**

**GIDEON KIARIE MWAURA ..... APPELLANT**

**AND**

**JOHN MUIGAI WACHIRA ..... 1<sup>ST</sup> RESPONDENT**

**CO-OPERATIVE BANK OF KENYA ..... 2<sup>ND</sup> RESPONDENT**

**MY CREDIT LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**MADUWANDE AUCTIONEERS ..... 4<sup>TH</sup> RESPONDENT**

**NATIONAL TRANSPORT AND SAFETY AUTHORITY ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. Before the court for analysis and determination are three applications: the first is the Notice of Motion dated 26<sup>th</sup> April, 2022 (hereafter the first application) brought by Co-operative Bank of Kenya (hereafter the 2<sup>nd</sup> respondent) supported by the grounds laid out on the face of the first application and the facts stated in the affidavit of Jackson Oire, legal officer of the 2<sup>nd</sup> respondent.
2. Therein, the applicant sought to stay execution of the ruling delivered on April 12, 2022 by Hon. Kagoni, E. M. PM in Milimani CMCC No. E003 of 2022 and all consequential orders, pending the hearing and determination of an appeal against the said ruling. In his supporting affidavit, the deponent stated that by way of the impugned ruling, the trial court issued temporary injunctive orders restraining the 2<sup>nd</sup> respondent as well as My Credit Limited, Maduwande Auctioneers and the National Transport And Safety Authority (hereafter the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents) from interfering with John Muigai Wachira (hereafter the 1<sup>st</sup> respondent) in terms of his possession of the motor vehicle registration



- number KCZ 280Z (the subject motor vehicle) and a mandatory injunction compelling the 2<sup>nd</sup> and 4<sup>th</sup> respondents to release the subject motor vehicle to the 1<sup>st</sup> respondent.
3. That the 2<sup>nd</sup> respondent; being dissatisfied with the impugned ruling intends to challenge it by way of an appeal and has applied for certified copies of the typed proceedings and the impugned ruling. That unless the stay order sought is granted and the subject motor vehicle is released to the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent stands to run the risk of losing its legal interest in the subject motor vehicle, thereby causing it to suffer substantial loss.
  4. Duncan Ndegwa Kinyua, the proprietor of the 4<sup>th</sup> respondent, swore a replying affidavit to the first application on August 2, 2022 averring that on the 28<sup>th</sup> day of December, 2021 the 4<sup>th</sup> respondent received instructions from the 2<sup>nd</sup> respondent to repossess the subject motor vehicle and that it acted on such instructions by recovering the subject motor vehicle from the 1<sup>st</sup> respondent on December 30, 2021, following which the said vehicle was towed to Mai Mahiu Police Station and booked therein. That its actions were at all material times lawful and proper.
  5. The Notice of Motion dated May 4, 2022(hereafter the second application) was brought by Gideon Kiarie Mwaura (hereafter the appellant) and is supported by the grounds laid out on its face and the facts stated in the affidavit of the appellant, who likewise seeks an order to stay execution of the aforementioned ruling delivered on 12<sup>th</sup> April, 2022 and/or an injunction against the sale of the subject motor vehicle, pending the hearing and determination of the appeal.
  6. In his affidavit, the appellant stated that he has at all material times been the registered owner of the subject motor vehicle which he purchased on 8<sup>th</sup> October, 2020 at a consideration of Kshs. 5,450,000/- and that the purchase thereof was financed by the 2<sup>nd</sup> respondent. The appellant stated that the subject motor vehicle was later stolen before being intercepted by the police at Mai Mahiu Police Station with the aid of the 4<sup>th</sup> respondent, prior to the filing of the suit before the trial court by the 1<sup>st</sup> respondent. It was averred that unless the stay order sought is granted and the subject motor vehicle is preserved, the 1<sup>st</sup> respondent is likely to sell or otherwise dispose of the subject motor vehicle. It was equally averred that the appellant has an arguable appeal as seen in the memorandum of appeal previously filed.
  7. The 1<sup>st</sup> respondent swore a replying affidavit to oppose the second application wherein he stated that he has a lawful claim on the subject motor vehicle by virtue of having made the requisite payments towards its purchase, and hence he ought to be allowed to enjoy its use. The 1<sup>st</sup> respondent stated that on those grounds, the appellant does not have a strong appeal against it and urged the court to dismiss the second application with costs.
  8. The third application is the Notice of Motion dated June 9, 2022which was also brought by the 2<sup>nd</sup> respondent and is anchored on the grounds set out on its body and the facts stated in the affidavit of Jackson Oire. The third application is seeking an order to the effect that pending the hearing and determination of the appeal, the status quo ante obtaining prior to the execution of the orders issued by the trial court on April 12, 2022 in Milimani CMCC No. E003 of 2022 do prevail and the subsequent effecting of the said order be restored, to wit, the appellant be compelled to surrender the subject motor vehicle to a police station within the Republic of Kenya.
  9. Jackson Oire by way of his supporting affidavit stated that the trial court vide the impugned ruling made an order for the release of the subject motor vehicle and which order amounts to a mandatory injunctive order which cannot be granted at the interlocutory stage. The deponent stated that the High Court issued interim orders for a stay of execution on May 6, 2022and which orders were extended on May 16, 2022to last until July 19, 2022.



10. That the interim orders have not been varied and/or set aside but that the 1<sup>st</sup> respondent, without cause and despite the subsisting interim orders had proceeded to execute the order made by the trial court. That the 2<sup>nd</sup> respondent has a legal interest in the subject motor vehicle and to that effect, the logbook in respect to the subject motor vehicle bears the joint names of the appellant and the 2<sup>nd</sup> respondent. It was averred that if the order sought herein is not granted, the subject motor vehicle will likely be alienated to the detriment of the 2<sup>nd</sup> respondent.
11. The 1<sup>st</sup> respondent swore a replying affidavit to resist the third application. Therein, he averred that the 2<sup>nd</sup> respondent failed to disclose to the court that the orders arising out of the impugned ruling had already been executed and that the subject motor vehicle had been released to him at the time of issuance of the interim orders by the High Court. He further averred that the law does not preclude the issuance of a mandatory injunction in his favour since he is the rightful owner and a bond fide purchaser of the subject motor vehicle by way of a public auction which was held by the 3<sup>rd</sup> respondent. It was stated that there were therefore no orders to be stayed in the first place and that there is nothing to indicate that the appeal will be rendered nugatory if the order sought is denied, since he has not taken any adverse action in respect to the subject motor vehicle.
12. The 2<sup>nd</sup> respondent rejoined with the further affidavit sworn by Jackson Oire on October 19, 2022 averring that contrary to the averments being made in the replying affidavit hereinabove, the 1<sup>st</sup> respondent had not executed the order arising out of the impugned ruling at the time the High Court issued interim orders for a stay of execution on May 6, 2022 and that in any event, the 1<sup>st</sup> respondent had previously sought for the release of the subject motor vehicle by way of an application filed before the trial court and dated 5<sup>th</sup> May, 2022 and upon which the trial court directed the parties to appear before it on May 30, 2022 for interparties hearing. The deponent stated that any execution therefore undertaken by the 1<sup>st</sup> respondent while the interim orders were in place is illegal.
13. Following the directions by the court, the parties filed and exchanged skeletal written submissions, though it is noteworthy that the 3<sup>rd</sup> and 5<sup>th</sup> respondents did not participate in the hearing of the applications or file any documents in reply thereto. It is also apparent from the record that at the time of writing this decision, the submissions by the 1<sup>st</sup> and 4<sup>th</sup> respondents had not been availed for the court's consideration.
14. On the part of Counsel for the appellant and in support of the second application, it was submitted that the principles pertaining to the grant of an order for a stay of execution have been met. Which principles are set out under order 42, rule 6(2) of the Civil Procedure Rules (CPR) and are reiterated in the decisions rendered in Butt v Rent Restriction Tribunal [1979] eKLR and Tusbo Capital Kenya Limited v Antony Mbutia Kiburi & another [2019] eKLR. On the principle of substantial loss, it was submitted that substantial loss forms the cornerstone of an application seeking an order for a stay of execution, with reference being made to Michael Wanjibia Onesmus v Francis Karanja Waibiga [2017] eKLR. In this respect, the appellant's counsel argued that if the subject motor vehicle is either sold or vandalized, he stands to suffer loss in the sense that he will be deprived of his use of the subject motor vehicle, which was purchased by way of a bank loan that is still being serviced.
15. Counsel further argued that the second application has been made without unreasonable delay and that the appellant is ready and willing to abide by the conditions to be set by the court on the provision of security, citing Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR where the court reasoned that a proposal by an applicant on his or her willingness to offer security is a demonstration of good faith and proper grounds for the granting of a stay of execution.



16. Counsel asserted that the appellant has a strong appeal with high chances of success, since the appeal is intended to prove that the 1<sup>st</sup> respondent did not meet the threshold to render him deserving of an interlocutory injunctive order in his favour and that the trial court also erred in awarding a mandatory injunction at the interlocutory stage of the suit. He cited [\*Locabail International Finance Limited v Agro-Export\*](#) (1988) 1 All ER 901 in that regard. On those grounds, the court was urged to allow the second application.
17. On its part, the 2<sup>nd</sup> respondent maintained its support of the third application by submitting through its counsel that it has provided sufficient grounds to warrant the grant of an order restoring the status quo ante of the parties in respect to the subject motor vehicle, prior to the execution of the impugned ruling. And further submitting that denial of the order will result in grave loss to the 2<sup>nd</sup> respondent, who will be left exposed and will unlikely recover any sums from the 1<sup>st</sup> respondent in respect to the subject motor vehicle.
18. Counsel contended that the 1<sup>st</sup> respondent executed the impugned order during the existence of interim stay orders issued by the High Court and which execution contravened the orders in place that were intended to maintain the status quo pending the hearing and determination of the material applications. The 2<sup>nd</sup> respondent's counsel therefore urged the court to restore the status quo ante to the position of the parties prior to the execution, relying on [\*Edwin Kangethe Wachira & Another v John Maina Mutero\*](#) [2008] eKLR where the court restored the status quo ante of the parties by issuing a mandatory injunction.
19. Counsel further submitted that the 2<sup>nd</sup> respondent has satisfied the grounds for the grant of injunctive orders, as set out in the renowned case of *Giella v Cassman Brown* [1973] E.A 358 by establishing that it has a prima facie case with reasonable chances of success and that it stands to suffer irreparable loss and that the balance of convenience tilts in its favour. The court was therefore urged to allow the third application.
20. The court has considered the material canvassed in respect of the first, second and third applications respectively. Noting that the orders sought in the three (3) applications are incidental to the impugned ruling and are intertwined in nature, the court will first address the first and second applications which will then pave way for the determination of the third application.
21. Concerning the first and second applications which I will tackle contemporaneously, both applications are seeking similar orders of stay of execution of the ruling delivered by the trial court on April 12, 2022 pending appeal. It is trite that the power of the court to grant stay of execution of a decree pending appeal is discretionary and which discretion ought to be exercised judicially. See [\*Butt v Rent Restriction Tribunal\*](#) (supra).
22. The applicable provision is Order 42, Rule 6 of the CPR which stipulates that:
  - “(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 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 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”.
23. Concerning the condition on whether the respective applications have been brought without unreasonable delay, going by the record, it is apparent that the impugned ruling was delivered on 12<sup>th</sup> April, 2022 whereas the first and second applications were filed on or about April 26, 2022 and May 4, 2022 respectively. In the court’s view, the applications have been brought within a reasonable time.
24. On the second condition, the relevance of substantial loss in any application for a stay of execution was aptly addressed by the Court of Appeal case in the renowned case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410 where it was held that:
- “Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented...”
25. The court went on to state the following about substantial loss:
- “1. ....
  2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
  3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
  4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”
26. As earlier mentioned, the trial court by way of the impugned ruling granted an interlocutory injunction restraining the 2<sup>nd</sup> respondent as well as the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents) from interfering with the 1<sup>st</sup> respondent’s possession of the subject motor vehicle and further granted a mandatory injunction compelling the 2<sup>nd</sup> and 4<sup>th</sup> respondents to release the subject motor vehicle to the 1<sup>st</sup> respondent.
27. It is apparent that the arguments presented to support the averments on substantial loss to be suffered by both the 2<sup>nd</sup> respondent and the appellant are that they both stand the risk of losing their legal/beneficial interest in the subject motor vehicle in view of the injunctive orders in place. According to them, the subject motor vehicle was purchased by the appellant under the financing of the 2<sup>nd</sup> respondent. It is therefore apparent from the material on record that the subject matter of the dispute before the trial court revolves around the ownership and/or interest in the subject motor vehicle and which issue can only be adequately articulated upon the suit being heard on merit.



28. At this stage, the court acknowledges that it must exercise its discretion in balancing the competing interests of the parties so as not to prejudice the matter pending appeal and is satisfied that the appellant and the 2<sup>nd</sup> respondent have demonstrated the manner in which they stand to suffer substantial loss if an order for a stay of execution is denied. Particularly in respect to the mandatory injunction granted by the trial court, and which would plausibly render the appeal, if successful, nugatory.
29. In this regard, the court is guided by the case of *Ndubiu Gitabi & Another v Anna Wambui Warugongo* [1988] 2 KAR, with reference to the decision in Sir John Donaldson M. R. in *Rosengrens v Safe Deposit Centres Limited* [1984] 3 ALLER 198 that:
- “We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff.....
- It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal..”
30. Concerning the question of provision of security, it is apparent that the impugned ruling is non-monetary in nature and hence the question on provision of security would not arise.
31. In view of all the foregoing circumstances, the court finds in favor of the appellant and the 2<sup>nd</sup> respondent in respect to the first and second applications.
32. Upon its determination on the above applications, the court will now consider the third application which was brought by the 2<sup>nd</sup> respondent and seeking an order for restoration of the status quo ante prior to execution of the impugned ruling. In *Total Kenya Limited v Kenya Revenue Authority* [2013] eKLR the Court of Appeal succinctly stated the following on the subject of maintenance and/or preservation of status quo:
- “In the Law Society of Kenya V. Commissioner of Lands, and 2 others, Civil Application No. Nai 181 of 2002, after the High Court (Ombija, J) allowed a preliminary objection to the suit and declared that the Law Society of Kenya which had brought a suit to challenge the allocation to the 2<sup>nd</sup> respondent of the land on which the High Court at Eldoret stands had no locus standi to bring the action, the Law Society of Kenya moved to this Court for orders to stay Ombija J’s dismissal. The Court ordered that:-
- “Considering all the circumstances of the matter before us we order that the status quo now obtaining do remain in force pending the hearing and determination of the intended appeal.
- This was so despite the society’s application being made under Rule 5 (2) (b) for orders of stay. Rule 5 (2) (b) emphasizes the centrality of loss to the parties on both sides of the appeal. That is what the court must strive to prevent by preserving the status quo because any loss may render the appeal nugatory.
33. In the present instance, the court notes that on the one hand, the 2<sup>nd</sup> respondent argued that despite issuance of the interim stay orders by the High Court, the 1<sup>st</sup> respondent proceeded to execute the impugned lower court order; while the latter argued that execution preceded the issuance of the interim orders.



34. Upon its own perusal of the record, the court notes that upon filing of the first and second applications, the High Court granted interim stay orders in respect to the second application on May 6, 2022 initially which interim orders were extended up to May 16, 2022. The record further shows that on May 20, 2022 directions were given for the first and second applications to be heard together, and a further order was issued for extension of the interim stay orders until July 19, 2022.
35. The court observed that none of the parties disclosed the details of the purported execution of the impugned order in terms of the date on which the release of the subject motor vehicle to the 1<sup>st</sup> respondent was effected. Suffice it to say that it is apparent from the record that during the subsistence of the abovementioned interim orders, the 1<sup>st</sup> respondent filed an application dated May 5, 2022 before the lower court seeking an order for release of the subject motor vehicle. The outcome of this application was not disclosed to the court. Nevertheless, the court is of the view that the release, if any of the subject motor vehicle to the 1<sup>st</sup> respondent more likely than not occurred during the subsistence of the interim stay orders thereby making such release irregular and illegal.
36. In view of its analysis and findings on the first and second applications, the court is satisfied that it would serve the interest of substantive justice for the status quo ante prior to the execution of the orders issued by the trial court on April 12, 2022 in Milimani CMCC No. E003 of 2022 to be restored, pending the hearing and determination of the appeal.
37. Consequently, the following orders are hereby made:
- a. The notices of motion dated April 26, 2022; May 4, 2022 and June 9, 2022 are hereby allowed as prayed.
  - b. The costs of the respective applications shall abide the outcome of the appeal.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 22<sup>ND</sup> DAY OF JUNE 2023.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

For the Applicant: Mr. Muluvi h/b for Mr. Mutua

For the 1<sup>st</sup> respondent: N/A

For the 2<sup>nd</sup> respondent: Mr. Odiyo

For the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> respondents- N/A

C/A: Carol

