



**Otieno v Onyango (Civil Appeal E204 of 2024)  
[2024] KEHC 14567 (KLR) (11 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14567 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E204 OF 2024  
RE ABURILI, J  
NOVEMBER 11, 2024**

**BETWEEN**

**ERICK OTIENO ..... APPLICANT**

**AND**

**CALVIN OCHIENG ONYANGO ..... RESPONDENT**

**RULING**

1. The application dated 14<sup>th</sup> October, 2024 seeks orders of stay of execution of the judgment and decree rendered on 21/6/2024 for Kshs 250,260 together with costs and interest in Kisumu Small Claims Court E060 of 2026 pending the hearing and determination of the application inter partes and until this appeal is heard and determined on merit.
2. The applicant also seeks an order for release of motor vehicle registration number KAT 884R Matatu attached by Ikimwanya Auctioneers pending the hearing and determination of the application and until the appeal is heard and determined. Further, that the Auctioneers cost be taxed in court and finally, that costs of the application be provided for.
3. The grounds upon which the application is predicated are on the face of the application, materially, is that on 21/6/2024 the judgment day, the applicant had been granted thirty days stay by the Adjudicator which time elapsed and that the applicant then applied for enlargement of that time vide an application dated 19/9/2024 which application was dismissed thereby paving way for the warrants of attachment and sale to be issued and executed by the Ikimwanya Auctioneers. That the applicant then filed this appeal challenging the ruling that dismissed the application for enlargement of time on stay of execution which was meant to allow the applicant process payment of the decretal amount.
4. That the applicant’s motor vehicle KAT 884R Toyota Matatu had since been attached and advertised for sale yet he applicant was ready, able and willing to pay the entire decretal sum within 21 days



- hence the attached motor vehicle should be released on running attachment pending hearing and determination of the application and the appeal.
5. The application is further supported by the affidavit sworn by Christine Musando Advocate for the applicant, reiterating the grounds in support thereof.
  6. Opposing the application, the respondent filed a replying affidavit sworn on 17<sup>th</sup> October, 2024 deposing in contention that the application is an abuse of court process, lacks merit and should be dismissed with Costs. That the application does not meet the threshold for grant of the orders sought. that the application herein is overtaken by events since the suit motor vehicle has already been sold by the auctioneer which sale was conducted by way of public auction on 17<sup>th</sup> October 2024, the certificate of sale filed in the Small Claims Court on 18<sup>th</sup> October 2024 and the successful purchaser took possession of the suit motor vehicle, as per the annexure of the certificate of sale dated 17.10.2024).
  7. It was further deposed that the judgement in this matter was delivered on 21.6.2024, stay elapsed on 21.7.2024, proclamation done on 16.09.2024, and attachment of the suit motor vehicle done on 26.9.2024 that the applicants got stay orders on 23/9/2014 and served them on 26/9/2024 after the said attachment.
  8. Further deposition was that the Adjudicator did not err when she dismissed the applications by the applicant herein, including the application by an objection to attachment of the subject motor vehicle and that the vehicle was duly advertised for sale from 9<sup>th</sup> October to 17<sup>th</sup> October 2024 when it was sold, which sale only fetched Kshs 250,000 and that the balance of the decretal sum plus the auctioneer's charges remain unsettled.
  9. The respondent urged this court to dismiss the application by the applicant with costs.
  10. The application was argued orally with Ms Musando reiterating her depositions and grounds and submitting that the applicant will suffer irreparable loss if the stay is not granted, that the delay was excusable, that their client's -insurance company's accounts had since been opened hence they were ready to deposit the decretal sum to secure the release of the motor vehicle as attached and that they were ready to prosecute the appeal. That the vehicle attached was used by the applicant for his livelihood hence he stands o suffer irreparable loss if the motor vehicle is sold.
  11. Opposing the application, Mr. Rakewa counsel for the respondent submitted that the application had been overtaken by events since the motor vehicle had been attached and sold prior to the filing of the application subject of this ruling, and that he had told this court on 18/10/2024 during the inter partes mention of the application that the sale had already taken place on 17/10/2024 as a scheduled. He referred the court to the annexures being the certificate of sale and submitted that the stay granted by the adjudicator lapsed in July 2024 giving rise to the attachment in September 2024.
  12. It was submitted that all applications filed by the applicant including objection proceedings were dismissed by 8/10/2024 upon which the vehicle which was under attachment and possession of the auctioneer was advertised for sale on 9/10/2024 after valuation and sold on 17<sup>th</sup> October, 2024, which was after 7 days and that the sale had a deficit of Kshs 98,000. Counsel urged this court to dismiss the application which had been overtaken by events.

### **Analysis and determination**

13. The application invokes the discretionary powers of the court, which discretionary powers must be exercised judiciously. It is brought under Order 42 Rule 6(1) of the [\*Civil Procedure Rules, 2010\*](#) which empowers this court to stay execution, either of its judgement or that of a court whose decision is being



appealed from, pending appeal. The conditions to be met before stay is granted are provided by the Rule 6(2) as follows:

“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.”

14. In *Butt v Rent Restriction Tribunal* [1982] KLR 417, the Court of Appeal guided on how a court should exercise discretion and stated that:

1. 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.
2. The general principle 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.
3. 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.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

15. The above cited case sets out the applicable principles in deciding whether or not to grant a stay of execution pending appeal.

16. On whether the application herein meets the threshold for grant of stay of execution and therefore release of the attached motor vehicle on running attachment until this application and the appeal as filed are heard and determined on merit. In *National Industrial Credit Bank Limited v Aquinas Francis Wasike & another* [2006] eKLR as cited by the High Court in *Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa* [2016] eKLR it was held that:

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”

17. In the instant case, the respondent has deposed and it is not controverted that the vehicle as attached was procedurally attached, that it was valued, advertised and sold and a certificate of sale exhibited, with



the purchaser who is not a party to these proceedings taking possession thereof. In this application, there is no prayer challenging the sale. Although the application was filed after the attachment, there was no prayer challenging the legality of the attachment and neither was there any order staying the scheduled sale and therefore, the applicant's insistence on stay orders is, in my view, an attempt to ask this court to issue orders in vain.

18. The applicant has the opportunity to challenge that process in the event that he has evidence that the attachment and sale of his motor vehicle was illegal and or irregular.
19. If it is the question of substantial loss, it is already suffered and this court cannot, at this stage, cure the loss by ordering for stay and release of a motor vehicle which is already sold and a certificate of sale issued to the buyer thereof. The buyer is also not a party to these proceedings and therefore his court cannot make orders that are prejudicial to him or her without according him an opportunity to be heard.
20. Under the circumstances, I am not persuaded that the prayers sought are available to the applicant/ appelland and therefore without delving into issues of delay, substantial loss and security for the due performance of decree or any other sufficient cause.
21. Accordingly, I find the application dated 14/10/ 2024 to be overtaken by events and the same is hereby dismissed. With an order that each party shall bear their own costs of the application.
22. Mention of the main appeal shall be on 9/12/2024 for further directions. The lower court file to be called for.
23. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 11<sup>TH</sup> DAY OF NOVEMBER, 2024**

**R.E. ABURILI**

**JUDGE**

