



**Ronoh & 2 others v Consolidated Bank of Kenya Ltd; Kigen & 2 others (Interested Parties)  
(Civil Suit E017 of 2018) [2024] KEHC 14299 (KLR) (15 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14299 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL SUIT E017 OF 2018  
RN NYAKUNDI, J  
NOVEMBER 15, 2024**

**BETWEEN**

**MICHAEL KIMUTAI RONO** ..... **1<sup>ST</sup> PLAINTIFF**

**ANNE JEROTICH RONO** ..... **2<sup>ND</sup> PLAINTIFF**

**ROSE CHEPCHIRCHIR RONO** ..... **3<sup>RD</sup> PLAINTIFF**

**AND**

**CONSOLIDATED BANK OF KENYA LTD** ..... **DEFENDANT**

**AND**

**JOHN KIGEN** ..... **INTERESTED PARTY**

**KIPLAGAT CHEBII** ..... **INTERESTED PARTY**

**IRENE CHEBIENI** ..... **INTERESTED PARTY**

**RULING**

1. Before me for determination is an application dated 23<sup>rd</sup> September, 2024 expressed under the provisions of Order 22 Rule 22, Order 51 of the Civil Procedure Rules, and Section 39 of the [Civil Procedure Act](#). The applicant seeks orders to wit: -
  - a. Spent
  - b. That it is imminent that unless the application is heard on a priority basis, the same would have been rendered nugatory as the Respondents have started the execution process.
  - c. That there be interim orders of stay of execution of this honorable court’s judgment and/or directions delivered on 31<sup>st</sup> July, 2024 pending the hearing and determination of this application interparties.



- d. That there be temporary stay of execution of the Honorable Court's judgment delivered on the 31<sup>st</sup> July, 2023 pending the hearing and determination of the intended appeal.
  - e. That the defendant/applicant stand to suffer greater detriment if the prayers sought are not granted.
  - f. Costs be provided for.
2. The application is premised on 22 grounds together with an affidavit in support sworn by Emma Mutune Omosa. The applicant avers that:
- a. That on the 31<sup>st</sup> July, 2023 the Honorable court issued a judgment in which it considered as follows:
    - i. That a declaration be and is hereby issued that the 1<sup>st</sup> defendant's intended exercise of its statutory power of sale is a nullity.
    - ii. That a declaration be and is hereby issued that the Plaintiff is discharged from his obligation as a guarantor and that the charge executed in favor of the 1<sup>st</sup> defendant over land parcels No. Karuna/Sosian Block 8(USWO) 476 Eldoret Municipality/Block 14/693 and Kitale Municipality/block 15/KoitoGos/322 be discharged forthwith.
    - iii. That a permanent injunction be and is hereby issued restraining the defendants by themselves or their agents or servants from selling, advertising for sale or in any manner whatsoever dealing with or disposing of land parcel No. Karuna/Sosian Block 8 (USWO) 476 Eldoret Municipality/Block 14/693 and Kitale Municipality/Block 15/ Koitogos/322
    - iv. That costs of the suit be borne by the 1<sup>st</sup> defendant.
  - b. That the defendant/applicant had expressed their wish to appeal against the decision of this honorable court rendered on the 31<sup>st</sup> day of July 2024 by Justice E.K Ogola vide an application dated 29<sup>th</sup> August, 2024.
  - c. That the said application was given directions to the effect that the same be served upon the respondents for response to be filed and served within 14 days after service so that it is heard on a date appointed by the Deputy Registrar.
  - d. That no orders for stay were granted by Hon. Justice P.J. Otieno.
  - e. That the Deputy Registrar has since given a date for interparties hearing on the 23<sup>rd</sup> October, 2024 before Justice R. Nyakundi.
  - f. That the respondents have since started the execution process.
  - g. That by the time the said application is heard, the Respondent would have cited the applicants for contempt of court since they have already asked for the original title deeds plus discharge of charge from the applicant.
  - h. That before there is need to seek stay of execution of this court's judgment pending the hearing and determination of this application and thereafter the appeal lest the Defendant suffers irreparable loss.
  - i. That the defendant/applicant stand to suffer great detriment if the prayers sought are not granted.



- j. That the applicant is aggrieved by the said decision and has filed a notice of appeal and is awaiting typed proceedings so that it can be able to complete the Appeal.
  - k. That the said appeal raised triable issues as particularized in the draft memorandum of appeal and particularly whether the interest levied was un-contractual so as to invalidate a charge.
  - l. That the judgment made conclusions that the Plaintiff had paid of the debt whereas the account had been credited with sale proceeds from a rescinded sale auction as legally required.
  - m. That the intended appeal is arguable since it seeks to answer the question whether the rescinded sale by auction for failure to issue the 14 days notification of sale is a ground for impeaching the entire charge and discharge a debtor.
  - n. That this suit being a property dispute, there is real danger that should the properties be discharged, the Plaintiff may dispose of the same and put it beyond reach of the court should the defendant succeed in the Appeal.
  - o. That the respondents have started the execution process.
  - p. That it is therefore necessary to stay the execution of the said judgment pending the determination of the appeal.
3. In response to the application, the Respondents through Michael Kimutai Ronoh, the 1<sup>st</sup> Plaintiff filed a replying affidavit sworn on 7<sup>th</sup> October, 2024. The Respondents argued that in an application for stay of execution is bound to establish the 4 conditions provided for in Order 42 rule 6 of the Civil Procedure Rules, 2010 which are:
- a. The existence of substantial loss
  - b. Sufficient cause to warrant the grant of the order.
  - c. Provision of security for the due performance of the decree as will be ultimately binding,
  - d. The making of the application without undue delay.
4. The Respondents further stated that the defendant had earlier moved the court on 30<sup>th</sup> August, 2024 while the judgment it sought to impugn delivered on the 31<sup>st</sup> July, 2024 and as such it fails the condition of undue delay. That the defendant has not made any offer for security as will be ultimately binding for the due performance of the decree.
5. According to the Respondents, the draft memorandum of appeal is a clear demonstration that the intended appeal does not display any iota of arguability that may tilt the findings of the superior court. That on substantial loss, the defendant had the onus to prove that it will occur of which it has failed to do so.
6. That no basis exists for the defendant to continue to hold the titles while it received the entire debts as reflected in its books over 10 years ago under the guise of seeking to prosecute an appeal that has no iota of success but merely intended to vex the Plaintiffs.
7. That the Plaintiffs led professional evidence of expert accountants and forensic debt analyst who challenged the defendants levying of interests with no rebuttal from the defendant and the findings of fact by the judge on account that the debt was settled cannot be disturbed in appeal.
8. That the valuation of the property as at the year 2014 was as follows:
- a. Karuna/Sosian Block 8 (USWO)/476 – Kshs. 25,600,000/=



- b. Eldoret Municipality Block 14/693 – Kshs. 29,400,000/=
  - c. Kitale Municipality/Block 15 (Koitogos)/322 – Kshs. 12,000,000/=
9. That this being 10 years later, the values have increased by over 3 times and are in the region of over Kshs. 200,000,000 hence no basis has laid by the defendant to hold onto the said property when no known debt exist as against the guarantors and Plaintiff in this matter.
10. That the values of the property that the Plaintiffs own cannot by any stretch of imagination attract the classification of being indigent and of which it has now become settled law that it is no longer a ground for a stay of execution that one is a pauper.

### **Analysis and determination**

11. I have carefully considered the application dated 23rd September, 2024, the supporting affidavit by Emma Mutune Omosa, the replying affidavit of Michael Kimutai Ronoh, and all the information available.
12. The discretionary remedy of stay of execution is one that calls upon the Court to balance competing interests; on one hand, the undoubted right of the Applicant to challenge the judgment through an appeal process, and on the other, the equally weighty right of the successful party to enjoy the fruits of their judgment. As aptly captured in *Butt v Rent Restriction Tribunal* (1982) KLR, the discretion should be exercised in such a way as not to prevent an appeal, while remaining cognizant that there must be good cause for depriving a successful litigant of the benefits of judgment.
13. The present application places the Court in the delicate position of having to weigh the Defendant bank's desire to preserve its security interests pending appeal against the Plaintiffs' right to enjoy unrestricted use of their properties, particularly in circumstances where expert evidence suggests the underlying debt was settled a decade ago. This balance must be struck within the well-established framework of Order 42 Rule 6 of the Civil Procedure Rules.
14. In approaching this task, I am guided by the words of the Court of Appeal in *Absalom Dova v Tarbo Transporters* [2013] eKLR:
- “The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves.”
15. With these principles in mind, I now turn to examine whether the Applicant has met the threshold requirements for grant of stay of execution pending appeal.
16. The primary issue for determination before this Court is whether the Defendant/Applicant has satisfied the requirements for grant of stay of execution pending appeal of the judgment delivered on 31st July, 2024.
17. The principles governing stay of execution pending appeal are well settled under Order 42 Rule 6 of the Civil Procedure Rules, which provides:
- “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."

18. The Court of Appeal in *RWW v EKW* [2019] eKLR aptly captured the purpose of stay applications:

"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."

19. Let me address each requirement in turn:

#### **On Substantial Loss:**

20. The Court in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR established that:

"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."

21. The Applicant's primary contention on substantial loss is that being a property dispute, there exists a real danger that should the properties be discharged, the Plaintiffs may dispose of them, putting them beyond the reach of the Court should the appeal succeed. This argument invites careful scrutiny.

22. Several critical factors militate against the Applicant's assertion of substantial loss: The properties in question have demonstrated remarkable appreciation in value from Kshs 67 million in 2014 to over Kshs 200 million presently. This significant increase in value, rather than suggesting risk, indicates robust security even in the event of a successful appeal. Secondly, the Plaintiffs have demonstrated that they are persons of substantial means, evidenced not only by their extensive property portfolio but also by the considerable appreciation in the value of these properties. This financial standing contradicts any suggestion that they might dispose of the properties or be unable to compensate the Applicant should the appeal succeed. Thirdly, the underlying debt was allegedly settled over 10 years ago, a factor that significantly weakens the Applicant's claim of potential loss. If indeed the debt was settled as alleged, the continued holding of the titles appears more punitive than protective. Most critically, the expert evidence led by forensic accountants regarding the interest calculations and debt settlement stands unrebutted. The Applicant had ample opportunity to challenge these calculations but failed to do so, lending credence to the trial court's findings on debt settlement.

23. The Court in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR emphasized that:

"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."

24. In the present case, the Applicant's fears appear largely speculative rather than substantiated. The substantial value of the properties, coupled with the Plaintiffs' demonstrated financial capacity, provides inherent security that far exceeds any legitimate claim the Applicant might have. Moreover, the uncontroverted expert evidence suggesting the debt was settled a decade ago fundamentally undermines the Applicant's claim of potential substantial loss.



25. The Court of Appeal in *Antoine Ndiaye v African Virtual University* [2015] eKLR emphasized that the applicant bears the burden of demonstrating substantial loss through clear and specific evidence rather than mere assertions. The Applicant in this case has failed to discharge this burden.

### **On timeliness**

26. The question of timeliness requires the Court to examine not just the chronology of events but the substantive diligence demonstrated by the Applicant. As held in *Vishram Ravji Halai v Thornton & Turpin* Civil Application No. Nairobi 15 of 1990 [1990] KLR 365, while time is of essence in stay applications, the Court must evaluate the overall context and circumstances.
27. A peculiar aspect of this case is the Applicant's approach to seeking stay orders. The chronology reveals that after the judgment was delivered on 31st July 2024, the Applicant filed its first application on 30th August 2024. Having failed to secure stay orders in that application before Justice P.J. Otieno, the Applicant has now returned to court with the present application dated 23rd September 2024. This raises a fundamental question: does a subsequent application for stay, following an unsuccessful earlier attempt, meet the threshold of timeliness under Order 42 Rule 6?
28. While the law does not expressly prohibit successive applications, the Court must be vigilant against what may appear to be attempts at forum shopping or seeking a 'second bite at the cherry'. As the Court of Appeal emphasized in *Antoine Ndiaye v African Virtual University* [2015] eKLR, stay applications must be pursued with diligence and purpose, not as repetitive attempts hoping for a different outcome.
29. The filing of multiple applications, rather than demonstrating diligence, may instead suggest a tactical approach to litigation that courts ought to discourage. This is particularly so where, as in this case, the Applicant has not demonstrated what new circumstances or evidence justifies this fresh application, beyond their dissatisfaction with the earlier ruling. The Court cannot endorse a practice where parties, dissatisfied with orders of one judge, simply file fresh applications hoping for a different outcome.
30. That said, mere multiplicity of applications does not automatically defeat the current application. The Court must still examine whether, viewing the entire chronology from the delivery of judgment, there has been unreasonable delay. However, the Applicant's chosen litigation strategy weighs heavily in the Court's consideration of whether to exercise its discretion in favor of granting stay.

### **On Security:**

31. The requirement for security serves as a crucial safeguard in stay applications. As emphasized in *Arun C. Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates* [2014] eKLR, security ensures the due performance of any decree that may ultimately bind the applicant, rather than serving as a punishment.
32. Several factors weigh heavily against the Applicant on the question of security. The Applicant, a financial institution familiar with such requirements, has offered no security whatsoever. The judgment discharged the Plaintiff from guarantor obligations based on expert evidence of debt settlement and questionable interest calculations. Furthermore, the properties' current market value of over Kshs 200 million provides substantial inherent security that exceeds any potential claim.

### **On the intended appeal**

33. While this Court must exercise restraint in examining the merits at this stage, certain aspects of the intended appeal warrant attention. The appeal primarily challenges factual findings about debt settlement, supported by unrebutted expert evidence. The question of uncontractual interest, though



legally relevant, appears insufficient to justify continued holding of titles, particularly given the evidence of debt settlement and the extended period the Plaintiffs have been deprived of their property rights.

34. This Court notes with particular concern that the expert evidence on interest calculations and debt settlement remains unchallenged. The Applicant had ample opportunity to present contrary evidence but failed to do so. This silence speaks volumes about the strength of the intended appeal.
35. In the end, the granting of stay of execution is not a mere procedural formality but a discretionary remedy that must be exercised judiciously. The Court must be satisfied that the conditions precedent have been met while ensuring that justice is served to all parties.
36. Upon a careful evaluation of the totality of evidence before me, several critical factors emerge. The properties at the heart of this dispute have demonstrated remarkable appreciation in value, now standing at over Kshs 200 million. The expert evidence on debt settlement and interest calculations remains tellingly un rebutted. The Applicant bank, despite its institutional capacity, has neither offered security nor satisfactorily demonstrated the substantial loss it claims to face.
37. Most significantly, this Court cannot turn a blind eye to the broader context. The Plaintiffs have been tied to these charges for over a decade, despite evidence suggesting the underlying debt was settled. The properties have remained encumbered, appreciating significantly in value while their owners' rights remain restricted. To extend this state of affairs without compelling justification would be to perpetuate an injustice rather than preserve the status quo for a meritorious appeal.
38. The Applicant, a financial institution well-versed in such matters, has fallen short of establishing the prerequisites for the grant of stay. In such circumstances, this Court must lean in favor of allowing the successful litigants to enjoy the fruits of their judgment, particularly where the delay has been considerable and the expert evidence stands uncontroverted.
39. Accordingly, I make the following orders:
  - a. The Application dated 23rd September 2024 is hereby dismissed.
  - b. The Applicant shall release the original title deeds for properties Karuna/Sosian Block 8 (USWO) 476, Eldoret Municipality/block 14/693 and Kitale Municipality/block 15/ Koitogos/322 to the Plaintiffs within 14 days of this ruling.
  - c. The Applicant shall execute and register the discharge of charge documents for the said properties within the same period.
  - d. Costs of this application shall be borne by the Applicant.
40. It is so ordered.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 15<sup>TH</sup> DAY OF NOVEMBER 2024**

**R. NYAKUNDI**

**JUDGE**

In the Presence of:

Mr. Kigamwa, Advocate

