

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. E049 OF 2025

ERICK NGESSA OMOLLO.....APPLICANT/APPELLANT
VERSUS
PAUL KIIZA WANYONYI..... RESPONDENT

RULING

1. By way of a Notice of Motion dated 13/03/2025, the Applicant seeks the following orders;

1) Spent

2) Spent

3) **That there be temporary orders of stay of execution pending, the hearing and determination of this appeal.**

4) **That costs of this application be in the ‘course’.**

2. The Application is expressed to be brought under **Order 42 Rule 6(1) and (2)** of the **Civil Procedure Rules**. Additionally, it is premised on the grounds on the face of it and the averments of the applicant in the affidavit sworn by **Erick Ngesa Omollo** in support of the application.

3. In his affidavit, the applicant deponed that on 20th February 2025 judgement was entered in favour of the Respondent in **Eldoret Small Claims Court Case No. 1218 of 2024**, annexing and marking a copy of the same as ENO-

1. Further, that he is aggrieved with the judgement and has appealed vide a Memorandum of Appeal which he annexed and marked as ENO-2. He also stated that the Respondent has issued him with a demand notice for the decretal sum and costs, which he annexed and marked as ENO3. He urged that the appeal has high chances of success and he is likely to suffer substantial loss if stay is not granted.

4. The Respondent filed a Replying Affidavit dated 28th March 2025 in opposition to the application. He deponed that the appeal has no chance of success and further, that if the application is allowed it would be prejudicial to him. He urged that the applicant has not demonstrated the substantial loss he will suffer if he pays the Kshs. 100,000 which the Respondent had paid to the Appellant for the purchase of motor vehicle registration number KBP 786M which motor vehicle the Appellant still is in possession of to date. He urged the court to dismiss the application.

5. The parties were directed to file submissions on the application. The applicant filed submissions dated 16th April 2025 whereas the Respondent filed submissions dated 17th April 2025.

Applicants' Submissions

6. Learned counsel for the Applicant submitted that the principles guiding grant of stay of execution was well established in the case of **Butt v The Rent Restriction Tribunal** which are that;
 - a) **Where the applicant is likely to suffer substantial loss unless the orders are made;**
 - b) **Where the application has been made without undue delay;**

c) Where the applicant has provided security for the due performance of the decree as may be binding on the applicant and

d) Where the appeal is an arguable one or the appeal has triable issues.

7. Counsel submitted that the appellant is likely to suffer substantial loss if stay is not granted as he is likely not to recover the decretal sum if it is paid out to the respondent and the Appeal is eventually successful. He urged that the respondent is not likely to refund the decretal sum and from his knowledge, he is not capable of refunding the money once paid out to him.
8. On delay, counsel submitted that the appellant brought this application on 10th March 2025 which is about 20 days from the time of delivery of judgment and therefore there was no delay. On security, he stated that the applicant has offered his motor vehicle registration No. KBP 768M as security for the due performance of the decree. That the said motor vehicle is the same motor vehicle sale the subject of this litigation. Further, that he annexed a valuation report on the said motor vehicle which certifies that the value of the motor vehicle is Ksh.405.000 which is sufficient security for the performance of the decree.
9. Counsel submitted that the memorandum of appeal has brought out how the magistrate erred in his decision and the said grounds of appeal raise fundamental errors made by the magistrate in making his decision. He urged that the application is deserving of the orders sought.

Respondents' Submissions

10. Counsel submitted that there is no substantial loss that the Applicant herein will suffer but instead it is the Respondent who will be prejudiced if the application is allowed. His reason was that it is the Respondent who gave out

his Kshs. 100,000/ and the Applicant still has it more than two years down the line, and also still retains the motor vehicle that he was to sell to the Applicant. On security, he pointed out the contents of Paragraph 11 of the supporting affidavit to the application, urging that it raises questions as to how the same will be in the interest of the respondent. He urged the court to disallow the application for lack of merit.

Analysis & Determination

11. Having addressed my mind to the pleadings as well as the submissions, it is my considered opinion that the issue for determination is as below;

Whether the applicant has satisfied the requirement for the issuance of the orders for stay of execution

12. 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.

13. Substantial loss was explained in the case of **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR** as follows;

“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.”

14. In the case of **Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR 63**, it was held as follows;

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”

15. In the instant case, the applicant has merely stated that he will suffer substantial loss the nature of which he has not stated. He also does not deny

that he is still in possession of the vehicle whose deposit was the subject matter of the suit before the Trial Court and that which the court notes he does not deny that he did not hand over to the respondent. Apart from stating that the respondent will not be able to refund the money in the event that the appeal is successful, he has not averred that the respondent is a man of straw. He has also not proffered any evidence to show that the execution that he seeks to stay is imminent.

16.For these reasons I am not satisfied that the order for stay of execution of the decree of the Trial Court is warranted and, in this regard, I find that the Application lacks merit and the same is accordingly dismissed in its entirety with costs to the respondent

Read Dated and Signed at ELDORET on 9th October 2025

E. OMINDE
JUDGE