



Final Auto Centre Limited v Cerba Lancet Kenya Limited (Civil Appeal E010 of 2024) [2025] KEHC 14432 (KLR) (27 January 2025) (Ruling)

Neutral citation: [2025] KEHC 14432 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E010 OF 2024
NIO ADAGI, J
JANUARY 27, 2025**

BETWEEN

FINAL AUTO CENTRE LIMITED APPLICANT

AND

CERBA LANCET KENYA LIMITED RESPONDENT

RULING

1. This ruling is on the Appellant/Applicant's application dated 12th September 2024 and filed under Certificate of Urgency of the same date. It is brought under Section 1A,1B,3A and 63e of the [Civil Procedure Act](#) Cap 21 Laws of Kenya, Order 42 Rule 6 of the Civil Procedure Rules and all other enabling provisions of law. The application is supported by the affidavit of Francis Murithi sworn on the even date
2. The Applicant seeks the following prayers:
 - a) Spent.
 - b) That pending hearing and determination of the application and the appeal, this Honourable Court be pleased to stay the proceedings at Mavoko Law Courts in Civil Suit No. E558 of 2024.
 - c) That the Honourable Court be pleased to order the stay and directions by Hon. S. Kandie be stayed and be hereby set aside until the final determination of the Appeal.
 - d) That , this Honourable Court be deemed to grant any further directions that may be necessary for the expeditious determination of this appeal.
 - e) That the costs of this application be provided for.



3. The application is opposed by the Respondent vide the Replying Affidavit sworn on 2nd October 2024 by George Kabue, the Respondent's Chief Financial Officer and prays that the application be dismissed with costs to the Respondent.

Factual Background

4. The Respondent herein instituted a suit alongside and interlocutory application against the Appellant at the Mavoko Chief Magistrate's Court claiming release of its motor vehicles registration Nos. KCT 816L and KCU 327B which are detained by the Appellant purportedly as lien for some unpaid amounts. The interlocutory application was prosecuted to finality and a ruling delivered on 5th September 2024 ordering the release of the Respondent's stated motor vehicles. The Appellant/Applicant herein being dissatisfied with the said ruling, filed a Memorandum of Appeal herein on 18th September 2024 alongside the instant application for stay of proceedings at Mavoko Magistrate's Court in Civil Suit No. E558 of 2024 and for stay pending hearing and determination of the Appeal.

Analysis and Determination

5. I have considered the application, the supporting affidavit, the Replying Affidavit, and the rival submissions filed by the parties' counsel as well as the judicial decisions relied upon. In my view, the issues for determination are as follows:
 - a) Whether the Applicant/Appellant has met the criteria for grant of orders of stay of proceedings.
 4. Whether the Applicant/Appellant has met the criteria for grant of orders of stay pending Appeal.
 - c) Who shall bear costs of the application?

a) Whether the Applicant/Appellant has met the criteria for grant of orders of stay of proceedings.

6. This Honourable Court has powers and jurisdiction to stay proceedings and the question of whether or not to grant an order for stay of proceedings is a discretionary one which ought to be exercised by the court upon consideration of the facts and circumstances of each case. Further, that the discretion ought to be exercised judiciously and the court has to consider if it will be in the interests of justice to grant the same.
7. The conditions for staying proceedings pending the hearing and determination of appeal were set out in the case of *Global Tours & Travels Ltd (Nairobi HC Winding Up Cause No. 43 of 2000)* as follows: -

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice.... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.



8. The conditions to be met for stay of proceedings pending appeal to be granted were also established in the case of Turbo Highway Eldoret Ltd v Muniu (Civil Appeal E040 of 2021) [2022] KEHC 10197 (KLR) (30 June 2022) (Ruling) where Judge Joel Ngugi (as he then was) stated, at paragraph 18 while relying on the decision of William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 Others [2019] eKLR which laid down the conditions as follows:-
- a. First, there must be an appeal pending before the higher Court;
 - b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
 - c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
 - d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
 - e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
 - f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.
9. That the conditions for a grant of stay of proceedings were further summarized by the Court of Appeal in the case of Stanley Kangethe Kinyanjui vs Tony Kelter & Others [2013] eKLR as follows: -
- “An applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory.”
10. The Applicant submits that the continuation of the suit at the Magistrates court after the release of the subject motor vehicles will render the appeal a mere academic process. The Applicant is also wary that their right to be heard will be stumbled upon if the said proceedings are not stayed. I notice that the application herein has been made without undue delay as both the Appeal and Application for Stay of proceedings were filed in good time. That the Appeal against the Ruling was filed by the Applicant on 18/9/2024, thirteen (13) days after the said ruling.
11. On the other hand, the Respondent submits that the Applicant’s assertion that its right to be heard will be compromised if the stay is not granted is misplaced. On the contrary, granting the stay will infringe upon the Respondent’s right to have the matter heard and resolved expeditiously and deny it the use of its vehicles. That the ruling being appealed against was fair and just based on the fact that the Applicant had agreed to release the vehicles upon payment of the agreed amount which the Respondent fulfilled.
12. This court is cautious that an order of stay of proceedings is so grave that it contravenes the very basic and constitutional principle that justice shall not be delayed. In the case of MRM aka RLM v



SMRM (Civil Appeal 124 of 2022) [2024] KEHC 446 (KLR) (25 January 2024) (Ruling), the court referred to the case of Kenya Wildlife Service vs James Mutembei (2019) eKLR where Gikonyo J quoted Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332, that:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue. This is a power which, has been emphasized, ought to be exercised sparingly, and only in exceptional cases. It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the *case* .”

13. In this regard, this court is guided by the principles stated above that stay of proceedings is indeed a grave matter that should only be accorded to deserving matters as it interferes with a party's right to expeditious resolution of a case. This court finds that the Applicant has not met the threshold for granting orders of stay of proceedings. The application is a mere delaying tactic which goes against the expeditious, cost-effective and proportionate resolution of disputes as provided for in Article 159(2) (b) of *the Constitution* which stipulates as follows:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles :-

- a.
- b. justice shall not be delayed.”

14. That even the principles of equity frown upon delay in justice and submitted on the legal maxim that justice delayed is justice denied. That the continued pendency of the subject matter herein is quite prejudicial to the Respondent as the same has the effect that the matter shall not be expeditiously determined, resulting to the fact that justice shall have been delayed.
15. The provisions of Article 159(2)(a)(b)(c) and (d) of *the Constitution* of Kenya as read with Sections 1A and 1B of the *Civil Procedure Act*, Cap 21 enjoin this court to foster and facilitate the overriding objective of the Act to render justice to Parties in all Civil Proceedings in a just, expeditious, proportionate and affordable cost to parties.
16. It is my considered opinion that it would not be in the interest of justice to exercise court's discretion and grant stay of proceedings as the same will only serve the purpose of delaying the suit that is pending at Mavoko Law Courts in Civil Suit No. E558 of 2024 to the detriment of the Respondent. I am guided by the decision in the case of Peter Kariuki & Another v Neema Shah (2021) eKLR where the court stated that:-

“In the instant case, it is my considered opinion that it would not be in the interest of justice to exercise court's discretion and grant stay of proceedings as the same will only serve the purpose of delaying the suit CMCC Civil Suit No. 908 of 2019 that is pending in the lower court to the detriment of the Respondent. I am therefore not satisfied that the Applicants



have demonstrated that they have an arguable appeal to warrant issuance of the orders being sought (emphasis added)

b) Whether the Applicant/Appellant has met the criteria for grant of orders of stay pending Appeal.

17. The law relating to stay pending Appeal is Order 42 Rule 6 (2). It is also important to state that the power to grant an order of stay is discretionary and is dependent on certain conditions being met.
18. Order 42 rule 6(1) and (2) of the Civil Procedure Rules,2010 provides as follows:
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except 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.”
19. In *Butt Vs. Rent Restriction Tribunal* [1979], the Court of Appeal gave pointers on what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court stated thus:
 - i. The power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an Appeal.
 - ii. 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 the Appeal court reverse the judge’s discretion.
 - iii. Thirdly, 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.
 - iv. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
20. On the first criterion as set out in Order 42 Rule 6 (2) i.e. Whether the Applicant has brought this application without unreasonable delay. I have earlier indicated that the application has been brought without unreasonable delay.



21. The second criterion is whether the Applicant has demonstrated that it is bound to suffer substantial loss if orders of stay of execution pending appeal are not granted. The question that follows is what comprises substantial loss. In *Silverstein Vs Chesoni* (2002)1 KLR 867 it was held 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”
22. The Appellant has submitted that he on the verge of losing colossal sums of money owed to it by the Respondent should the subject motor vehicles be released to the Respondent and therefore the appeal will be rendered nugatory.
23. On the issue of substantial loss being suffered by the Applicant should the subject vehicles be released to the Respondent; this court observes that the Appellant’s appeal or claim is over a disputed amount of money due from the Respondent. Such disputed amounts can easily be ascertained through evidence in the suit pending before the Magistrates Court.
24. The Applicant appeals to this Honourable Court to stay proceedings and execution to enable the Applicant an opportunity to be heard on his Appeal.
25. The Respondent on the other hand argues that the application lacks merit and is otherwise an abuse of the court process and further that the Applicant has failed to prove and or establish loss it is likely to suffer if the orders sought are disallowed. That no security for due performance of the decree has been provided by the Applicant. That in view of the foregoing, the Applicant has substantially failed to adhere to provisions of Order 42, Rule 6 (2) of the Civil Procedure Rules hence the application ought to be dismissed.
26. The court is under a duty to hold the rings of justice even handed; it should not offer any illegitimate advantage to either party.
27. In granting an order of stay of execution, the court should not be seen to interfere with a party's enjoyment of the fruit of the judgment. In the case of *Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No.6726of 1991* where the court stated as follows: -

“The financial ability of a decree-holder solely is not a reason for allowing stay, it is enough that the decree-holder is not a dishonourable miscreant without any form of income. Suffice to state that the respondent, at this moment, is the successful party and in order to deny him the fruits of his success, it is upon the applicant to prove that he is unlikely to make good whatever sum he may have received in the meantime.”
28. The loss the Appellant has alluded to is that the appeal herein will be rendered nugatory should the stay order be declined. It is my considered view that the Appellant’s appeal is frivolous and or idle since the Appellant can ventilate his claim in the suit pending before the Magistrate’s court and not through the appeal herein. In addition, this being a monetary claim, any loss to be suffered by either party can adequately be compensated by an award in damages. The Appellant has not shown by evidence through an affidavit that the Respondent is incapable of settling any sums to be found legitimately payable to it by the Respondent.
29. The third criterion is that the Applicant must furnish security for the due performance of the decree. I am fully aware that the court has a delicate task of balancing the interests of both the Appellant and the Respondent. The Appellant who seeks stay orders pending the hearing of the Appeal so that his



Appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his successful litigation. It is true that under Order 42 rule 6 aforesaid, the Applicant is required to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder. I agree with the position in *Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others* [2015] eKLR, where it was held that:

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

30. I also associate myself with the holding in *Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd* [2019] eKLR, where the court observed:

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... This the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine.”

31. The law is that where the applicant intends to exercise its undoubted right of appeal, and in the event, it were eventually to succeed it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the Respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security. The issue of adequacy of security was dealt with by the Court of Appeal in *Nduhiu Gitahi vs. Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 where the Court of Appeal expressed itself as follows:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank



guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so. The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it”.

c) Who should bear the cost of this application?

32. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. In *Jasbir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 others SC. Petition No. 4 of 2012: [2014] eKLR*. The Supreme Court held that costs follow the event and that the Court has the discretion in awarding such costs.
33. Taking all the above factors into account, in my view, the Applicant will suffer no prejudice if the case at the Magistrates court proceeds for hearing and determination as the Appellant/Applicant will have an opportunity to counterclaim for any claimed amounts and thereafter make submissions on it at the close of the case.
34. Accordingly, I hereby make the following orders: -
 - a. The Appellant/ Applicant’s Notice of Motion application dated 12th September 2024 as well as the Memorandum of Appeal of even date filed herein on 18th September 2024 are without merit and both are dismissed with costs of Ksh.15,000/= payable to the Respondent within 30 days from the date of this ruling.
 - b. The pending suit at Mavoko Law Courts in Civil Suit No. E558 of 2024 between Cebra Lancet Kenya Limited Vs Final Auto Center Limited shall proceed for hearing and determination and the Applicant will be at liberty to properly raise any lawful claim against the Respondent in the said suit.
 - c. This appeal file shall be closed.
35. It is so ordered.

RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 27TH JANUARY 2025

NOEL I. ADAGI

JUDGE



DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 27TH JANUARY 2025

In the presence of :

J. Oketch.... for Applicant

Juma h/b for Muturi..... for Respondent

Milly Grace.... Court Assistant

