



Olkalou Dairy (2016) Ltd v Churchill Rombosia Kimwanga & another (Appeal E012 of 2025) [2025] KEELRC 2838 (KLR) (22 October 2025) (Ruling)

Neutral citation: [2025] KEELRC 2838 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
APPEAL E012 OF 2025
AN MWAURE, J
OCTOBER 22, 2025**

BETWEEN

OLKALOU DAIRY (2016) LTD APPELLANT

AND

CHURCHILL ROMBOSIA KIMWANGA 1ST RESPONDENT

JOSEPH KINGORI T/A BEMAC AUCTIONEERS 2ND RESPONDENT

RULING

1. Before this Honourable Court are two applications for determination. The first application, dated 13th March 2025, the Appellant/Applicant is seeking the following orders that:
 1. Pending the hearing and determination of the application inter-parties, this Honourable Court be pleased to order stay of execution of the judgment which was delivered on 12.2.2025 by Honourable E.H. Keago and subsequent decree resulting thereon.
 2. Pending the hearing and determination of the intended appeal, this Honourable Court be pleased to order stay of execution of the judgment which was delivered on 12.2.2025 by Honourable E.H. Keago and subsequent decree resulting thereon.
 3. Costs of this application be in the cause.
2. In the second application dated 14th April 2025, the Appellant/Applicant is seeking the following orders that:
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 2. This Honourable Court be pleased to declare that the Warrants of Attachment dated 4.4.2025, the Proclamation Notice by Bemac Auctioneers dated 8.4.2025, and the execution



commenced by the Claimant pursuant to the said warrants and proclamation notice, are irregular, null and void.

3. This Honourable Court be pleased to set aside and cancel the Warrants of Attachment drawn and extracted by the Claimant dated 4.4.2025 and the Proclamation Notice dated 8.4.2025 by Bemac Auctioneers.
4. This Honourable Court be pleased to order that as result of the irregular attachment of the Respondent's movable property pursuant to the Warrants of Attachment dated 4.4.2025 and the Proclamation Notice dated 8.4.2025, and the Respondent is not under any obligation to pay any auctioneer fees to Bemac Auctioneers as indicated in the Proclamation Notice dated 4.4.2025 as well as the court collection fees and costs of the application provided in the Warrants of Attachment dated 4.4.2025
5. The costs of this application and the unlawful execution commenced by the Claimant, to be borne by the Claimant or, as the court deems fit.
6. The costs of this application be in the cause.

Appellant/Applicant's supporting affidavit

3. Both applications are supported by the affidavit of Samuel Mwangi Irungu, the Appellant/Applicant's chairman Board of Directors, dated 13th March 2025 and 14th April 2025 respectively.
4. The Appellant/Applicant avers that it is seeking a stay of execution following a judgment in Nyahururu CMEELRC No. E010 of 2022, which awarded the 1st Respondent Kshs. 205,961/= for salary in lieu of notice, salary arrears for 2 months, salary in lieu of leave, service gratuity for the period worked and cost and interest of suit.
5. Aggrieved with the judgment, the Appellant/Applicant avers that it filed an appeal in Nakuru ELRCA No. E012 of 2025 and initiated steps to compile the record. Despite this, the 1st Respondent issued a demand of Kshs.296,061/= and, without proper service of cost assessment, obtained warrants of attachment leading to a proclamation notice dated 8th April 2025.
6. The Appellant/Applicant avers that the 2nd Respondent attached essential business tools, which the Applicant claims are secured under a debenture with Co-operative Bank, rendering the attachment illegal.
7. The Appellant/Applicant argues that the execution is premature, irregular, and risks substantial loss, including auctioning of assets over disputed fees.
8. The Appellant/Applicant assert that the appeal is arguable, filed without delay, and that granting a stay would not prejudice the Respondents but would prevent the appeal from being rendered nugatory.
9. The Appellant/Applicant urged this Honourable to allow both applications as prayed.

Respondent's replying affidavit

10. In opposition to both applications, the Respondent filed a replying affidavit dated 10th June 2025.
11. The Respondent avers that indeed judgment was delivered on 12th February 2023 and that a demand letter dated 19th February 2025 was sent to the Appellant/Applicant, who acknowledged receipt but failed to respond, instead filing an appeal and application without securing stay orders.



12. The Respondent argues that execution was lawful and that the proclaimed assets, office furniture and equipment, are not essential tools of trade for the Appellant's dairy business.
13. The Respondent contend that the debenture over the assets has not crystallised, as no default has been proven.
14. The Respondent maintains that execution was due to non-payment of the decretal sum, not auctioneer fees, and asserts that the Appellant/Applicant has not demonstrated substantial loss or justified the stay request.
15. The Respondent urges this Honourable court to dismiss the two applications with costs or, alternatively, require the Appellant/Applicant to provide security for the decree's performance.
16. Parties canvassed both applications by way of written submissions.

Appellant/Applicant's submissions

17. The Appellant/Applicant relied on Order 42 Rule 6 of the Civil Procedure Rules, 2010, which provides as follows;

“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.

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.”

18. The Appellant/Applicant submitted that the three conditions to fulfil the stay of execution include:
 - a. The substantial loss may result to the applicant unless the order is made
 - b. The application has been made without unreasonable delay
 - c. Security as the court orders for the due performance
19. The Appellant/Applicant relied on the case of *Matata & Another v Rono & Another* [2024] KEHC 2799 (KLR), where the court cited the Court of Appeal in *Butt v Rent Restriction Tribunal* [1979] KECA 22 (KLR), the court outlined key principles guiding the decision to grant or deny a stay of execution pending appeal. The court emphasized that this power is discretionary and should be exercised to avoid frustrating the appeal process. A stay should generally be granted unless there is an overwhelming reason not to, ensuring that the appeal is not rendered ineffective if successful. Judges are advised not to deny a stay solely because alternative remedies may exist later. Additionally, the court must consider the specific circumstances of each case. Under Order XLI Rule 4(2)(b) of the Civil Procedure Rules, the court may require security for costs, and failure to comply with such an order will result in the lapse of the stay.



20. The Appellant/Applicant contends that the application for stay of execution was filed without undue delay, as both the memorandum of appeal and the application were lodged within a month of the judgment dated 12th February 2025.
21. On substantial loss, the Appellant/Applicant argues that the Respondent's financial capacity remains undisclosed, raising a legitimate concern that the decretal sum may not be recoverable if the appeal succeeds. Citing the case *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] KECA 333 (KLR), the Appellant/Applicant submitted that once a reasonable fear of non-refund is raised, the burden shifts to the Respondent to prove financial means, which he failed to do. Therefore, the Appellant/Applicant asserts that paying the decretal sum prematurely would risk rendering the appeal nugatory.
22. The Applicant submitted that it is ready and willing to provide security for the due performance of the decree, as affirmed in *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] KEHC 8358 (KLR), where the court held that such an offer demonstrates good faith and satisfies the requirement for stay. The Appellant/Applicant further argues that the warrants of attachment dated 4th April 2025 and the proclamation notice dated 8th April 2025 by Bemac Auctioneers should be set aside, citing non-compliance with Order 21 Rule 9A of the Civil Procedure Rules, 2010, which requires service of cost assessment documents, none of which were served. The Appellant/Applicant discovered the ex parte cost ruling only upon being served with execution documents. Relying on *Abdi v Ahmed* [2024] KEHC 11514 (KLR), the Applicant emphasizes the constitutional right to appeal and argues that execution would render the appeal nugatory.
23. Additionally, the Appellant/Applicant invokes the debenture agreement with Co-operative Bank of Kenya, which includes both fixed and floating charges. The debenture stipulates that execution or attachment triggers crystallization of the floating charge into a fixed charge, giving the bank priority over other creditors. This position is supported by *Menengai Rolling Mills Limited & another v Blue Nile Wire Products Limited & another* [2019] KEHC 12328 (KLR), *Mackenzie (Kenya) Ltd v Pharmico Ltd* [1976] KEHC 7 (KLR), and *Trans Africa Energy Ltd v Alten Renewable Energy Developments Africa Bv & Others* [2024] KEHC 7517 (KLR), where courts held that proclamation or execution initiates crystallization, granting the debenture holder precedence. The Appellant/Applicant argues that since execution is incomplete and assets have not been sold, the bank's interest takes priority, and the warrants should be set aside to preserve the appeal and protect secured interests.
24. The Appellant/Applicant urges this Honourable court to find that the application dated 13th March 2025, and 14th April 2025 is merited and allow the said applications with costs.

Respondent's submissions

25. The Respondent, citing Order 42 Rule 6(2) of the Civil Procedure Rules, argues that the Appellant/Applicant has failed to demonstrate substantial loss warranting a stay of execution. The Respondent contends that the Appellant's claim regarding the 1st Respondent's undisclosed financial status is speculative and unsupported by evidence. Furthermore, the Respondent asserts that there is no legal obligation for a party to disclose their financial means in such applications, and the burden of proving potential loss lies solely with the Appellant.
26. The Respondent, relying on *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] KEHC 1094 (KLR), argued that the conditions under Order 42 Rule 6 of the Civil Procedure Rules are interdependent, and failure to satisfy any of them undermines the court's discretion to grant a stay of execution. On the issue of substantial loss, the court in *Silverstein v Chesoni* [2002] 1 KLR 867 and *Mukuma v Abuoga* (1988) KLR 645 emphasized that substantial loss is the cornerstone of stay



applications, as it involves demonstrating that execution would irreparably affect the applicant or render the appeal nugatory.

27. The Respondent acknowledges that the Appellant/Applicant claims the 2nd Respondent attached essential business assets such as desks, computers, and printers under a proclamation notice dated 8th April 2025, which the Appellant/Applicant argues is null and void due to an existing debenture with Co-operative Bank of Kenya. The Appellant/Applicant submitted that it is seeking to have the warrants and proclamation set aside, citing a Kshs.197 Million loan secured by various instruments including immovable property, receivables, and personal guarantees, as per a letter of offer dated 15th May 2023. The debenture comprises a fixed charge over immovable assets and a floating charge over all movable assets, formalized in the Further Supplemental Debenture dated 20th June 2023.
28. The Respondent submitted that clause 6.3 of the Further Supplemental Debenture specifies that a Partial Fixed Charge is created when any creditor attempts execution or attachment against the company's assets. Clause 17 of the Further Debenture empowers Co-operative Bank to appoint a receiver upon such events or upon default, granting the receiver full authority over the company's assets, including uncalled capital. Clause 5 of the Appendix defines events of default, including failure to pay secured amounts when due. These clauses collectively establish that the proclamation of movable assets by the 2nd Respondent on 8th April 2025 triggered crystallization of the floating charge into a fixed charge, thereby giving the bank priority over the attached assets under the debenture agreement.
29. The Respondent submitted that the Appellant/Applicant has not provided any evidence to show that the Bank has taken any action in accordance with clause 17 of the Further Debenture an event set out in clause 6 has happened. The Respondent also submitted that the Appellant/Applicant is in collusion with the Bank to ensure that the 1st Respondent does not enjoy the fruits of the judgment. The Respondent rely on the case of Landmark Port Conveyors Limited v Buzeki Enterprises Limited & Another [2019] KEHC 570 (KLR), where the court observed that although the defendant is in default under the terms of the debenture, the objector has failed to enforce its rights, particularly by not appointing a receiver, thereby compromising its own position. This passive conduct raises concerns of implied collusion, as both parties appear to be avoiding action that could trigger adverse consequences. Citing the cases of Sokhi International (K) Ltd v Giro Commercial Bank Ltd (2006) eKLR and Evans v Rival Granite Quarries Ltd (1910) 2KB979, the court emphasized that a debenture holder cannot allow a company to continue operating and acquiring credit while shielding itself from liability. Additionally, the objector failed to issue the required notice to crystallize the floating charge into a fixed charge, as per clause 3.5 of the debenture. The court concluded that such mutual inaction undermines the rights of other creditors and violates principles of equity, which it cannot endorse.
30. The Respondent submitted that the Appellant/Applicant cannot claim that the 1st Respondent has no right to carry out execution because the Debenture has crystallised as per clause 6.3, yet it has not provided any evidence that the Bank has moved to exercise its rights as per clause 17 of the Debenture Agreement. In any case, the 1st Respondent has priority over the Bank as per clause 6-partial Fixed Charge-over the assets that are still secured by the floating charge.
31. The Respondent argued that the Appellant/Applicant's proclaimed goods used in its dairy business do not qualify as tools of trade under Section 44(1)(ii) of the *Civil Procedure Act*. Citing Blackwood Hodge (Kenya) Ltd v Lead Gasoline Tank Cleaning Sam and Chase (K) Ltd [1986] KEHC 57 (KLR), the court held that the protection offered by section 44(1)(ii) which exempts "the tools and implements of a person necessary for the performance by him of his trade or profession" applies only to natural



persons, such as artisans, and not to corporate entities. Therefore, the Appellant, being a company, cannot rely on this provision to shield its assets from attachment.

32. In *Invesco Assurance Co. Ltd v Kinyanjui Njuguna & Co. Advocates & another* [2020] KEHC 2628 (KLR), the court held that section 44 of the *Civil Procedure Act* is intended to protect natural persons, not corporate entities. It emphasized that the language of the provision clearly refers to individuals, and had the legislature intended to include corporations, it would have done so explicitly. The court therefore aligned with existing jurisprudence excluding companies from the protection offered under section 44 of the *Civil Procedure Act*.
33. The Respondent urged this Honourable Court to dismiss the two applications dated 13th March 2025 and 14th April 2025 to dismiss with costs.

Analysis and determination

34. The court has considered both applications dated 13th March 2025 and 14th March 2025, the supporting affidavit replying affidavit together with the rival submissions by both counsel; the issues for determination are as follows:
 - a. Whether the Appellant/Applicant has fulfilled the requirement for stay of execution;
 - b. Whether the application dated 14th April 2025 is merited.
35. On the issue for stay of execution, Rule 73(2) of the Employment and Labour Relation Court (Procedure) Rules 2024 provides as follows:

“Rules on execution or stay of execution of an order or decree of the Court shall be in accordance with the Civil Procedure Rules.”
36. In *Butt v Rent Restriction Tribunal* (Supra) the Court of Appeal held that the principle established in *Wilson v Church* (No. 2) (1879) 12 Ch D 454 emphasizes that while granting a stay of execution is at the court’s discretion, it must consider whether specific circumstances justify such an order. The court should generally exercise its discretion to ensure that, if the appeal succeeds, it is not rendered ineffective or nugatory. As stated by Brett LJ and Cotton LJ, the court has a duty to protect the appellant’s right of appeal by preventing irreversible consequences during the appeal process. This Honourable Court reiterates Order 42 Rule 6 of the Civil Procedure Rules and *James Wangalwa & Another v Agnes Naliaka Cheseto*(Supra) which has already mentioned in the earlier part of this ruling.
37. In this instant case, the Appellant/Applicant dissatisfied with the judgment delivered on 12th February 2025, filed the appeal within reasonable time and explained the substantial loss it will suffer in the event stay of execution and the Appellant/Applicant is willing to provide the decretal sum until the hearing and determination of this appeal is done.
38. As to the application dated 14th May 2025 there is no doubt that the Appellant/Applicant had taken out a loan vide a debenture Agreement with Co-operative Bank of Kenya Limited. When the Appellant/Applicant went ahead and issued warrants of proclaimed goods they included desks, computers, and printers. The Respondent’s argument made was that those were of tools of trade and it is a company and not a natural person. Section 44(1) of the *Civil Procedure Act* provides as follows:

“All property belonging to a judgment debtor, including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree:



Provided that the following shall not be liable to attachment or sale—

- (i) the necessary wearing apparel, cooking vessels, beds and bedding of the judgment-debtor and of his wife and children, and those personal ornaments from which, in accordance with religious usage, a woman cannot be parted;
- (ii) the tools and implements of a person necessary for the performance by him of his trade or profession;
- (iii) where the judgment-debtor is an agriculturalist—
 - (a) the first ten thousand shillings in value of his livestock, if any; and
 - (b) the first five thousand shillings in value of all implements, tools, utensils, plant and machinery used in connection with stock or dairy farming or in the production of crops or plants; and
 - (c) the first one thousand shillings in value of agricultural produce necessary to enable him to earn his livelihood;
- (iv) books of accounts;
- (v) a right to sue in damages;
- (vi) a right of personal service;
- (vii) stipends and gratuities allowed to pensioners of the Government, or payable out of a service family pension fund notified in the Gazette by the Minister, and political pensions;
- (viii) two thirds of the salary of public officer or other person in employment;
- (ix) a contingent or possible right or interest, including an expectancy of succession by survivorship;
- (x) a right of future maintenance;
- (xi) any fund or allowance declared by law to be exempt from attachment and sale in execution of a decree.”

39. Execution in case of cross-claims under same decree [Order 22, rule 15.] provides where application is made to a court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then—

- (a) if the two sums are equal, satisfaction for both shall be entered upon the decree; and
- (b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum, and for so much only as remains after deducting the smaller sum, and satisfaction of the smaller sum shall be entered upon the decree.

40. In view of the foregoing and the court being satisfied that the Appellant/Applicant has satisfied the requirements of the law set out in (Order 42 Rule 6C2) where it is provided that stay of execution will only be granted if application is made without undue delay which is proved here court is also satisfied that substantial loss may result to the Applicant if stay is not granted and the Applicant is able and willing to grant security.



All the above have been satisfied and therefore the court is obliged to grant the orders as per application dated 13th March 2025 as hereunder: -

1. The stay of attachment of the proclaimed movable properties in the proclamation of attachment/repossession/ distraint of movable property as per Notice dated 8th April 2025 Subject to the Applicant depositing Kshs.205,961/= in court within 21 days from today's date as per application dated 14th April 2025.
2. That this Honourable Court is pleased to declare that the Warrants of Attachment dated 4.4.2025 and the Proclamation of attachment/repossession/distraint of movable property Notice dated 8.4.2025 issued by the 2nd Respondent on instructions of the 1st respondent pursuant to the said warrant and proclamation notice, are irregular, null and void ab initio.
3. The court as well orders stay of execution of the Judgment delivered on 12th February 2025 as per the applicant's Application dated 13th March 2025 subject to order No. 1 above.
4. Costs to be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 22ND DAY OF OCTOBER, 2025.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COvID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

