



Swift Capital Limited v Skypac Consult Auctioneers & another (Civil Appeal E084 of 2025) [2025] KEHC 15314 (KLR) (30 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15314 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E084 OF 2025
E OMINDE, J
OCTOBER 30, 2025**

BETWEEN

SWIFT CAPITAL LIMITED APPELLANT

AND

SKYPAC CONSULT AUCTIONEERS 1ST RESPONDENT

ISAAC KIMELI RONO T/A ISAPAM AUCTIONEERS 2ND RESPONDENT

RULING

1. The application before this court is the Notice of Motion application dated 28/4/2025, brought pursuant to provisions of Section 3A of the *Civil Procedure Act*, Order 40 and 51 of the Civil Procedure Rules, and all other enabling provision of law. The Applicant seeks the following orders:
 - a. Spent.
 - b. That a stay of execution of its orders be issued for the Ruling given on 15th April 2025 in the case MCCC/031/2025 by Hon. Peter Areri.
 - c. That pending hearing and determination of the Appeal on the Ruling given in the case MCCC/031/2025 by Hon. Peter Areri, on 15th April 2025, this Honourable Court do issue an order of stay of execution of the orders given on 15/4/2025.
 - d. That costs be determined by the Court.
2. The application is supported by the grounds on the face of the said application and the Supporting affidavit of Samson Jimmy Mwanyasi, dated 28th April 2025.
3. The Applicant deposed that he is the director of the Applicant/Appellant. That on 22st January 2025, the 1st Respondent filed an application under a Certificate of Urgency for orders that the motor vehicle KDL 533Y be released pending the hearing of the application, a temporary injunction barring the



- Respondents or their agents from advertising and sale of the motor vehicle stated above or in the alternative that the statutory power of sale be suspended for 24 months until the Applicant could redeem the motor vehicle and that on 15th April 2015, the Court delivered a Ruling in the favour of the 1st Respondent and ordered that the Motor vehicle be released by the Appellant/Applicant as prayed.
4. Being aggrieved and dissatisfied by the said Ruling, the Applicant proffered an Appeal and now seeks that the same be stayed pending the hearing and determination of the Appeal which he deposes has high chances of success for reasons that the Appellant/ Applicant did not infringe on the rights of the 1st Respondent but only sought to recover money owed as per an agreement.
 5. He deposed that the Appellant/Applicant will not be able to recover the amount owed in full even if the car which is the subject matter is sold as the interest and penalties keep accruing and therefore will eat into the value of the security.
 6. He further deposed that the Appellant/Applicant will suffer losses and irreparable injury if the Orders of 15th April 2025 are not stayed as their business relies on client's repayment of moneys loaned and subsequent repossession of securities in case of default for recovery of money owed.
 7. He maintained that it is not in contention that the 1st Respondent applied for a loan worth Ksh. 7,640,627.03 on the 1st October 2024 from the Appellant/Applicant and gave 3 securities as collateral being 2 rollers and the motor vehicle KDL 533Y, that the Appellant/Applicant approved the loan and disbursed to the Applicant who was then supposed to pay a monthly instalment of Ksh. 704,890.81 and that the 1st Respondent did not pay up the amount owed but only gave promises to pay.
 8. He contended that the Appellant/Applicant on seeing that the loan was not being serviced sent a demand letter on the 23rd of December to the 1st Respondent which was never responded to prompting the Appellant/Applicant to send auctioneers that is the 2nd Respondent to repossess the 1st Respondent motor vehicle the subject matter herein and hence the case that was presented before the court.

Replying Affidavit

9. The Application is opposed by the 1st Respondent, Isaac Kemeli Rono, who filed a Replying Affidavit dated 12th May 2025.
10. He deposed that he is the director of the 1st Respondent and that it is indeed true that he took a loan with the Appellant herein which money was taken for various projects that had been issued by the government of Kenya. He further deposed that it is indeed true that the order was issued on 15th April 2025, was to effect that the Appellant was to release Motor vehicle registration number KDL 533Y on a running attachment pending hearing and determination of the suit.
11. He added that it is not in dispute that he owes the Appellant and it is also not in dispute that that he worked and he is awaiting payment from various government departments.
12. He maintained that the Application does not meet the threshold for grant of Orders of stay of execution for the reason that the matter is still proceeding.
13. He further deposed that he has shown the Honourable Court that he has already done contracts for the Government and he has raised invoices that have not been paid. He added that he is a contractor and the said motor vehicles are the only source of income. He urged the Court to allow him pay Kshs. 200,000/= on monthly basis as he awaits payment of the said invoices and that the Appellant be directed to release his motor vehicle subject to the payment of Kshs. 200,000/= on monthly basis.



Submissions

14. The Application was canvassed via written submissions. The Applicant filed submissions dated 27th May 2025 while the 1st Respondent filed submissions dated 5th June 2025.

The Applicant's Submissions

15. On the court's discretion to grant the orders sought, Counsel for the Applicant cited Order 42 Rule 6 of the Civil Procedure Rules and urged that the court has discretion to grant orders of stay of execution and added that it is only right that the court grants the stay pending the hearing and determination of the appeal because should the court fail to grant, the Appeal shall be rendered nugatory thus impacting on the applicant's right of Appeal. Reliance was placed on the Court of Appeal case of *Butt v Rent Restriction Tribunal* [1979], where the Court stated that;
- “The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.”
16. And further that;
- “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.
17. Counsel submitted that there is no overwhelming hindrance or prejudice that will be occasioned to the Respondent if the orders for stay are granted because the 1st Respondent has failed to pay up a loan, he owes the Applicant/Appellant which continues to balloon and eat up into the values of the securities he had given for his loan for which he has not paid a single dime to date and that this being the gist of his appeal, if the stay sought is not granted the appeal will be rendered nugatory.
18. On substantial loss, Counsel submitted that the dispute before the Magistrate Court is in relation to his the 1st Respondent's motor vehicle KDL 533Y which was lawfully repossessed by the Applicant/Appellant. That the said Respondent admitted to taking up the loan which fact he still admits before this court in his Replying Affidavit dated the 12th May 2025 at paragraph 3. That further he admits that the loan was for the total sum of Kshs. 7,640,627.03 for which he provided the subject motor vehicle KDL 533Y as part of a series of securities the other securities being KHMA 821L and KHMA 959Q rollers.
19. That however, the dispute before this court is with regard to the Lower Court's Ruling that the Applicant releases the attached motor vehicle registration number KDL 533Y yet the loan amount has ballooned to the point that even if the motor vehicle KDL 533Y were to be sold the proceed therefrom will not cover even a fraction of the loan amount. Counsel submitted that furthermore, the motor vehicle keeps on depreciating in value and there is no guarantee that with the order of running attachment given at the Magistrate Court the motor vehicle will be properly maintained.
20. Counsel submitted that in a pattern seen by many microfinances when debtors refuse to pay the 1st Respondent might even choose to destroy the motor vehicle, sell it, hide it or even run it down and this therefore will leave the Applicant with no redress whatsoever over his right to be paid back the money loaned which right was infringed by the 1st Respondent. Counsel therefore urged that in the event that the court fails to grant the orders for stay of execution then the Applicant will be the biggest loser and



that this will be evident when the motor vehicle is released and the 1st Respondent and he fails to pay since he made promises to pay even at the Magistrate court but has never paid and that the parties even went up to the position of making a consent which never materialized because the 1st Respondent was just making empty promises.

21. On substantial loss, Counsel urged that they have demonstrated that the Applicant will be occasioned a substantial loss of a huge amount of money since the loan is running to about 10 million and above and cited the case of Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation) [2004] 2 EA 331 where Ogola J stated that:

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”

22. On the 1st Respondent request at Paragraph 8 and Paragraph 12 of their Affidavit that the court grants an order for them to pay Ks. 200,000 per month Counsel submitted that this if allowed will be akin to the court rewriting the whole contract between the parties and added that it is trite law that a court should not rewrite a contract between the parties as was held in the case of Muigai Enterprises Limited v Kenya Commercial Bank Limited ML HCOMM No.473 of 2015[2016] eKLR. Counsel urged that what the court needs to put into further consideration is that the 1st Respondent was to pay and still is to pay a total of Ks. 704,890.81 as monthly instalments and hence if the court were to grant their prayer that they make monthly instalments of Ks. 200,000/-it would lead to a huge loss of nearly Ks, 500,000/- which would be to the detriment of the Applicant.
23. On unreasonable delay, Counsel submitted that the Application was made without unreasonable delay as the Ruling was made via the CTS on the 15/4/2025 and the Appeal was filed within the 14 days granted for appeal.
24. In regard to security, Counsel submitted that according to the doctrine of 'Pacta sunt servanda' which means that agreements must be kept, it is clear that the 1st Respondent failed to keep the agreement between him and the Applicant which means he is in breach of a contract to borrow money and hence he should be ordered to provide security for due performance. Counsel added that this is the reason that he owes the Applicant a great deal of money which keeps on ballooning in interest and penalties that will eat up into the values of the securities given.
25. That because the Respondent has never fulfilled any of the promises that he made, then he should be the one to be ordered by the court to furnish security over the large amount of loan that he has which he owes. Counsel therefore urged that the 1st Respondent be ordered to furnish a security of Ks. 1,000,000/- to be put in a joint account or be furnished to the court as the court deems fit.

The 1st Respondents Submissions

26. Counsel for the 1st Respondent also cited Order 42 Rule 6 of the Civil Procedure Rules on stay of execution and submitted that in line with the conditions therein, it is evident that the Appellant has not met them. Counsel relied the case of Antoine Ndiaye v African Virtual University (2015) eKLR in this regard
27. Counsel submitted that the Court should not issue the stay orders as prayed for by the Applicant because the Applicant has not disclosed to the Honourable Court that the said motor vehicle was released on a running attachment. Counsel pointed out that he understands a running attachment to connote that the person to whom the property is released holds it on condition that it is subject to the



attachment without the liberty for dispose of it so as to remove it from attachment. Counsel urged that if that is correct, then it would be necessary for the Appellant/applicant to demonstrate to court how such release order would occasion to him an injustice or hardship. Counsel maintained that same has not been demonstrated to this Honourable Court by the Appellant/Applicant

28. Regarding the 1st Respondent monthly repayment plan of Kshs. 200,000/=, Counsel submitted that the Court has jurisdiction to allow that the 1st Respondent to be paying a sum of Kshs. 200,000/= monthly. Counsel cited the case of Surgipharm Limited v Express Kenya Limited & another [2017] KEHC 9881 (KLR) where the Honourable Court held that:

“The Court's discretion to order for payment of a Decretal amount in instalments is one that must be exercised in a Judicial manner and in Rajabali Alidina vs Remtulla Alidina & Another [1961] EA 565 Law J applied the following tests in considering such an application:-

- a) The circumstances under which the debt was contracted
- b) The conduct of the debtor
- c) His financial position, and
- d) His bona-fides in offering to pay a fair proportion of the debt at once.”

29. Counsel added that in the aforementioned case it was further held thus:

The Application of 27th October 2016 is hereby allowed to the extent that the Decretal sum shall be paid in monthly instalments of Ks. 200,000/=with effect from 31st March 2017 and thereafter on or before the last day of each succeeding month.”

30. Counsel urged that the 1st Respondent has fulfilled the aforementioned conditions and as such he has in his replying affidavit annexed invoices that he has raised to different departments for work already done. Further Counsel submitted that the 1st Respondent has no other source of income and only does contractual works and that the said invoices indicate his current financial situation in that he has not been paid and as such it will be prudent for the Honourable Court to allow his application of paying Kshs. 200,000/= monthly.

Determination

31. The principles guiding the grant of a stay of execution pending appeal are provided under Order 42 Rule 6(2) of the Civil Procedure Rules which provides 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

32. The factors to consider in stay pending appeal is set out in the Court of Appeal decision in Butt v Rent Restriction Tribunal [1982] KLR 417, (Supra). The Court gave guidance on how a Court should exercise discretion in such an Application and held as follows: -



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.
33. On the issue that an applicant pleads that they stand to suffer substantial loss, in the case of *Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018 (Supra)* the Court of Appeal pronounced itself to the effect that:
- “It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”
34. On the issue of the provision of security, the court relies on the case of *Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd [2019] eKLR*.
35. On unreasonable delay. The Court of Appeal sitting in Meru in Civil Appeal No. 45 of 2015 *M'ndaka Mbiuki v James Mbaabu Mugwiria [2016] eKLR* held that;
- “This ground is normally easy to determine and is usually straight forward. Although there is no exact measure as to what amounts to unreasonable delay, it will not be difficult to discern inordinate delay when it occurs. It must be such delay that goes beyond acceptable limits given the nature of the act to be performed.”
36. On whether or not the appeal file is arguable, the Court herein is guided by the decision in *Athuman Nusura Juma Vs. Afwa Mohamed Ramadhan [2016] eKLR* wherein the Court held as follows:
- “Whether the intended appeal has merits or not is not an issue to be determined by a Court when dealing with an Application of this nature but by the Court dealing with the merits of the appeal, that is why the requirement that the intended appeal be arguable is preferred with the word “possibly”.
37. Having considered and applied my mind to facts of the case as deposed in the Affidavits of both parties, the applicable Statutory and Case Law as herein above summarised, I am satisfied that the Applicant herein has met the requirements of Order 42 Rule 6(2) of the Civil Procedure Code for the granting of a stay of execution as follows;



38. As herein above submitted by the Applicant, and supported by the record of the court, this Application and the Appeal was filed very well within the time frame given. There was therefore no unreasonable delay in moving the court.
39. The Respondent admits to owing the debt. He does not rebut the deposition that he has not been repaying the same. Instead, he states that he does government contracts and he is not being paid in time to enable him repay the loan at the agreed amount. He therefore seeks that the court revises the monthly repayments of Ks. 700,000/- or thereabouts to Ks. 200,000/- to enable him make the monthly repayments with ease. This submission by the respondent that he is not in a position to service the loan, does show that the Applicant has sufficiently demonstrated that he is and also stands to suffer substantial loss if the stay that he seeks is not granted.
40. Further to the above, the Respondent also deposes, and in effect confirms the deposition by the Applicant that the motor vehicle in question, which is among the securities that he had given to the Applicants for the loan advanced, and which the Applicants had attached for reasons of the Respondents default in the repayment of the loan, was released to him by the Lower Court on a running attachment. The fact that the Respondent is not paying back the loan, and is in possession of, and is using and enjoying the benefits of the motor vehicle, which the court notes is an asset that depreciates over time and more particularly with regular use, only further goes to buttress the court's finding as above that the Applicant has sufficiently demonstrated that he stands to suffer substantial loss if the order for stay is not granted.
41. Further, by dint of the fact that the Respondent does not deny that he owes the Applicant the money lent the subject matter of this Application and also does not deny that he has not paid back the same and instead now seeks to have the court revise the repayment terms in his favour by reducing the agreed monthly repayment by a sum of over Ks. 500,000/- the court is satisfied that the Applicant has sufficiently demonstrated that he has an arguable appeal which would be rendered nugatory if the stay sought is not granted.
42. In this regard therefore, in light of my findings with respect to the key issues that the court is to consider in an application seeking for the stay of the execution of a decree, I am satisfied that the Applicant's Application has merit. Further for the reasons given in my conclusions above, I see no justification at all in ordering that the Applicant deposits security for the due performance of the decree. The upshot therefore is that the said Application is allowed in its entirety as follows;
- a. That an order of stay of execution of the Ruling of the Hon. Peter Areri, SPM delivered on 15th April 2025, in ELDORET MCCC/031/2025 be and is now hereby issued pending the hearing and determination of the Appeal herein filed before this Honourable Court.
 - b. That the Respondents shall bear the costs of the Application.

READ DATED AND SIGNED AT ELDORET ON 30TH OCTOBER 2025

E. OMINDE

JUDGE

