

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ISIOLO
CIVIL APPEAL NO. E041 OF 2024
FATUMA GOLLO DUBAAPPLICANT
/APPELLANT
VERSUS
BARAK ABDULLAHI BORU.....

RESPONDENT
RULING

1. The Appellant’s Notice of Motion dated 17th April, 2025 seeks the following orders:
 1. *(spent)*
 2. *(spent)*
 3. *(spent)*
 4. *THAT the honorable court be pleased to stay the execution of the Judgment and Decree of Hon. Gavava A. Mohammed delivered in kadhi’s court Divorce cause No. E004 of 2023 on 1st October 2024 and any subsequent orders issued pending the hearing and determination of the Appeal.*
 5. *(spent)*
 6. *The costs of the Application to be in the cause.*
2. The Application is supported by the grounds on the face of the Application and the Supporting Affidavit of the Applicant.
3. The Applicant states that the trial court entered Judgment in favor of the Respondent on 1st October 2024, and on diverse dates in the month of December of the same year, the respondent moved the court seeking for various orders and directions on the execution of the judgment.
4. That on 16th April 2025, the trial Court issued a warrant of arrest against the Applicant and upon

being arraigned in court, the Applicant deposited a sum of Kenya Shillings Five Hundred Thousand (kshs.500,000/=) and the log book for Motor Vehicle Registration No. KDE 316 Voxy , following which the warrant of Arrest was lifted.

5. The Applicant states that she has filed an Appeal against the judgment of 1st October 2024 and avers that if the Respondent proceeds with execution and enforcement of the Judgment delivered, the appeal will be rendered nugatory. They argue that there is real and present danger and irreparable detriment unless stay orders are issued.
6. It is also stated that the Application was filed on time and she is willing to abide by any order on security that this court may order.
7. The Application is unopposed.

Analysis and Determination

8. Stay of Execution pending appeal is governed by the provisions of Order **42, Rule 6 of the Civil Procedure Rules, 2010**. The Applicant must satisfy the court in respect to the following:
 - a) That Substantial loss would result, unless stay is granted.
 - b) The Application for stay has been made without unreasonable delay.
 - c) Security of due performance of the decree must be given by the applicant.
 - d)** The applicant must also show that the appeal is arguable with high chances of success.

9. I have considered the Application, the grounds cited, and the legal principles governing stay of execution pending appeal.
10. On Substantial loss, it is trite law that the onus is on the respondents to demonstrate their ability to refund the decretal sum in the event that the appeal succeeds (see ***Victory construction v BM(a minor suing through next friend PMM) [2019] eKLR***
11. The Applicant was directed to pay some ksh. 4,000,00 albeit in instalments and was later directed to deposit a vehicle. Am satisfied that the amount is substantial, and the basis of such payment not clear. Substantial loss has therefore been demonstrated.
12. Is the Appeal arguable? In the case of ***Stanely Kangethe Kinyanjui v Tony Keter & 5 others [2013] eKLR*** , It was held: *an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before court, one which is not frivolous.*” without going in other merits and demerits of the appeal, I have perused the memorandum , and I am satisfied that the grounds set out are not frivolous. The appellant should therefore be allowed to ventilate the same on appeal.
13. I am equally satisfied that there was no delay in filing the present application. Judgement was delivered on 1st October 2024 and the Memorandum of Appeal was filed on 17th October 2024. Further the trial court gave further Orders on 17th April 2025 and the application herein was filed on 17th April, 2025. In the circumstances which have been explained, the delay cannot be said to be inordinate

14. The condition of providing security of due performance of the decree is essential. In this case, the trial court has already ordered the Applicant to deposit a sum of Kshs. 500,000/= and the log book for Motor Vehicle Registration No. KDE 316 . This deposit, of the cash and the logbook is fairly sufficient security for the due performance of the decree in the event that the Appeal does not succeed.

15. Accordingly, I allow the Notice of Motion dated 17th April, 2025, and issue orders as follows:

a) **THAT** the execution of the judgment and decree delivered by the trial Court on 1st October 2024 and **all** subsequent orders are hereby stayed, pending the hearing and determination of the Appeal

b) **THAT** the deposit of Kenya Shillings Five Hundred Thousand (kshs.500,000/=) and the log book for Motor Vehicle Registration No. KDE 316 Voxy, already made by the Applicant pursuant to the trial court's order of 17th April 2025, shall be held by the court pending the hearing and determination of the appeal.

c) Costs of the Application shall be in the cause.

Dated, signed and delivered at Isiolo, this 3rd day of December 2025.

S. Chirchir

Judge .

In the presence of:

Roba Katelo- court Assistant

ORIGINAL