

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. E213 OF 2025

ALEX WAHOME NDIRANGU T/A

KINGSTAR AUCTIONEERS.....APPELLANT/APPLICANT

VERSUS

SHADRACK KIPCHIRCHIR KORIR.....1ST

RESPONDENT

PURITY CHEPKEMOI MAINA.....2ND

RESPONDENT

RULING

1. By the Notice of Motion dated 13th August 2025 the appellant/applicant prays for the following orders;

i. -ii- Spent.

iii. That pending inter parties hearing and determination of the appeal, this honourable court be pleased to grant interim stay of execution of the order issued by Hon. Christine Menya on 4th August 2025 in Nakuru CM Misc Application 171 of 2025 Kingstar Auctioneers v Shadrack Korir & Purity Chepkemoi Maina.

iv. That the costs of this application be in the cause.

2. The application is premised on the grounds on its face as well as the affidavit of the applicant's advocate Mr. Edwin

Munga Ndichu. He deponed that the appellant/applicant acting under the instructions from its principal My Credit Limited filed Nakuru CM Misc. Application No. 171 of 2025, seeking break-in orders for the seizure of motor vehicle registration number KCM 024F belonging to the 1st respondent. The said motor vehicle had been offered as security under a deed of guarantee for a loan advanced to the 2nd respondent. Further, that on 19th June, 2025, the court granted the requested orders. However, the 1st respondent approached the court vide an application dated 23rd June 2025 seeking stay of the sale of the motor vehicle and warrants of arrest.

3. He further deponed that on 25th October 2025 the court issued ex parte orders staying the intended sale of the suit vehicle and also issued warrants of arrest against the 2nd respondent. The appellant/applicant filed a preliminary objection dated 15th July, 2025, challenging the jurisdiction of the subordinate court to continue entertaining the matter. However, on 28th July, 2025 and without notice the matter was irregularly listed and mentioned in their absence. Thereafter, substantive orders were issued for the release of the suit motor vehicle and the committal of the 2nd Respondent to civil jail.
4. He stated that the said orders were issued contrary to due process, in breach of the appellant/applicant's right to a fair hearing and in total disregard of the preliminary objection. Further, that on the 4th August, 2025, the Magistrate apologised for the misstep but surprisingly still

issued orders releasing the vehicle, not on any other grounds but on account of the 1st respondent's disability. The court also issued orders releasing the 2nd respondent on a kshs. 50,000 bond. That the said orders were issued despite earlier directions that the question of jurisdiction ought to have been heard first.

5. He asserted that the impugned orders had the effect of determining the entire matter at a preliminary stage, thus undermining the hearing and resolution of the jurisdictional objection and the principal dispute involving the financier, borrower, and guarantor. Further, that there was risk of the 1st respondent removing the tracker, concealing or disposing of the suit vehicle thereby frustrating and rendering nugatory the financier's lawful right of repossession as secured under the deed of guarantee. Thus, unless the orders of 4th August 2025 are stayed and/or set aside the appellant /applicant, the financier stands to suffer irreparable harm as the secured asset will likely be lost or rendered unrecoverable.
6. The respondents in response filed a replying affidavit sworn on 27th August, 2025 by the 1st respondent. He averred among other things that the application herein is frivolous, inept and an abuse of the court process and the same should be dismissed in the first instance. That the trial Magistrate heard the application before her and issued proper orders in the presence of the parties' counsel.

7. He further averred that the trial Magistrate in her ruling noted that justice ought to be seen to be done and using her discretion released the motor vehicle in the interest of justice. Further that the prejudice that would be occasioned to the respondents could not be compensated through damages. In addition, that the appellant/applicant will not be prejudiced in any way because should he ultimately get orders in his favor, the subject motor vehicle would be within the court's premises and they could repossess the same with Court orders.
8. The application was canvassed by way of written submissions filed by only the appellant/applicant. The respondents' advocate informed the court that they would rely on their replying affidavit entirely.
9. The appellant/applicant's submissions were filed by Kimani Musyimi & Ndichu Advocates LLP and are dated 12th September 2025. Counsel gave a brief background of the case and identified two issues for determination.
10. The first issue is whether the applicant has shown sufficient cause under Order 42 rule 6 for stay of execution. Counsel submitted that the lower court ought to have determined whether it had jurisdiction to entertain the application before making substantive orders. Thus, by proceeding to issue the said orders without resolving the preliminary objection, the trial Magistrate exceeded her jurisdiction and rendered the resulting orders irregular and potentially void.

11. He further submitted that a preliminary objection must be determined before the substantive issue, is determined. He placed reliance on the decision in **Golden Century Limited v Josef (Miscellaneous Application E224 of 2024) [2025] KEELC 4397 (KLR) (12 June 2025) (Ruling)**, where the court held as follows:

“In the case of Rockland Kenya Ltd -vs Commissioner General of KRA & Another [2020] eKLR, the court held that substantive orders cannot be issued in miscellaneous applications. The court had in turn cited with approval the decision in Witmore Investment Ltd vs County Government of Kirinyaga & 3 Others [2016] eKLR where Limo J had stated that;”where a party such as an applicant herein seeks an order that in effect appears to resolve with a finality an issue in controversy or a contested issue, the application ceases to be interlocutory and it is a misconception to describe it as such. If the applicant wanted to move this court for a final resolution of the issues in controversy, raised in the application, it should have moved this court properly in the manner provided by the law. The court in the case of Nairobi West Hospital Ltd v Joseph Karina & Another [2018] eKLR, made a similar finding that a substantive order cannot be issued through a miscellaneous application. (Emphasis ours)”

12. Counsel submitted that Order 42 rule 6 (1) of the Civil Procedure Rules empowers the court to stay execution for sufficient cause through established criteria requiring the applicant to demonstrate arguable appeal grounds, substantial loss if stay is refused and adequate security provided. In affirming that position, reference was made to the decision in **Hassan & Another v Makacy & 2 Others (Environmental and Land Appeal E224 OF 2024) [2025] KEELC 3821 (KLR) (15 May 2025) (Ruling)**.

13. The second issue is whether loss will result if the stay is refused and the appeal rendered nugatory. Counsel submitted that the motor vehicle KCM 024F represents the appellant/applicant's principal financier's sole security for the underlying financial arrangement. That the appellant /applicant faces a genuine risk of the said motor vehicle being disposed of, sold or concealed during the appeal period.

14. The court's attention was drawn to the decision in **Executive Super Rides Limited & another v NCBA Bank of Kenya PLC; Regent Auctioneers (Interested Party) (Civil Appeal (Application) 900 of 2024) [2025] KECA 1171 (KLR) (20 June 2025) (Ruling)**, where the Court held as follows:

“On the nugatory limb, an appeal or intended appeal will be rendered nugatory where the resulting effect of not granting a stay of execution is likely to be irreversible or, if it is not reversible.

where damages will not reasonably compensate the party aggrieved (see Stanley Kangethe Kinyanjui vs Tony Keter & 5 others Civil (supra)). Hence the various decisions of this Court that the purpose of a stay of execution is to preserve the Subject matter of the appeal, In the present application, concerns were raised not only as regards the legality of the subject auction, but also that sale of the suit property took place during the pendency of court orders prohibiting the same. The applicants have also demonstrated the prejudice they are likely to suffer, whereas the respondent relies on the prejudice that is to be suffered by a third-party purchaser, who has not been identified. We are therefore persuaded that this is a matter where status quo orders are merited, to preserve the suit property and balance the interests of both parties,”

15. In conclusion, he urged the court to grant them stay of execution of the orders issued on 4th August 2025 pending hearing and determination of the appeal. Further, that the subject motor vehicle be preserved in its current location and they be granted costs of the application.

Analysis and determination

16. I have considered the application, affidavits and the submissions by the applicant, and find the issue arising for determination to be whether the appellant/applicant has satisfied the ground for issuance of the stay of execution pending appeal.

17. It is trite law that an appeal in itself does not operate as a stay of execution. Order 42 rule 6(2) of the Civil Procedure Rules provides as follows:

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

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must

balance the interests of the appellant with those of the respondent.”

18. In **RWW vs. EKW [2019] eKLR**, the court addressed the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

19. The appellant/applicant has contended that he faces a genuine risk of the said motor vehicle being disposed of, sold or concealed during the appeal period. Thus, to him issuance of stay of execution orders is crucial for the said reason.

20. On their part, the respondents averred that the trial Magistrate noted that justice ought to be seen to be done and using her discretion found that releasing the motor vehicle on running attachment was the best way to achieve ends of justice. Further, that any prejudice that

would be occasioned to the respondents could not be compensated through damages.

21. In **Ainushamsi Multiple Hauliers Agencies Limited v Francis Ndegwa Karanja & another (Suing as the Administrators of the Estate of John Muya Ndegwa (Deceased) [2020] KEHC 4093 (KLR)** Odunga J (as he was then) held as follows;

“31.....what is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the Civil Procedure Act are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore

always opt for the lower rather than the higher risk of injustice. See Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589. This was the position in Jason Ngumba Kagu & 2 Others vs. Intra Africa Assurance Co. Limited [2014] eKLR where it was held that: "The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of "the appeal will be rendered nugatory", the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process."

Also see:

(i) John Gachanja Mundia Vs Francis Muriira alias Francis Muthika & another [2016] eKLR.

(ii) Bungoma High Court Misc. Application No. 42 of 2011 - James Wangalwa & another V Agnes Naliaka Chesero. The two cases dealt with the same issue.

22. It is trite law that grant of stay of execution is discretionary and the court will exercise such discretion on a case by case basis depending on the circumstances of the case. I concur with the authorities cited above that courts must balance the rights of the parties in a such an application and ensure that justice is served. Having considered the instant application, I note that it is not disputed that the subject motor vehicle is in the possession of the 1st respondent following the orders by the trial court, which have not been set aside. Upon considering the application on its merit I find that the applicant has failed to demonstrate what substantial loss he would suffer if the stay orders are not granted.

23. The above being the position, I find no good reason advanced to warrant staying the orders issued on 4th August 2025 in Nakuru CM Misc Application 171 of 2025 by Hon. Christine Menya. However, I hereby restrain the 1st respondent from disposing of the subject motor vehicle in the interest of justice pending the outcome of the appeal. The appellant/applicant is called upon to fast track the hearing of the Appeal, for the same to be heard within the next six (6) months.

24. The upshot is that the application dated 13th August 2025 for stay of execution is dismissed, save for the order issued at paragraph No. 23.

25. Costs shall be in the cause.

26. Orders accordingly.

Dated and signed this 20th January, 2026 by:

**H. I. ONG'UDI
JUDGE**

**Delivered this 17th February 2026 in open court at
Nakuru by:**

**J. M. NANG'EA
JUDGE**