

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CIVIL APPEAL NO. E088 OF 2024

DAVID MUYA KARIUKI.....APPELLANT/APPLICANT

-VERSUS-

AYAN AUTOMOBILE LTD.....
RESPONDENT

RULING

1. The Notice of Motion Application before the Court dated 4th April 2025 was brought under Certificate of Urgency and is premised under the provisions of **Order 4, 39, 42 and 43** of the **Court of Appeal Rules**, as read together with **Order 11 Rule 3(1) (a) and (d) and 2 and Order 51 of Rule 1** of the **Civil Procedure Rules** and **Sections 1A, 1B and 3A** of the **Civil Procedure Act**, the Appellant/Applicant is seeking the following reliefs as against the Respondents *inter alia that* Court be pleased to issue Orders for stay of execution of the Ruling of Hon. M.L. NABIBYA dated 20th March 2025 and consequential Orders issued pending hearing and determination of the Appeal, an Order of temporary injunction restraining the 1st Respondent herein whether by themselves, their agents and/or servants from proclaiming, advertising for sale and/or actual selling by public auction, selling, entering, taking possession of or in any way interfering and/or dealing with the current ownership of land parcel no. THIKA MUNICIPLAITY BLOCK 22/334 pending the hearing and determination of this appeal, a determination that the appellant was not heard on the substantive suit an do direct that the substantive suit be heard pursuant to a relief for private sale and any other Orders it deems necessary pending the hearing and determination of this application.

2. The Application before the Court is supported on the grounds appearing at the foot thereof and in the Affidavit sworn by the Applicant on 4th April 2025. The subject Application was filed together with even-dated Memorandum of Appeal which raises four grounds of Appeal as against the impugned decision. The Appellant/Applicant challenges the decision of the trial Court delivered on 20th March 2025 in Civil Suit No. E771 Of 2025 dismissing his main suit. The Applicant's case is that the trial Court dismissed his main suit without considering the prayer contained therein seeking relief in respect of a private sale. He subscribed to the position that the trial Court denied him a hearing on the issue of private sale. Consequently, he stands to suffer irreparable damage as the 1st Respondent has already advertised for sale land parcel no. THIKA MUNICIPLAITY BLOCK 22/334 (the suit property) on 14th April 2025. That the Appellant/Applicant is a single mother who resides in and has resided on the subject property with her children for more than 10 years, hence she will be rendered destitute and homeless unless the prayers sought herein are allowed.
3. The Applicant deposed that she guaranteed the loan issued by the 1st Respondent to the borrower *Polly Wanjiku Wanjau* (the 2nd Respondent herein) to the tune of Ksh.2 million only using the title to the suit property as security, following which the borrower defaulted and stopped all communication with the Applicant. Subsequently, the 1st Respondent threatened to dispose of the suit land contrary to the provisions of **Sections 90, 96 and 97** of the **Land Act 2012** leading the Applicant to seek relief before the trial Court, which dismissed the Applicant's main suit and accompanying Application vide the impugned decision. The Applicant attached to her Supporting Affidavit 4th April 2024, a valuation report dated 6th April 2023 bearing the Letterhead of *QMACS RELATORS LIMITED* whereby, the value of the suit property is indicated as Ksh. 5,500,000

(five million and five hundred thousand). It was averred that the value of the subject property far exceeds the amount guaranteed by the Applicant in respect of the loan amount advanced to the borrower by the 1st Respondent. Therefore, the Applicant stands to suffer irreparable loss unless the sale of the suit land is stopped by this Court as sought.

4. The 1st Respondent resisted the instant Application through the Replying Affidavit sworn on its behalf by *SALEH JACKLINE* on 24th April 2025 in her capacity a “Legal Analyst” with the 1st Respondent. The 1st Respondent deposed that the Orders issued by the trial Court which the Applicant is seeking to stay through the current proceedings are in the nature of negative Orders, hence, are incapable of being stayed.
5. That the 2nd Respondent applied for and obtained a loan facility in the amount of Ksh.2,137,500 from the 1st Respondent vide a Letter of Offer dated 6th April 2023 and Loan Agreement dated 4th April 2023 whereby, the 1st Respondent offered the suit land as security for the aforesaid loan and same was duly charged and registered as required by law. The 1st Respondent annexed copies of the Letter of Offer, Loan Agreement and Charge marked respectively as “**SJ-2a**”; “**SJ-2b**”; and, “**SJ-3**”.
6. It was further averred that the entire loan facility procured by the 2nd Respondent was expressed to be payable in two monthly instalments of Ksh.1,165,87.00 inclusive of both principal amount and interest. Furthermore, the loan would fall due 30 days following the date of disbursement. The 1st Respondent deposed that the loan Agreement provided for interest at the rate of 6 % reducing per month and, in the event of default, the outstanding amount would attract an interest rate of 5 percent every 7 days until the default in question is made good.

7. The 1st Respondent subscribed to the position that the 2nd Respondent defaulted on the aforesaid loan resulting in the issuance of 90-days statutory notices dated 2nd June 2023 to both the Applicant and the 2nd Respondent. Furthermore, after the lapse of the 90-days statutory period, the 1st Respondent issued a 40-days' Notice to Sell to both the Applicant and the 2nd Respondent on 11th September 2023 pursuant to the provisions of **Section 96(2)** of the **Land Act 2012**. That, on 15th November 2023, the 1st Respondent issued a 45-days' Redemption Notice to the Applicant and the 2nd Respondent via registered post and through *Mistan Auctioneers* and a Certificate of Service was duly prepared in compliance with the requirements of **Rule 15(d)** of the **Auctioneers Rules 1997**. Furthermore, the 1st Respondent through *Garam Investors Auctioneers* issued a 14-day Courtesy notice dated 4th June 2024 to the Applicant and the 2nd Respondent accompanied by a Certificate of Service.
8. The 1st Respondent argued that the 2nd Respondent defaulted on the loan advanced by to her, which default is not disputed, therefore, the Applicant became liable to pay off the loan in question Applicant being the guarantor of the aforementioned loan. Refuting the Applicant's claim that she stands to suffer irreparable loss if the suit land is sold, the 1st Respondent argued that the Applicant was well aware of the consequences of guaranteeing the 2nd Respondent's loan. The 1st Respondent deposed that the Application before this Court is expressed to be anchored on the Court of Appeal Rules which are not applicable to the present matter, therefore, this Court lacks jurisdiction to adjudicate on the instant Application.
9. The Court directed that the subject Application be dispensed by way of written submissions. The Applicant lodged written submissions dated 19th August 2025 through her Counsel,

identifying a single issue for resolution by the Court namely, *whether a stay of execution should be granted in the matter herein*. Relying on the decision of the Court in **Congress Rental South Africa v Kenyatta International Convention Centre; Cooperative Bank of Kenya Limited & Another (Garnishee) (2019) eKLR**; and, in **Machira T/A Machira & Co. Advocates v East African Standard (No.2) (2002) 2 KLR 63**, it was submitted that for an Application seeking a stay of execution to succeed the conditions set out under **Order 42 Rule 6(2)** of the **Civil Procedure Rules** need to be met by the Applicant conjunctively as opposed to disjunctively. With regard to the timing of the filing of the subject application, the Applicant submitted that same was lodged 30 days after delivery of the impugned decision, hence, there was no delay. On the question of substantial loss, it was argued that same is demonstrated by the Applicant's occupation of the subject property, being her family home, for more than 10 years. The Applicant expressed readiness to furnish security as directed by the Court in performance of the trial Court's decree and urged the Court to Order for the deposit of favorable security taking to account that the 2nd Defendant is responsible for originating the subject dispute.

10. The 1st Respondent's written submissions dated 11th June 2025 identified three issues for the Courts determination, viz:
- i. Whether the Applicant meets the threshold for grant of Stay of Execution Orders?
 - ii. Whether the Applicant meets the threshold for grant of temporary injunction on appeal?
 - iii. Whether the Application dated 7th April 2025 is merited."

11. .Citing the dictum of the Court in **Charles Barongo Nyakeri vs The County Government of Kisii (2020) eKLR**, and, **Kiberetu v Kibiti (Being sued as the Administrator of theEstate of M’Irura M’Mungania alias Irura Mungania**, the 1st Respondent reiterated the submissions that a negative is by nature incapable of being stayed. Further guidance was sought in the decision of the Court in **Mungania v Centenary Savings and Credit Cooperative Society [2023] KEELC 19912 (KLR)**, to buttress the proposition that a party seeking a temporary injunction pending appeal pursuant to the provisions of **Order 42 Rule6(6)** of the **Civil Procedure Rules** needs to establish that it has an arguable appeal, that the appeal is not frivolous, furthermore, that the appeal would be rendered nugatory unless the Orders sought are granted.
12. Guidance was placed in the decision of the Court of Appeal in **Kitho Civil & Engineering Co. ltd v National Bank of Kenya Limited & Another (Civil Appeal Application E706 of 2021) [2023] KECA 387 (KLR)**, to anchor the argument that the statutory power of sale accrues on account of the borrower’s failure to pay, which gives rise to the guarantor’s obligation to settle the debt in question. 14. It was further submitted that the Application before the Court is an attempt to determine the entire appeal through an application as it reproduces a relief craved in the Memorandum of Appeal dated 4th April 2025 namely, that the Applicant be heard on the substantive suit pursuant to a relief on private sale. Citing the dictum of the Court in **Moses Lugalla Luke & 5 others v Paul Cheruiyot & 3 Others [2007] eKLR**; and, **Anthony Muriithi Njeru & Another v Mercy Wambua Njeru & Another [2021] KEELC 767 (KLR)**, the 1st Respondent urged the Court not to consider the preceding prayer.

13. The Court has anxiously considered parties rival submissions and pleadings in respect of the Application before it. The following issues for resolution were isolated:

I. Whether the Application is merited

II. Which party shall bear the costs of the Application?

14. The Applicant's main prayer in the current Application is for a stay of execution pending appeal of the trial Court's decision dated 20th March 2025. The 2nd Respondent (borrower) did not enter appearance nor defend the subject suit. The 1st Respondent (lender) subscribes to the position that its statutory power of sale accrued due to the borrower's default following which Statutory Notices were issued to the Respondents as deposed in the Replying Affidavit of *Saleh Jackline* dated 24th April 2025. The 1st Respondent urged the Court to hold that the instant Application lacks merit due to the Respondents' default.

15. The granting of a stay of execution pending appeal is a matter within the Court's discretion. In exercising its discretion to grant an order for stay of execution pending appeal, the Court must be satisfied that the applicant has demonstrated the following conditions set out in **Order 42 Rule 6(2) of the Civil Procedure Rules, 2010** conjunctively:

“a. That substantial loss may result unless the order is made.

b. That the application has been made without unreasonable delay.

c. Such security as the court orders for the due performance of the decree has been given by the applicant.”

In the case of **Robert Njoka Muthara & Another -vs- Barclays Bank of Kenya Limited & Another [2017] eKLR**, the Court defined a guarantee as follows: -

“...A guarantee by definition is a pledge by a person (guarantor), other than a party upon whom the contractual or other legal obligation is imposed, to the effect that if the party so bound (principal) fails to perform the act in question, the guarantor, will either perform or make good any loss or claim arising from the non-performance. The pledge is ordinarily made to a creditor. The essence is that the guarantor agrees not to discharge the liability in any event, but to do so only if the principal debtor fails to honour his duty...”

16. In the instant suit, the Applicant guaranteed the defaulted loan using the suit property as security for the defaulted loan. The 1st Respondent submitted that the Court will not stop a mortgagee from exercising its statutory power of sale where the loan amount falls due and is not settled.

17. The Applicant has not faulted any of the Statutory Notices issued by the 1st Respondent in exercise of its Statutory power of sale. She averred and submitted that she will suffer irreparable loss which cannot be compensated by an award of damages in the event the suit property is sold by the 1st Respondent in exercise of its statutory power of sale, as the Applicant has inhabited the suit land for a period in excess of 10 years together with her family.

18. In the case of **James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR**, the Court stated that in an application for stay of execution, the applicant must establish other factors which show that execution will create a state of affairs that will irreparably affect or negate the very essential core

of the applicant as the successful party in the appeal, as that is what substantial loss would entail.

19. The Court of Appeal in **RWW v EKW [2019] eKLR** reasoned as hereunder:

“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. 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.”

20. The Court is satisfied that the present Applicant was commenced without delay having been lodged within the statutory 30-days period following delivery of the impugned decision. With regard to the question whether the Applicant will suffer irreparable harm/injury which cannot be adequately compensated by an award of damages, if the Orders sought herein are disallowed, the Court is guided by the reasoning of the Court in **Andrew Mkisa Wanyonyi v Equity Bank Kenya Limited & 3 others [2021] KEHC 5042 (KLR)** as follows:

“I agree with the Respondent’s submission that once the suit property was offered as security, the possibility of its sale in case of

default in servicing the advanced monies was a fact within the knowledge of the Applicant hence the fact that the property is the only income earning asset and matrimonial home is not a ground for stopping the sale.”

21. On the third condition which concerns security, the Applicant expressed willingness to furnish security in satisfaction of the trial Court’s Decree. the 1st Respondent deposed that the total outstanding amount as at 19th November 2024 is Ksh.4,374,414.00 on account of penalties and interests. Interestingly, the Letter of Offer dated 6th April 2023 is predated by the Loan Agreement dated 4th April 2023. In normal circumstances, a Letter of Offer comes before the Loan Agreement not later. The Applicant deposed that she guaranteed the 2nd Respondent’s loan up to Ksh. 2 million.

22.The in-duplum rule is applicable in Kenya as held by the Court in **Salat v Kanuli Information Technology Solutions & 3 others [2024] KEHC 15369 (KLR)**. The Court finds and holds that the Applicant is liable to the 1st Respondent for the entire amount of Ksh.4,275,000 (being the original loan Ksh.2,137,500 multiplied by 2). The interest rate on defaulted loan amount at 5 per cent per week as per the Loan Agreement dated 4th April 2023 is held to be inapplicable and in contravention of the in-duplum rule.

23.The following are the Final Orders of the Court:

- I. The Appellant/Applicant to deposit half of the due amount (i.e., Ksh.2,137,500) in an interest-bearing account held by both parties Advocates’ within 30 days of this Ruling, failure to which the 1st Applicant shall be at liberty to execute.**
- II. Costs of the Application to abide the outcome of the Appeal.**

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY
OF FEBRUARY, 2026.**

**HON. T. W. Ouya
JUDGE**

**For Appellant.....Kibe Njoroge
For Respondent..... Cherop H/b for Osoro for Respondent.
COURT ASSISTANT.....Brian**

ORIGINAL