



**Sitienei v Sirgoi Holdings Limited & another (Cause 26 of 2019)  
[2025] KEELRC 556 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 556 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 26 OF 2019  
JK GAKERI, J  
FEBRUARY 27, 2025**

**BETWEEN**

**HOSEA K SITIENEI ..... CLAIMANT**

**AND**

**SIRGOI HOLDINGS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**BOARD OF DIRECTORS SIRGOI HOLDINGS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before the Court for determination is the respondents Notice of Motion dated 24<sup>th</sup> October, 2024 filed under Certificate of Urgency seeking orders that –
  1. Spent.
  2. Spent.
  3. This Honourable Court be pleased to stay execution of decree in respect of the judgment entered on 5<sup>th</sup> October, 2023 and any other Order that may be issued pursuant thereto, pending hearing and determination of the intended appeal
  4. The applicant be at liberty to apply for further orders and/or directions as the court may deem fit and just to grant.
  5. Costs of this application be provided for.
2. The Notice of Motion is expressed under Section 3 of the *Appellate Jurisdiction Act* and Rule 5(2)(b) of the Court of Appeal Rules, 2022 and is based on the grounds set out on its face and the Supporting Affidavit of Engineer Nathan Chum sworn on 24<sup>th</sup> October, 2024.



3. The affiant deposes that he is director of the respondent and the applicant proposes to provide a bank guarantee as security for the decretal sum pending the hearing and determination of its appeal which is underway as the requisite documents have been prepared and a Notice of Appeal filed.
4. The deponent states that Garnishee proceedings had already been commenced against the applicant and freezing of the applicants account would impede its business operations and its ability to meet critical financial obligations and occasion hardship.
5. That garnishment will render the appeal nugatory and the balance of convenience lies in favour of granting the stay and the respondent stands to suffer no irreparable harm as pay in lieu of notice has already been paid and the appellant had an arguable appeal.
6. The affiant further deposes that interests of justice will be best served by preservation of the status quo and the applicant stood to suffer substantial loss if execution ensues.

### **Respondent's response**

7. By a Replying Affidavit sworn on 29<sup>th</sup> October, 2024, the respondent deposes that the applicant was not entitled to a stay as the decree is a money decree and the application was filed belatedly, and did not file the appeal promptly and is attempting to delay execution and frustrate him from enjoying the fruits of his judgment.
8. That no substantial loss will ensue if the stay order is not grant and no good reason has been demonstrated for the stay and the applicant has not demonstrated any good faith by payment of a substantial sum.
9. That the applicant has never challenged the bill of costs and the application lacks a substratum, is an afterthought and filed after an inordinate delay after the Garnishee application was filed and in bad faith and deserves dismissal.

### **Applicant's submissions**

10. On jurisdiction of the court to stay execution, the applicant cited Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 and the decision in Charles Ngatia Nguyo V Erika Kariithi & Another [2014] eKLR, to urge that the court has jurisdiction to do so.
11. As regards the exercise of discretion, reliance was made on the principles in Giella V Cassman Brown Co. Ltd [1973] E. A. 358 and the sentiments of the court in Pius Kipchichir Kogo V Frank Kimeli Tenai [2018] eKLR and Paul Gitonga Wanjau V Gathuthi Tea Factory Co. Ltd & 2 Others [2016] eKLR to urge that the applicant has met the threshold for the grant of stay of execution pending appeal.
12. On security, the applicant submits that it is ready and willing to furnish Kshs.750,000.00 as security as the court may deem fit including depositing the same in a joint interest earning account in the name of the advocates on record pending the outcome of the appeal.
13. That the applicant is a reputable company engaged in substantial business operations.
14. Reliance was also made on the decisions in Chris Munga N. Bichage V Richard Nyagaka Tongi & 2 Others and Mohammed Salim t/a Choice Butchery V Nasserpuria Memon Jamat [2013] eKLR.
15. On arguability of the appeal, reliance was made on the decisions in Wasike V Swala [1984] eKLR 591, on what is an arguable appeal, the decisions in Stanley Kang'ethe Kinyanjui V Tony Ketter & 5 Others [2013] eKLR, David Morton Silvester in V Atsango Chesoni [2002] eKLR were cited to urge that



the applicants offer to provide security during the pendency of the appeal manifested commitment to safeguard the respondents interests and the appeal raised substantial legal and factual issues.

16. As to whether the appeal will be rendered nugatory, the applicant submits that garnishment of its account to satisfy the decretal sum of Kshs.1,858,465.00 will irreversibly impact on its financial operations and the respondent may not have the financial wherewithal to reimburse the same if judgment is overturned.

### **Respondents submissions**

17. As to whether the respondent's Notice of Motion meets the threshold for the grant of stay Orders, the respondent/claimant cites the decision in James Wangalwa & Another V Agness Naliaka Cheseto [2012] eKLR, Kenya Shell Ltd V Kibiru [1986] KLR 410, Machira t/a Machira & Co. Advocate V East African Standard [2002] 2 KLR 63, Equity Bank Ltd V Taiga Adams Co. Ltd [2006] eKLR and Amina Karamo V Njagi Gachagua & 3 Others [2020] eKLR to submit that the applicant had not demonstrated that it would suffer substantial/irreparable loss.
18. On delay, reliance was made on the sentiments of the court in Ibrahim Mungara Mwangi V Francis Ndegwa Mwangi [2014] eKLR to urge that the instant application was made after unreasonable delay of over (1) year which is too long to warrant its dismissal.
19. Finally, on security the respondent submitted that provision of security is critical and the offer to provide a bank guarantee was not appropriate after the inordinate delay.
20. The respondent posits that the instant application was brought in bad faith, a kneejerk reaction to the imminent execution of the judgment and violates the principles of equity and is an abuse of the court process.

### **Analysis and determination**

21. The singular issue for determination is whether the instant application is merited.
22. Briefly, although the instant suit was filed in late 2019, no meaningful progress was made until 2022 when the suit was dismissed on account of the claimant's non-attendance on 1<sup>st</sup> February, 2022 but an application for reinstatement dated 7<sup>th</sup> March, 2022 was granted on 10<sup>th</sup> November, 2022. Hearing was concluded on 29<sup>th</sup> March, 2023 and judgment was delivered on 5<sup>th</sup> October, 2023.
23. Garnishee proceedings were instituted in September 2024 and Garnishee Order nisi granted on 30<sup>th</sup> September, 2024, which prompted the instant application. The court granted temporary stay of execution and thereafter accorded the applicant sufficient time from 30<sup>th</sup> October, 2024 to 18<sup>th</sup> February, 2025 to provide the requisite security but the respondent/Applicant failed refused and/or neglected to do so.
24. Left with no option, the court directed the parties to file and exchange submissions on 29<sup>th</sup> January, 2025 and a ruling reserved on 18<sup>th</sup> February, 2025.
25. Strangely, the applicant did not contest the claimant/respondent's Party and Party Bill of Costs dated 9<sup>th</sup> October, 2023 or the Ruling delivered on 17<sup>th</sup> May, 2024.
26. The only things the applicant did promptly was the request for typed copy of the proceedings vide letter dated 9<sup>th</sup> October, 2023 and Notice of Appeal on 10<sup>th</sup> October, 2023.
27. The principles that govern the grant of a stay of execution pending appeal are well settled.



28. Order 42 rule 6(2) of the Civil Procedure Rules, 2010 provides:  
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.
29. As held by the Court of Appeal in *Butt V Rent Restriction Tribunal* [1982] KLR 417, the courts power to grant or decline an application for stay of execution is discretionary and the discretion must be exercised within the parameters of Order 42 Rule 6 of the Civil Procedures Rules, 2010. See also *RWW V EKW* [2019] eKLR.
30. Concerning substantial loss, the applicant deposed that garnishment by the respondent would occasion substantial loss as the respondent was unlikely to refund the amount if paid and had no known assets. The respondent did not respond to the applicant’s allegation that he has capacity to refund the amount, if paid to him.
31. That garnishment would severely impede its operations and potentially affect its financial position.
32. In determining this issue, the court is guided by the sentiments of the Court in *James Wangalwa & Another V Agnes Naliaka Cheseto* (Supra) that:

No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process. The applicant must establish other factors which show that the 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...

The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory...”

See also *Kenya Shell Ltd V Benjamin Keruga Kiburu & Others* (Supra) and *Pan African Insurance Co. Ltd V International Air Transport Association* HCCC No. 86 of 2006.

33. From the averments by the applicant and evidence on record, the court is satisfied that the applicant stands to suffer substantial loss if the Garnishee Order nisi is confirmed and the respondent paid as there is a real possibility that the applicant may not recover the money if the appeal is successful.
34. On the timing of the application, the sentiments of the court in *Jaber Mohsen Ali & Another V Priscillah Butt & another* [2014] eKLR are instructive.
35. The question that arises is whether this application has been filed after unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any Order given thereafter. In the case of *Christopher Kendagor V Christopher Kipkorir* (18) the applicant had been given 14 days. The application was denied the court holding that the application ought to have come before expiry of the period given to vacate the land”.



36. In the instant suit, it is clear that the judgment in respect of which stay of execution is sought was delivered on 5<sup>th</sup> October, 2023. Strangely, the applicant did not seek the typical 30 days stay of execution yet it was represented in court on that day.
37. Granted that the application herein is dated 24<sup>th</sup> October, 2024 more than a year after the judgment, the court is not surprised that this application was made after the Garnishee Order nisi was obtained by the respondent as no other reason has been provided for doing so at this point in time.
38. Notably, the applicant by did not address the issue of timing of the application, preferring to concentrate on the triability and arguability of the appeal, which is beyond this court's jurisdiction to determine, thus indirectly conceding that the application was not made without unreasonable delay.
39. This is further demonstrated by the fact that no explanation or excuse for the long delay was given by the applicant.
40. As regards security, the sentiments of Mativo J. (as held he then was) in *Mutahi Kiranga V Margaret Waweru & Another* [2015] eKLR are instructive:

There is therefore an offer of security coming from the applicant in satisfaction of the said requirement. It is trite law that the failure by the court to make an Order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of jurisdiction in granting stay. However, the offer for security must come from the applicant as a price for stay. See *Carter & Sons Ltd. V. Deposit Protection Fund Board & 2 Others* Civil Appeal No. 291 of 1997.

The applicant's offer to provide security signifies good faith and its absence may be construed to mean that it is not ready to forgo anything for the stay of execution notwithstanding the fact that judgment has already been entered into against the applicant".

41. The purpose of security was explained in *Arun C Sharma V Ashana Raikundalia t/a Rairundaria & Co. Advocates*.  
See *Equity Bank Ltd V Taiga Adams Co. Ltd* [2006] eKLR.
42. In a mark of good faith, the applicant has offered to provide security, partly in cash and as the court may direct.
43. Relatedly, in the course of garnishment proceedings, the applicant offered security in the form of a bank guarantee but failed to actualize the same even after being accorded time by the court.
44. Finally, although the applicant filed the instant application after a long unexplained delay, the court is still persuaded that the applicant deserves one last chance salvage its appeal by providing sufficient security.
45. Consequently, the following Orders commend themselves for issue:
  - a. The applicant shall deposit the sum of Kshs.750,000.00 in an interest-earning account, in a reputable bank in Kenya, managed by the advocates of the parties within 30 days. and
  - b. The applicant in addition; shall provide a bank guarantee of the entire balance of the decretal sum within 30 days.
  - c. If the applicant fails to fulfill (a) or (b) above or both the temporary stay of execution on force shall lapse and the respondent will be at liberty to execute the judgment and decree dated October 5, 2023.



Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

