



REPUBLIC OF KENYA



**Al- Amaans International Ltd v Ngugi (Civil Appeal E095 of 2024)
[2025] KEHC 333 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 333 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E095 OF 2024
REA OUGO, J
JANUARY 23, 2025**

BETWEEN

AL- AMAANS INTERNATIONAL LTD APPELLANT

AND

ELIJAH NGUGI RESPONDENT

RULING

1. Al-Amaans International Ltd (the applicant) filed a Motion dated 22.10.2024 seeking the following orders;
 - i. Spent
 - ii. That the court be pleased to stay execution of the Judgement/Decree, Warrants of Attachment dated 7th October 2024 and all consequential orders in Bungoma MCCC NO. E215 of 2023 pending the hearing and determination of this Application inter-partes.
 - iii. That the Court be pleased to stay execution of the Judgment/Decree, Warrants of Attachment dated 7th October 2024 and all consequential orders in Bungoma MCCC No. E215 of 2023 Pending the hearing and determination of the pending Appeal.
 - iv. That the costs of this application be provided for.
2. The application is brought under sections 1A,1B, and 3A of the *Civil Procedure Act*, Order 42 (6) of the Civil Procedure Rules. Elijah Ngugi is the respondent.

The application is supported by grounds on the face of the application and the affidavit of Ahmad Reza. The grounds summarize the facts as follows; the trial court delivered judgment on 14th May 2024 granting the Respondent herein a permanent injunction and warding him costs of the suit. On 21st May 2024, the Appellant/applicant herein proceeded to request for certified copies of the typed proceedings and judgment which are yet to be provided. On 12th June 2024, the Appellant/Applicant herein filed



a Memorandum of Appeal dated 12th June 2024. The Respondent is demanding Kshs.175,000.00 in legal costs and Kshs.232,884.00 in Auctioneer's fees and has already obtained warrants of Attachment for sale and has proceeded to proclaim the Appellant's property. The Application has been filed without inordinate delay since the Respondent served the proclamation Notice upon the Applicant/Appellant on 18th October 2024. Should the Respondent proceed with the stated execution the Appellant /Applicant will have effectively been driven away from the seat of justice and the Appeal rendered nugatory thus occasioning a substantial loss to the Appellant/Applicant. The Appellant/Applicant is ready and willing to provide such reasonable security for due performance as this Honorable Court may order.

3. The application was opposed. The respondent filed a replying affidavit dated 5.11.2024. The respondent avers that he sued the applicant in CMCC No. E215 of 2023 to protect his proprietary rights as the registered owner of the subject vehicle which he had acquired in a public auction. Judgment was in his favor a permanent injunction was granted and he was granted costs. Pursuant to the judgment he filed a bill of costs on 23rd July 2024, the application was served on the respondent and it was assessed on 23rd August 2024 and a certificate of costs plus a decree was issued. Due to the inaction of the applicant's counsel, he instructed an auctioneer who obtained warrants of attachment and sale. The auctioneer proceeded to proclaim the applicant's goods. The application before the court has been made to halt the execution of costs and to delay him from realizing the fruits of the judgment. The delay in bringing that application has not been explained. The execution is for costs so no substantial loss can be occasioned if the costs are paid to him. He is capable of refunding the costs should the court find merit in the appeal and order a refund of the costs, as he is an astute businessman and he has assets capable of raising the sum of Kshs. 175,000/-. The applicant has not demonstrated how payment of the costs will result in rendering the appeal as nugatory and looking at the nature of orders issued by the lower court a stay would mean that the applicant is at liberty to take his vehicle away. The application is non-meritorious and should be dismissed with costs. The applicant submits in its further affidavit dated 15.11.2024, that it has already deposited a sum of Kshs. 150000/- satisfying the requirement of furnishing security for due decree performance. The application was brought without undue delay. The proclamation notice was served on 18.10.2024 and the application was filed on 23.10.2024, 5 days after the proclamation. Though the respondent filled a bill of costs the Magistrate's Court has no jurisdiction under the Advocates Act to tax a bill. A bill of costs is to be delivered in the High Court by way of a miscellaneous application and not in the same cause as the respondent did in Bungoma MCCC No. E215 of 2023. He did not have a chance bring up this before the trial court as the matter was never in Court again in the usual manner for taxing a bill until the respondent sought to execute. The respondent's ability to refund the case sought cannot sanctify an unlawful execution process.
4. Parties canvassed the application by way of oral submissions. The submissions reiterate the facts as deponed parties in the rival affidavits .

Analysis and Determination

5. I have considered the rival affidavits, the written submissions, and the law governing an application for a stay of execution. Order 42 Rule (6) (2) provides as follows:
 - (2) 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.



6. The applicant has to satisfy the conditions stated in the above-mentioned order. The 1st condition is whether the applicant will suffer substantial loss. As correctly submitted each case is considered on the facts submitted. The Court in *James Wangalwa Joseph Simiyu Mukenya vs Agnes Naliaka Cheseto* Miscellaneous Application 42 of 2011 eKLR stated as follows;

“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 CPR. 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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus: “...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.” (emphasis mine).

In my view, the applicant has failed to explain the substantial loss it is likely to suffer. To merely state that execution has begun in my view is not sufficient. The applicant has not denied that he was served with the respondent’s bill of cost and costs awarded after he failed to respond to it. The applicant has to demonstrate that it will suffer substantial loss. The applicant has failed to demonstrate how 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.

7. The 2nd condition is whether the application has been made without delay. The lower court delivered the judgment in CMCC No. E215 of 2024 on the 12. 6 2023. A memorandum of appeal was filed on 13.6.2024. Thereafter the applicant took no action. The applicant moved to court when its goods were proclaimed through an application dated 22.10.2024. This was about 4 months after the judgment was delivered. The applicant claims that it sought proceedings through a letter dated 21.5.2024. This letter was not attached to the applicant’s affidavit nor has the applicant attached any further correspondence that he sought proceedings. There was a delay in taking action after the judgment was delivered. However, the applicant moved to court as soon as the execution began. The applicant was served with a proclamation on 18.10.2024 and it filed the application on 22.10.2024.
8. On the last condition the applicant was ordered to deposit a sum of Kshs. 150,000/- by this court at the stage it was considering the application filed under a certificate of urgency. The purpose of the security under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. The issue of security is discretionary. The order granted before inter partes hearing was to temporarily cushion the applicant from an ongoing execution. I have considered the pros and cons in this matter and in my view I find that the application dated 22.10.2024 has no merit and it is dismissed. Cost shall abide by the appeal.

DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 23RD DAY OF JANUARY 2025.

R. E .OUGO

JUDGE



In the presence;

Applicant - Absent

Mr Anwar - For the Respondent

Wilkister C/A

