



**County Government of Nyamira v Nyariki (Civil Appeal  
E032 of 2024) [2025] KEHC 696 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 696 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL APPEAL E032 OF 2024  
WA OKWANY, J  
JANUARY 23, 2025**

**BETWEEN**

**COUNTY GOVERNMENT OF NYAMIRA ..... APPELLANT**

**AND**

**FRANCIS OSUMO NYARIKI ..... RESPONDENT**

*(Being an Appeal against the Ruling of Hon. C. I. Agutu – SRM Nyamira dated and delivered on 28th August 2024 in the original Nyamira CMC CC No. 18 of 2020)*

**RULING**

**Background**

1. The Respondent herein obtained judgment against the Appellant before the trial court in Nyamira CMCC No. 18 of 2020. The trial court thereafter granted the Respondent leave to the execute the decree by attaching the Applicant’s movable property, to wit, motor vehicles.
2. Aggrieved by the decision to allow execution by way of attachment of movable property, the Appellant/Applicant filed the instant appeal seeking to overturn the trial court’s said ruling. Concurrently with the Appeal, the Applicant filed the instant application seeking, inter alia, stay of execution.

**Application**

3. This ruling is therefore in respect to the Application dated 5<sup>th</sup> September 2024 wherein the Applicant seeks the following orders: -
  1. Spent
  2. Spent



3. That the Honourable Court be pleased to call for the record of proceedings in Nyamira Cmcc No. 18 OF 2024 (FRancis Osumo Nyariki Vs. County Government Of Nyamira) and order that there be a stay of further execution in the said matter pending resumption of sessions, hearing and determination of a formal application seeking vacation of the said warrants;
  4. That costs of this Application be provided for.
4. The Application is supported by the affidavit of the Applicant's County Secretary and Head of Public Service, Mr. Jack Magara, and is premised on the grounds that: -
- a. That, this Honourable Court has supervisory jurisdiction under Article 162 of the Constitution of Kenya, 2010 to make such orders and give such as are appropriate and expedient to ensure access to and the fair administration of justice in as far as the exercise of judicial function by subordinate Courts is concerned.
  - b. That, the Applicant is apprehensive that the Respondent in a predicate matter –vide Nyamira CMCC No. 18 of 2024 (Francis Osumo Nyariki Vs. County Government Of Nyamira), intends to summarily proclaim up to 8 (eight) County Government Official Motor Vehicles in a purported execution process that is unknown to law, ex facie defective ab initio, utterly vexatious and expressly prohibited in statute, vide section 21 (4) and (5) of the Government Proceedings Act [Cap. 40 — Laws of Kenya].
  - c. That, it is imperative and essential unto the fair administration of justice herein that this Honourable Court issues orders staying further execution of the impugned warrants and pending resumption of sessions, hearing and determination of a formal application seeking vacation of the said warrants, vide a notice of motion dated 05.09.2024 by this court, vide NyamiraHCCA No. E032 of 2024 (County Government Of Nyamiravs. Francis Osumo Nyariki).
  - d. That, the Applicants' being dissatisfied with the ruling in Nyamira CMCC NO. 18 OF 2024 (Francis Osumo Nyariki Vs. County Government Of Nyamira) delivered on the 28<sup>th</sup> day of August, 2024 by Honorable C.I. Agutu, proceeded to file an appeal seeking vacation of the said warrants, lodged and pending hearing and determination in the predicate matter, vide Nyamira HCCA No. E032 of 2024 (County Government Of Nyamiravs. Francis Osumo Nyariki) which will not have any essence if the warrants the said application challenges shall have been executed in the interim;
  - e. That the Applicants are apprehensive that the Respondents will initiate execution process by way of attachment of the Applicant's property to satisfy the decretal sum as decreed.
  - f. That the appeal is meritorious with high chances of success.
  - g. That, it is basic statutory law, pursuant to the provisions of section 21 (4) and (5) of the Government Proceedings Act [Cap. 40 — Laws of Kenya — well known to the Respondent herein, that no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs;
  - h. That, unless judicial intervention is sought in the earliest opportune, substantial public property risks being summarily disposed of and privatized in a process that is not only prohibited in statute but also certain to grossly and irreparably cripple public service in as far as the competence and functional operations of the County Government are concerned;



- i. That, it is fundamental to the rule of law that statutes be obeyed and the procedure for satisfaction of orders and decrees against Government — whether national or county, be strictly adhered to as spelt under section 21 of the *Government Proceedings Act* [Cap. 40 — Laws of Kenya];
  - j. That, the ends of justice as dictated by the predicate circumstances of the instant application warrant that the same be heard on priority basis;
  - k. That, this Honourable has statutory as well as inherent jurisdiction to adjudge and grant the prayers sought herein.
  - l. That this application has been made in absolute good faith and has been brought without unreasonable delay.
5. The Respondent opposed the Application through a Notice of Preliminary Objection (PO) wherein he listed the following grounds: -
1. That the substantive order sought (Order No. 3 on the Notice of Motion Application) is grossly ambiguous and incapable of being comprehended and its effect is undiscernible and as such it cannot be granted.
  2. That the application is ambiguous, incomprehensible and its purpose is undiscernible hence the same is untenable in law.
  3. That there is no legal basis upon which the application is brought and as such there is no basis upon which the same can be granted/ allowed leave alone being entertained by this Honourable court.
  4. That there is no application for Stay of Execution pending appeal and as such no orders of stay of execution of the decree in the trial court can issue.
  5. That the substantive prayer sought herein is alien (not known) in law and hence incapable of being granted.
  6. That the application is incompetent, a non-starter and fatally defective and as such it cannot be allowed.
6. The Respondent also filed a Replying Affidavit wherein he reiterates the contents of the PO and avers as follows in paragraphs 3 – 11 thereof: -
3. That the substantive order sought in this Application is Order number 3 on the Notice of Motion, i.e.
 

“THAT the Honourable Court be pleased to call for the record of proceedings in Nyamira CMCC NO. 18 OF 2020 (Francis Osumo Nyariki -vs- County Government Of Nyamira and order that there be a stay of further execution in the said matter pending resumption of sessions, hearing and determination of a formal application seeking vacation of the said warrants.”
  4. That I am informed by my Advocates on record, which information I verily believe to be true that the substantive order sought in this application is alien (unknown) and untenable in law and as such it cannot be granted and that being the case, not even interim orders of stay of execution can be granted on its basis.



5. That my Advocates on record have informed me which information I verily believe to be true that the substantive order sought (Order No. 3 on the Notice of Motion Application) is grossly ambiguous, incapable of being comprehended and as such cannot be granted.
6. That there is no application for Stay of Execution of the Decree of the trial Court pending the hearing and determination of this appeal and as such no orders of stay of execution of the Decree in the trial court can be issued/ granted to the Applicant.
7. That the said order 3 on the Notice of Motion seeks stay of execution pending hearing and determination of a formal application seeking vacation of the warrants of attachment and sale issued by the trial court.
8. That there is no such formal application filed by the Applicant herein and as such there is nothing upon which stay of execution of the decree in the trial court can be granted.
9. That the Applicant is not disputing the Respondent's entitlement to the decretal sum but it adamantly does not want to pay the Respondent subjecting the Respondent to unfairness and injustice.
10. That the Applicant has not come to court with clean hands but with the malice of delaying the settlement of this case with the intention to deny the Respondent the realization of the fruits of his litigation.
11. That the Ruling on the Applicant's Application to forestall the execution process commenced by the Respondent in the trial court is the subject of this appeal and there are High Court authorities in force stating that no leave of the court is required before a party executes a decree against a County Government such as the applicant in the case at the trial court and as such there is no arguable appeal filed herein and as such no orders of stay of execution can be granted.

7. The Application was canvassed by way of written submissions which I have considered. The application is expressed to have been brought under Order 42 Rule 6 of the Civil Procedure Rules (CPR) among other statutory provisions including *the Constitution*.

8. Order 42 Rule 6 of the CPR stipulates as follows: -

Stay in case of appeal

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- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (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.
  - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
  - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
  - (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
  - (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
9. The gist of the Application is the prayer to stay the execution of a decree issued before the lower court on the basis that the attachment of key county government assets, to wit, motor vehicles, is not only unlawful, but also contravenes the provisions of [Government Proceedings Act](#) which protects public assets from such actions.
  10. The Applicant's case was that its application satisfies all the conditions set for the granting of orders for stay of execution namely; that it will suffer substantial loss if the orders sought are not granted; that the Application has been filed within reasonable time and that an order for security for costs is not required in respect to proceedings involving the government.
  11. The Respondent, on the other hand, reiterated the contents of his Replying Affidavit and stated that the orders sought are ambiguous, alien and incomprehensible.
  12. It was the Respondent's case that while the instant appeal is against a ruling in respect to the application dated 18<sup>th</sup> March 2024 that sought to forestall the execution proceedings commenced by the Respondent, the Applicant does not contest the decree issued by the trial court and further, that no appeal has been filed against the lower court judgment and decree. The Respondent maintained that the application is an academic exercise as it merely challenges the legality of the execution process.

### **Analysis & Determination**

13. Having given due consideration to the submissions made by the parties herein and their pleadings, I find that the main issue for determination is whether the Applicant has made out a case for the granting of the orders for stay of execution pending appeal.
14. The Application challenges trial court's decision to allow the Respondent to initiate execution by way of warrants of attachment against the Applicant's immovable property. According to the Applicant, the trial Magistrate erred in allowing and issuing warrants of attachment against its movable property contrary to the provisions of Section 21 of the [Government Proceedings Act](#). The Applicant's contention is that the Respondent should have opted for other modes of execution besides the attachment of the Respondent's movable property.



15. The manner of execution of decrees against the government was discussed in *Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza* [2012] eKLR where Githua J. stated as follows:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the *Government Proceedings Act*. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the *Government Proceedings Act* (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.”

16. Guided by the decision in the above cited case, I find that the Respondent should have enforced the decree by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount since Section 21(4) of the *Government Proceedings Act* protects the Government from execution and attachment of its property/goods.
17. My above finding on the correct mode of execution of decrees against the government would have been sufficient to determine this application but I am still minded to consider the issue of whether the application meets the conditions set under Order 42 rule 6(2) of the Civil Procedure Rules for the granting of orders for stay of execution. The provision requires an applicant for stay of execution of a decree or order pending appeal to satisfy the conditions set out therein namely: -
- (a) that substantial loss may result to the applicant unless the order is made,
  - (b) that the application has been made without unreasonable delay, and
  - (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. (See *Antoine Ndiaye vs, African Virtual University* [2015] eKLR).



18. What amounts to substantial loss was discussed in *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, where it was held 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 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 ... 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.”

19. In the instant case, the applicants aver that they stand to suffer substantial loss of over Kshs. 503,050 as well as costs and interest if stay of execution is not granted. They further aver that the Respondent has not demonstrated that he will be able to refund the decretal sum if the appeal succeeds. The applicant has also pleaded that it is able to comply with any order as to security of costs as it have secured a bank guarantee.

20. In *RWW vs. EKW* [2019] eKLR, the court considered 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.

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.”

21. In this case, the Applicant submitted that the attachment of its assets, which include about 6 motor vehicles would occasion it irreparable loss as the said vehicles are critical for its delivery of services to the residents of Nyamira County.

22. The Respondent did not make any submissions on the aspect of substantial loss or give any material as to his ability to repay the decretal sum in the event the appeal succeeds. The Applicant’s counsel was categorical that the Applicant will suffer substantial loss if stay is not granted. Accordingly, I am persuaded that substantial loss has been proved.

23. On whether the application was filed within reasonable time, I note that the impugned ruling was rendered on 28<sup>th</sup> August 2024 and the instant application filed on 5<sup>th</sup> September 2024. I am satisfied that there has been no inordinate delay in bringing the instant appeal and application.

24. Turning to the issue of security for the due performance of the decree, the Applicant cited the provisions of Order 42 Rule 8 of the CPR and argued that the said provision is explicit that no security shall be required from the Government in proceedings for stay of execution pending appeal. The said order stipulates as follows: -



8. No security to be required from the Government
- No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.
25. The Respondent, on his part, urged this court to order the Applicant to provide security for the due performance of the decree.
26. I find that in the face of the clear provisions of Order 42 Rule 8 of the CPR which states that no security shall be required from the government in proceedings for stay pending appeal, the provision of security is not a requirement for stay under the said Rules.
27. For the reasons that I have stated in this ruling, I find that the instant application is merited and I therefore allow it.
28. Before I pen off, I am minded to address the Applicant's prayer for the calling of the lower court record. I find that such a prayer is not necessary in view of the fact that this application arises out of an appeal in which the filing of the Record of Appeal, by the Applicant, is an automatic mandatory requirement.
29. I further find that even though the Respondent was of the view that the Application is ambiguous and incomprehensible, a close scrutiny of the grounds on the body of the Application and the supporting affidavit, clearly indicate that the orders sought are for stay of execution pending appeal only against the mode of execution allowed by the trial court. For that reason, the stay order issued herein is only in respect to attachment of movable property, to wit, the Applicant's motor vehicles. This means that the Respondent is will be at liberty to explore and proceed with any other mode of execution of the decree.
30. In conclusion, I make the following final orders: -
- a. There shall be stay of execution of the warrants, by way of attachment of the Applicant's movable property, pending the hearing and determination of the appeal.
  - b. The Applicant is directed to file and serve the Record of Appeal, and list the appeal for directions within 60 days from the date of this ruling.
  - c. The costs of this Application shall abide the outcome of the appeal.
31. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS AT NYAMIRA THIS 23<sup>RD</sup> DAY OF JANUARY 2025.**

**W. A. OKWANY**

**JUDGE**

