



REPUBLIC OF KENYA



**Ol Kalou Dairy (2016) Limited v Neru (K) Limited (Civil Appeal  
E024 of 2024) [2025] KEHC 1017 (KLR) (Civ) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1017 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA**

**CIVIL  
CIVIL APPEAL E024 OF 2024**

**KW KIARIE, J**

**FEBRUARY 28, 2025**

**BETWEEN**

**OL KALOU DAIRY (2016) LIMITED ..... APPELLANT**

**AND**

**NERU (K) LIMITED ..... RESPONDENT**

**RULING**

1. The appellant/applicant herein moved the court through a Notice of Motion dated the 19<sup>th</sup> day of September 2024. It was brought under Sections 1A, 1B, 3A and 63 ( e ) of the [Civil Procedure Act](#), Order 10 Rule 11, Order 22 Rule 22 (1), and Order 51 Rule 1 of the [Civil Procedure Rules](#), and Article 159 of [the Constitution](#) of Kenya. The applicant is seeking the following orders:
  - a. That this application be certified as urgent and heard ex parte in the first instance for reasons set forth herein.
  - b. That this Honourable Court be pleased to grant a stay of execution of the decree issued on 22<sup>nd</sup> March 2024 and Judgment entered on 22<sup>nd</sup> March 2024 pending the hearing and determination of this application inter partes.
  - c. That this Honourable Court be pleased to grant a stay of execution of the decree issued on 22<sup>nd</sup> March 2024 and Judgment entered on 22<sup>nd</sup> March 2024 pending the hearing and determination of the appeal.
  - d. The orders issued should be served upon M/S Airways Auctioneers for compliance.
  - e. That the costs of this application be provided for.
2. The application was premised on the following grounds:



- a. That ex parte interlocutory judgment was entered on 22/3/2024 in Ol Kalou Civil Case No. E020 of 2024 against the appellant/applicant.
  - b. That the appellant/applicant filed the application dated 7/8/2024 seeking to set aside the ex parte interlocutory judgment, stay the execution of the decree issued thereof and seek leave to defend the suit by filing a statement of defence thereto.
  - c. That the matter had been slated for a mention on 12/9/2024, but by the consent of both parties, the matter proceeded for inter partes hearing of the said application and the ruling was also delivered on the same day dismissing the application of 7/8/2024 seeking to set aside the ex parte interlocutory judgment entered on 22/3/2024, leaving the Appellant/Applicant condemned unheard.
  - d. That the Appellant/Applicant, being aggrieved with the ruling delivered by Hon. Judicaster Nthuku in Ol Kalou Civil Case E020 of 2024 on 12/9/2024, has filed a Memorandum of Appeal dated 13/9/2024 against the whole decision.
  - e. That the Appellant/Applicant has an arguable appeal as it is due to the unfortunate maladministration of the previous management that necessitated the entry of the interlocutory judgment on 22/3/2024 by dint of its failure to enter appearance and file the requisite pleadings in time.
  - f. That the appellant/applicant has been in a deep crisis necessitating the appointment and installation of new management, which was elected a few months ago and which has been working incessantly to put the appellant/applicant back on its feet and has instructed the firm of M/s Ndegwa Wahome & Co. Advocates to deal with all their briefs currently in court.
  - g. The recently installed management only learnt of the current suit when the Notice of Entry of Judgment dated 2/7/2024 was served upon them in the Appellant/Applicant's offices.
  - h. That it is due to the poor record keeping by the previous management that precipitated the new management's oblivion on whether the summons to enter appearance were served upon the Appellant/Applicant and therefore not in a veritable position to deny or acknowledge service which was allegedly done in their absence.
  - i. That the appellant/applicant is apprehensive that the respondent will commence execution proceedings and may even move to proclaim their properties, which are currently under general debenture in favour of M/s Cooperative Bank, and the appellant/applicant will not have been accorded a fair hearing.
  - j. That the execution of the decree of 22/3/2024 will occasion a grave miscarriage of justice and would cause the appellant/applicant irreparable damage as the same is an entity that caters for a large number of dairy farmers in Nyandarua County.
  - k. That the appellant/applicant is willing to give security for the due performance of the ruling and the consequential orders thereof as may be ordered.
3. The application was opposed on the following grounds:
- a. The application does not satisfy the threshold for grant of stay of execution under Order 42 Rule 6 of the Civil Procedure Rules.
  - b. The applicant has not demonstrated that substantial loss may result to the applicant unless the orders of stay are made.



- c. The applicant has not furnished any security for the due performance of such decree or order as may ultimately be binding on them which is a fatal error.
  - d. The applicant has not demonstrated any sufficient cause for grant of stay of execution under Order 42 Rule 6 of the Civil Procedure Rules. The instant application is a delaying tactic made in bad faith that is misconceived, incompetent, lacks merit and an abuse of the court process and ought to be dismissed with costs.
  - e. That should the court be inclined to allow the, the applicant/appellant be ordered to deposit the entire decretal sum of ksh184,361/= and the auctioneers costs into an interest-earning account in a reputable commercial Bank, to be held by both advocates for the parties to this appeal, within 21 days of the ruling of the court.
4. It is trite law that an appeal does not operate as a stay of execution. Order 42 Rule 6 of the [Civil Procedure Rules](#) states as follows:
- No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.
5. The purpose of issuing an order for a stay of execution was explained in the case of [RWW vs EKW](#) [2019] eKLR, as follows:
- 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.
6. The applicant has not made any offer to the respondent for the stay of execution. After considering all the facts of this case, I make the following orders:
- a. Half of the decretal sum will be deposited in a joint interest-earning account in the names of the parties' advocates within 30 days of the ruling.
  - b. Failure to comply means the plaintiff/respondent will be at liberty to execute .
  - c. Costs of this application to abide by the outcome of the appeal.

**DELIVERED AND SIGNED AT NYANDARUA THIS 28<sup>TH</sup> DAY OF FEBRUARY 2025**

**KIARIE WAWERU KIARIE**

**JUDGE**

