



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Lokonje v YBIS Limited & another (Civil Appeal E249 of 2024)  
[2025] KEHC 2336 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2336 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E249 OF 2024  
H NAMISI, J  
FEBRUARY 27, 2025**

**BETWEEN**

**GRACE NAKAIYO LOKONJE ..... APPELLANT**

**AND**

**YBIS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**DORIFIN KEMUNTO OGERO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Appellant, being dissatisfied with the Ruling and Order delivered on 3 September 2024 by Hon. Daniel Ndalu in Gatundu Civil Case No. E132 of 2023, lodged an appeal on the following grounds:
  - i. That the learned Chief Magistrate erred in law and in fact in arriving at a decision without evaluation of the evidence on record or giving any reason;
  - ii. That the learned Chief Magistrate erred in law and in fact in holding that M/V registration number KCV 796X was registered in the name of the 1st Respondent contrary to the documentary evidence of the Log Book exhibited before the Court;
  - iii. That the learned Chief Magistrate erred in law and in fact in holding that control and ownership of the M/V registration no. KCV 796X belongs to the Plaintiff/1st Respondent contrary to the documentary evidence on record;
  - iv. That the learned Chief Magistrate erred in law and in fact in failing to pay attention or have any regard to the Appellants' documents of ownership contained in her Affidavits and annexures;
  - v. That the learned Chief Magistrate erred in law and in fact in failing to have any regard to Appellant's submissions and also failed to analyse the case law placed before Court;



- vi. That the learned Chief Magistrate erred in law and in fact in placing M/V registration no. KCV 796X in the custody of the court without regard to the costs incurred by the Appellant and the security of the same;
  - vii. That the learned Chief Magistrate erred in law and in fact in making a decision not supported by the evidence and arriving at an erroneous decision not based on sound principles of law or fact.
2. The Appellant has filed Notice of Motion dated 24 September 2024 seeking the following orders:
    - i. (spent)
    - ii. That this Honourable Court be pleased to grant a temporary stay of execution of the Orders issued by the Hon. Daniel Ndalu on 3 September 2024 in Gatundu MCCC E132 of 2023 pending the hearing and determination of this application;
    - iii. That this Honourable Court be pleased to grant a temporary stay of execution of the Orders issued by the Hon. Daniel Ndalu on 3 September 2024 in Gatundu MCCC E132 of 2023 pending the hearing and determination of this appeal;
    - iv. That costs be provided for.
  3. The Application is supported by Affidavit sworn by the Applicant and premised on the following grounds:
    - a. That a ruling delivered on 3 September 2024 directed the Applicant to place her motor vehicle registration KCX 769X in the custody of the Court as per directions of the Court issued on 7 June 2023;
    - b. That the Applicant was not a party to the suit on 7 June 2023 or privy to those directions;
    - c. That the Order is in disregard of her ownership rights and her motor vehicle stands to degrade and get damaged if placed as directed;
    - d. That the Applicant purchased the motor vehicle from a third party who is not a party to the suit hence the Order is prejudicial to her;
    - e. That the Applicant has spent a lot of money to revamp/repair the motor vehicle which was in bad shape and she stands to lose irreparably if the motor vehicle goes to waste;
    - f. That no prejudice will be suffered if the Applicant is allowed to hold the motor vehicle on condition that she does not sell it;
    - g. That the application is filed within reasonable time and the appeal has high chances of success.
  4. The Supporting Affidavit reiterates the grounds of the Application.
  5. In response, the 1st Respondent filed the a Replying Affidavit in which they averred that they are the registered owner of the subject motor vehicle. While the Appellant/Applicant was not a party to the proceedings at the material time, it is pertinent to note that the 2nd Respondent had had unlawful possession of the motor vehicle and was at large, yet to be traced by the Police despite significant efforts by the 1st Respondent. Later, it came to the attention of the 1st Respondent that the motor vehicle had been fraudulently transferred to the Appellant/Applicant. This transaction necessitated the Appellant/Applicant being enjoined in the proceedings.
  6. Parties canvassed the Application by way of written submissions.



## Analysis and Determination

7. Under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 in an application for stay pending appeal, an applicant should satisfy the court that:
  - a. Substantial loss may result to him/her unless the order is made;
  - b. That the application has been made without unreasonable delay; and
  - c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
8. The Appellant/Applicant relied on the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules as well as section 1A (2) of the *Civil Procedure Act*, Cap 21, as well as the cases of George Kimotho Ilewe -vs- Joseph Mathuku Ngewa & Another Misc Application No. E72 of 2021, John Gachanja Mundia -vs- Francis Muriira alias Francis Muthika & Another [2016] eKLR and Tsusho Capital Kenya Ltd 7 2 Others -vs- Viona Nasimiyu Ndombe [2020] eKLR. The Appellant/Applicant urged the Court to take judicial notice that the orders for placement of the motor vehicle in the custody of the court until the hearing and determination of the suit where the Applicant was not involved would definitely render the motor vehicle a waste and unserviceable for lack of use and care. This would lead to the Appellant/Applicant suffering substantial loss by the time the suit is over, bearing in mind that the defendant in the lower court case is untraceable and the loss claimed by the Plaintiff therein is for a liquidated amount which can only be met by the Defendant.
9. On the issue of security, the Appellant/Applicant submitted that the purpose of Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. The Appellant contended that the circumstances of this case are clear in that the Applicant is a stranger to the 2nd Respondent and any decree that may result will be a money decree that will only attach to the 2nd Respondent. The Appellant/Applicant pledged to provide security for the due performance of the decree should the appeal fail by holding the subject matter in safe custody without parting with its ownership or possession till the appeal is heard.
10. In its submissions, the 1st Respondent relied on the case of Antoine Ndiaye vs African virtual University [2015] eKLR where the Court opined thus:

“stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 rule 6 of the Civil Procedure Rules...”
11. With regard to security of costs, the 1st Respondent submitted that the pledge by the Applicant to hold the motor vehicle in safe custody without parting with its ownership or possession until the Appeal is determined does not meet the legal requirements for providing proper security as it does not ensure the due performance of the ruling or orders of the trial court. Further, the 1st Respondent submitted that the receipts presented by the Applicant do not indicate the particulars of the motor vehicle insured and are addressed to one, Neema, who is not the Appellant/Applicant.
12. I did not have the opportunity to appreciate the case before the trial court since the pleadings before me were limited to the Application. I note from the 1st Respondent’s submissions that the claim in the lower court is not purely a liquidated claim. The 1st Respondent seeks the following reliefs:



- a. Loss of use of motor vehicle registration number KCV 769X at Kshs 3000/= per day from 1st July 2022 until the motor vehicle is returned to the custody of the Plaintiff;
  - b. General damages for loss of use;
  - c. Permanent injunction restraining the Defendant, her agents, employees, servants or any other persons whether acting on their own behalf or on the Defendant's behalf from interfering with or otherwise dealing with the Plaintiff's motor vehicle registration number KCV 769X;
  - d. Costs of the suit; and
  - e. Any other relief the Honourable Court may deem fit and just to grant
13. However, I take cognisance of the Applicant's argument that she is a stranger to the claim between the Respondents herein, having purchased the motor vehicle from a Car Yard. I note that the logbook presented by the Appellant and the one by the 1st Respondent reflect different owners of the same motor vehicle. I will not venture into the merits of the appeal herein, but focus on the conditions for stay of execution pending appeal. The power of a court to grant stay of execution is discretionary. This discretionary power must not be exercised capriciously or whimsically but must be exercised in a way that does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the appeal overturn the trial court's decision. (see *Butt vs. Rent Restriction Tribunal* [1979]).
14. The purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of the case. The Court of Appeal in *RWW vs. EKW* (2019) eKLR addressed itself on this 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.” (emphasis added)
15. As I consider whether or not to exercise my discretion in granting the orders sought, I am minded that the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR the court stated:
- “The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”



16. In weighing these competing rights and with a view to delicately balancing the same, I grant the order for stay of execution on condition that the Applicant shall furnish security equivalent to the value of the motor vehicle. The Agreement for Sale furnished by the Applicant indicates that the purchase price was Kshs 905,000/=. Therefore, the Applicant shall furnish security in the sum of Kshs 900,000/=: by way of bank guarantee from a reputable bank within 21 days of today. The Applicant shall also take all necessary steps to ensure that the appeal is properly filed and admitted within 45 days of today.

**DATED AND DELIVERED AT THIKA THIS 27 DAY OF FEBRUARY 2025**

**HELENE R. NAMISI**

**JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

Mrs. Muhoho.....for the Appellant/Applicant

Mr. Gaya h/b Mr. Nduati.....for the 1st Respondent

N/A.....for the 2nd Respondent

Libertine Achieng .....Court Assistant

