



**Otieno v Mboya (Miscellaneous Application E794 of 2023)
[2025] KEHC 1367 (KLR) (Commercial and Tax) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1367 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E794 OF 2023
PM MULWA, J
FEBRUARY 27, 2025**

BETWEEN

HUMPHREY HESKEY OTIENO APPLICANT

AND

FREDRICK NOVEL OTIENO MBOYA RESPONDENT

RULING

1. The Applicant filed the Notice of Motion dated 11th September 2023 and asked the court to stay the execution of the judgement of Honourable L.B. Koech entered on 24th June 2022 and affirmed in the ruling rendered on 28th July 2023 pending the hearing and determination of the intended appeal.
2. The Application was supported by the grounds on the face of it and by the sworn Affidavit of Humphrey Huskey Otieno and stated that in the court's Ruling dated 28th July 2023 the court ignored the fact that neither the Applicant nor his advocates were served with the Application to enter judgment in default of filing defence and at the time there were active negotiations between the parties. The Applicant argued that he was never served with the application for judgment in default or any mention or ruling notice but was simply served with a judgment entered against him delivered on 24th June 2022 clearly condemning the Applicant unheard.
3. In response, the Respondent filed a replying affidavit dated 7th November 2023 stating that that the Applicant has not satisfied the mandatory requirements for stay of execution and therefore his Application should be struck out with prejudice.
4. Having considered the application, response and the parties' written submissions the court frames only one issue for determination;



- a. Whether the Applicant has demonstrated that the order of stay of execution pending appeal is merited.
5. Before delving into the main issue for determination in this application the Court takes cognisance of the issue raised by the Respondent regarding the supporting affidavit in the application. The Respondent averred that the application was fatally defective and bad in law having failed to comply with mandatory provision of law as it was supported by unsigned supporting affidavit and should therefore be struck out. The court does confirm that the copy availed to the court by the Applicant is indeed signed.
6. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 Rule 6(2) of the *Civil Procedure Rules* which 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.”
7. The import of the above is that there are three conditions to be fulfilled can therefore be summarized as follows;
 - a. that substantial loss may result to the applicant unless the order is made
 - b. application has been made without unreasonable delay
 - c. security as the court orders for the due performance
8. Substantial loss - It was the Applicant’s submission that he stands to suffer substantial loss if the judgment is not stayed on the account that the Applicant is facing eminent threat of execution of the judgment where the Respondent was awarded Kshs. 6,076,737.00. Thus, the Applicant is apprehensive that in the event of execution the Respondent will not be in a position to reimburse the Applicant.
9. While considering the interest of both the Applicant and the Respondent, the court must satisfy itself that that no party will suffer undue prejudice. This principle was enunciated in the decision of the Court of Appeal in *Absalom Dova v Tarbo Transporters* [2013] eKLR, where it stated: -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”
10. It is the court’s considered view that while the Applicant has merely stated that he is likely to suffer loss should execution take place; he added that he was apprehensive that the Respondent may not be able to repay him should the appeal go in their favour. That fear is not far-fetched as Respondent has



neither rebutted nor demonstrated that he has the means and capacity to refund the Applicant. In the instant case the Applicant is likely to suffer substantial loss.

11. Undue delay – As to whether the application has been filed without undue delay, judgment was entered on 28th July 2023 while the application for stay of execution was made on 11th September 2023 which is slightly over a month. This court thus finds that this application for stay of execution has been filed without undue delay.
12. The issue of security of costs was not fully addressed by the court and the Applicant left it up to the court’s discretion. In contrast the Respondent asked the court to order the Applicant to deposit a total of Kshs. 7,141,317.00 as security for costs into an interest earning account in the joint names of the parties’ advocates.
13. The purpose of security was clearly enunciated in *Arun C. Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, where the court stated: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”
14. Taking all relevant factors into consideration and in order not to render the intended appeal nugatory, the court allows the application for stay of execution pending appeal on condition that the Applicant deposits a sum of Kshs. 3,200,000.00 into court as security of this appeal within 45 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI

THIS 27TH DAY OF FEBRUARY 2025.

PETER M. MULWA

JUDGE

In the presence of:

Mr. Ochieng for Applicant

Mr. Nalyanya for Respondent

Court Assistant: Carlos

