



Fortune Savings and Credit Co-operative Society Limited v Gachoki (Civil Appeal E021 of 2024) [2025] KEHC 3966 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3966 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E021 OF 2024
EM MURIITHI, J
MARCH 27, 2025**

BETWEEN

**FORTUNE SAVINGS AND CREDIT CO-OPERATIVE SOCIETY
LIMITED APPELLANT**

AND

JOHNSON GAKURU GACHOKI RESPONDENT

RULING

1. The applicant filed a notice of motion dated 10th February, 2023 seeking the following orders:
 1. Spent.
 2. Spent.
 3. That this Honourable Court be pleased to issue an Order of Stay of Implementation and/or Execution of the Judgement delivered on 7th March, 2024 by the Cooperative Tribunal CTC 468 of 2019 and all consequential orders arising therefrom pending the hearing and determination of Kerugoya HCCA/E021/2024.
2. The application is based on the grounds on the face of the application and the supporting affidavit of Amos Kimotho Njeru setting out the facts relied on that by the Judgement dated 7th March, 2024. The Learned Honourable Members of the Co-operative Tribunal were of the view that the Appellant/Applicant had failed to prove its case and proceeded to dismiss its Counterclaim on the grounds that it lacked merit. The Tribunal however proceeded to allow the Respondent's Claim with costs and directed the Appellant to immediately release Motor Vehicle Registration Number KCN 087L to the Respondent within 14 days.
3. That the Learned Honourable Members of the Co-operative Tribunal fell into grave errors of fact and law hence the Appeal to this Honourable Court, Appeal No Kerugoya HCCA/E021/2024. The



Appeal was duly filed in this Court on 21/03/2024, being Fortune Sacco Society Ltd Versus Johnson Gakuru Gachoki.

4. The Appellant/Applicant stand to suffer tremendous loss owing to its loss of its security over the Loans advanced to the Respondent. As it stands, the Respondent is more likely to freely escape his legal obligation of repaying the loan.
5. The Appellant's Appeal is arguable, meritorious with probable chance of success.
6. The respondent on 28th March, 2024 filed a Replying Affidavit indicating that the Applicant/Appellant herein was ordered on 25th May, 2021 to release the motor vehicle back to him but has since refused and or neglected to obey the ruling issued by the Honourable Members of the Co-operative Tribunal.
7. That the Applicant/ Appellant is in possession of the log book of motor vehicle Registration number KCN 087L and would not suffer any prejudice if the same is released to him as he would only be using to carry out business and cannot sell it.
8. That this Honourable Court should balance the interest of both parties by having the Applicant/Appellant release motor vehicle registration number KCN 087L as ordered by the Honourable Members of the Co-operative Tribunal while the Appellant mounts its appeal.
9. That the Appellant be ordered to deposit in court security for costs as granted by the Honourable Members of the Co-operative Tribunal.

Appellant submissions

10. It is the Appellant/Applicant's submission that it has indeed satisfied the required threshold for the grant of stay orders. It is noteworthy that the Respondent was advanced with several loan facilities by the Applicant and the same have remained unsettled to date thus leaving a huge loan balance of over Kshs.23,000,000.00/= as at the time of Judgement. As part of security of the said facility was Motor Vehicle Registration number KCN 087L Isuzu FVZ, whose purchase was financed by the Applicant.
11. Following the impugned Judgement issued by the Co-operative Tribunal and which is herein appealed against, the Tribunal Ordered for the release of the said Motor Vehicle without due regard that the Respondent was still indebted to the Applicant. The Tribunal further fell into grave errors by failing to give directions as to the payment of the loan balance as brought out clearly in the Applicants Counter Claim.
12. In Antoine Ndiaye v African Virtual University (2015) eKLR Gikonyo J opined that; 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.

Respondent submissions

13. The respondent submits that the Appellant has not met the conditions required to have the order of stay issued.
14. On what substantial loss is, it was observed in James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, 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.

15. The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, 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. 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.

Issue

16. Whether stay of execution pending hearing of the appeal should be granted.

Analysis

17. The applicant seeks for this Honourable Court to issue an order of stay of execution of the Judgement delivered on 7th March, 2024 by the Cooperative Tribunal CTC 468 OF 2019 and all consequential orders arising therefrom pending the hearing and determination of Kerugoya HCCA/E021/2024.
18. The issue for consideration is:

Whether stay of execution should be granted

19. 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.
 - c. That substantial loss may result to the applicant unless the order is made
20. The Appellant/Applicant’s deposed that they stand to suffer tremendous loss owing to its loss of its security over the loans advanced to the Respondent. As it stands, the Respondent is more likely to freely escape his legal obligation of repaying the loan. The tribunal ordered the release to the respondent



Motor Vehicle Registration number KCN 087L Isuzu FVZ, whose purchase was financed by the Applicant and was part of the loan security.

21. The respondent deposes that the Applicant/ Appellant is in possession of the log book of motor vehicle Registration number KCN 087L and would not suffer any prejudice if the same is released to him since he would only be using to carry out business and cannot sell it.
22. The respondent deposed that the court should balance the interest of both parties by having the Applicant/ Appellant release motor vehicle registration number KCN 087L as ordered by the Honourable Members of the Co-operative Tribunal while the Appellant mounts its appeal.
23. In *Machira T/A Machira & Co Advocates vs East African Standard (No2)*[2002]KLR 63
24. "To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."
25. It is clear that the applicant has an arguable appeal and will suffer substantial loss in case stay of execution is not granted.

That the application has been made without unreasonable delay

26. The appellants' application was filed without any undue delay. The trial court delivered its judgement on 7th March, 2024. The appellant filed his Notice of Motion application dated 21st March, 2024 and the Memorandum of Appeal on the same day.
27. In *Netplan East Africa Limited v Investment & Mortgages Bank Limited* [2013]eKLR that:-"The test is whether the delay is prolonged and inexcusable, and, if it is ,can justice be done despite the delay. When such delay is established, unless it is well explained, it becomes inexcusable"
28. There was no delay in filing the application for stay of execution.
29. 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
30. The respondent deposes that the Appellant be ordered to deposit in court security for costs as granted by the Honourable Members of the Co-operative Tribunal.
31. The appellants have not offered any security but the issue of nature and amount of security is in the discretion to the court to direct. On security for performance of the decree, the court held as follows:
The Court in *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another* [2018] eKLR, stated that:-

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide



security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

34. As it is the discretion of the court to determine the security, the Court considers it sufficient to order that the motor vehicle shall not be sold in the meantime. As regards the request for release of the motor vehicle to the Respondent, the likely loss of value by user of the vehicle must be avoided. The remedy in commercial cases of this nature is to afford the parties an expeditious disposal of dispute and for that purpose the Court shall make provision for disposal of the appeal on priority basis.

Orders

35. Accordingly, for the reasons set out above, the Court find merit in the application for stay of execution pending the hearing and determination of the appeal, which is granted on the following conditions:
1. The applicant shall not dispose the suit motor vehicle Registration number KCN 087L in the meantime.
 2. The Record of Appeal shall be filed within thirty (30) days.
 3. In default, execution to issue.
36. Costs in the Appeal.
Orders accordingly.

DATED AND DELIVERED THIS 27TH DAY OF MARCH 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Kamau for Mr. Kibue for the Appellant.

Mr. Mumo for Mr. Kimemia for Respondent.

