



REPUBLIC OF KENYA



KENYA LAW
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**Magfree Enterprises Limited & another v Muchoki (Civil Appeal
E301 of 2024) [2025] KEHC 5071 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5071 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E301 OF 2024**

TW OUYA, J

APRIL 30, 2025

BETWEEN

MAGFREE ENTERPRISES LIMITED 1ST APPLICANT

JOHN NYAGA IRERI 2ND APPLICANT

AND

STEPHEN KIGO MUCHOKI RESPONDENT

RULING

1. This ruling is in respect to the Notice of Motion dated the 4th of March, 2024. Prayers 1 and 2 of the Motion are now spent, and what is now pending this court's determination are the following prayers:
 - i. That pending the hearing and determination of the appeal, there be a stay of execution enforcing the judgement delivered by the Hon. Joseph Were on the 12th of July, 2023 in MCCC/E482/2021;
 - ii. That costs of the application be provided for.
2. The application is premised on the grounds stated on the face of the Motion and the depositions made in the Supporting Affidavit sworn on the 4th of March, 2024, by Mr. John Nyaga Ireri, the 2nd applicant herein. In a nutshell, Mr. Ireri deposed that the trial court, in MCCC/E482/2021 rendered judgement in favour of the respondent as against the applicants, and they immediately sought stay of execution of the said judgement, which stay was granted.
3. That after the stay granted by the trial court lapsed, the respondent instructed Viewline Auctioneers to proceed with the execution of the decree; and the auctioneers proceeded to their business premises on the 28th of February, 2024, and issued a seven (7) day proclamation notice, which notice lapsed on the 5th of March, 2024.



4. Mr. Ileri averred that while the decree has provided for the sum of Kshs. 412, 919, the respondent has proclaimed goods worth more than Kshs. 900,000, which is more than two times the decretal sum; as such, if the attachment takes place, they shall be extremely prejudiced.
5. He further averred that they intend to appeal against the decision of the trial court and they are apprehensive that the respondent may proceed to execute by attaching their properties upon the lapse of the period indicated on the proclamation.
6. Mr. Ileri contended that they are not snatching the fruits of the judgement from the respondent but they are rather exercising their legal right of appeal. He further contended that their application has been brought without undue delay, and that they are ready and willing to abide by any orders the court may deem just and fit to issue.
7. The application was contested by the respondent vide a replying affidavit sworn on the 11th of April, 2024, by Mr. Joseph Ngugi, learned counsel for the respondent. In the affidavit, Mr. Ngugi averred that the application by the applicants was misconceived, incompetent and an abuse of the court process, as they have not laid any sufficient basis to grant the orders sought; and that the application is meant to keep the respondent from enjoying the fruits of a valid judgement.
8. He contended that the applicants have not filed any appeal against the judgement of the lower court to warrant the stay of execution pending the hearing and determination of their appeal; and that the applicants have only attached an unfiled draft Memorandum of Appeal to their application which means that there is no valid appeal on record, as such, the orders of stay of execution pending appeal cannot be granted.
9. Mr. Ngugi averred that in the unlikely event that the applicant's appeal exists as filed, then the same is void ab initio as it was lodged 9 months after judgement was delivered; which is goes against the 30 days period provided in law to lodge an appeal. He contended that the instant application is another calculated move to delay the execution process in favour of the respondent, as the alleged appeal does not exist.
10. Mr. Ngugi further contended that should this court grant the prayers sought in the present application, they would be substantial injustice on the respondent's part as he would be kept from enjoying the fruits of a valid judgement for an indefinite period of time; and that it was in the interest of justice that the application be dismissed with costs.
11. He averred that should this court be inclined to allow the application, then it should be allowed on condition that the applicants deposit half the decretal sum with the respondent's advocate and the other half in a joint interest earning account in the names of the advocates for both parties as security for the stay orders pending appeal.
12. The application was canvassed by way of written submissions. The applicants' submissions dated the 29th of April, 2024, were filed on their behalf by their learned counsel Okatch & Partners Advocates. Whereas those by the Respondent were filed on his behalf by his learned counsel Joe Ngugi & Company Advocates.
13. I have duly considered the application the affidavits on record and the written submissions filed on behalf of both parties, having done so, I find that the key issue arising for determination is whether the applicant is deserving of the orders sought.
14. The law governing stay of execution pending appeals is found in Order 42 rule 6 of the Civil Procedure rules. Order 42 rule 6 (1) of the Civil Procedure rules provides as follows: "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.”

15. On the other hand, Order 42 rule 6 (2) which provides for conditions to be fulfilled before a party is granted an order for stay of execution pending appeal, stipulates thus: “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.”
16. It is evident from the above provision of law that stay of executions pending appeals is only applicable in situations where an appeal has already been filed before court, but not in a situation where an appeal has not been filed or is yet to be filed.
17. I have perused the records of this court, and I have noted that the applicants have not filed their intended appeal. What the applicants have attached to their application is a draft Memorandum of Appeal dated the 4th of March, 2024, which they supposedly intend to file.
18. It is trite that under Section 79 G of the *Civil Procedure Act*, an appeal from the subordinate courts to the high court is to be filed within a period of 30 days from the date of the decree or order appealed against. However, in the instance where a party is delayed in filing their intended appeal, Section 79 G of the Civil Procedure Court grants the high court a wide and unfettered discretion to enlarge the time for filing the said appeal upon an application being made by such a party.
19. Section 79 G of the *Civil Procedure Act* stipulates as follows: “Every appeal from a subordinate court to the High Court shall be filed within a period of Thirty Days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
20. In this case, the impugned judgement was allegedly delivered on the 12th of July, 2023, I say allegedly, because a copy of the said judgement was not availed before this court; the applicants were therefore expected to have filed their appeal within a period of 30 days from the said date, which they did not do.
21. Pursuant to Section 79 G of the *Civil Procedure Act*, the applicants would have made an application to have their intended appeal admitted out of time, before or while making their application for stay of execution, which they also did not do. This therefore means that there is no appeal on record against which an application for stay pending appeal can be anchored on. In my considered view, to grant an order for stay of execution on a non-existent appeal would be to issue orders in a vacuum.



Determination

22. Having found that there is no appeal against which the application for stay of execution can be anchored, I hold that the present appeal lacks in merit and the same is hereby struck out with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF APRIL, 2025.

HON. T. W. OUYA

JUDGE

For Appellant/applicant.....no Appearance

For Respondent.....ms Achola

Court Assistant...ms Doreen

