



REPUBLIC OF KENYA



KENYA LAW
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**Tarus & another v Owiti (Civil Appeal E277 of 2024)
[2025] KEHC 5175 (KLR) (29 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5175 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E277 OF 2024
RN NYAKUNDI, J
APRIL 29, 2025**

BETWEEN

LINUS KIMURGOR TARUS 1ST APPELLANT

MICHAEL KIMURGOR TARUS 2ND APPELLANT

AND

CELESTINE OLUOCH OWITI RESPONDENT

RULING

1. The applicant approached this court vide a Notice of motion seeking the following orders;
 - a. Spent
 - b. Spent
 - c. Spent.
 - d. That this Honourable Court may be pleased to stay execution of the Decree issued on 9th December 2024 and/or any other consequential orders emanating from the judgment delivered in the Small Claims Court Civil suit No. E304 of 2024 pending the hearing of this Appeal.
 - e. That this Honourable Court may be pleased to issue any other such relief as may be deemed fit in the interest of justice.
 - f. That costs of this Application be in the cause.
2. The application is premised on the grounds on the face of it and the averments of the applicant in the supporting affidavit. He deposed that judgment in the trial Court was delivered on 9th December 2024 and being aggrieved by the said judgment, he preferred an appeal against the same. Further, that he has learnt from reliable sources that the Respondent is in the process of executing the Decree emanating



from the said judgment to his detriment. He urged that unless the orders sought are granted, the Appeal may be rendered nugatory. Further, that his Appeal has high chance of success and no prejudice will be occasioned to the Respondent should this application be allowed in the interest of justice.

3. The Respondent opposed the application vide a replying affidavit dated 10/03/2025. She deposed that the application has been brought in bad faith, the same has been filed with ill intention to obstruct and delay the course of justice. Further, that the application offends the Mandatory Provisions of Order 42 Rule 6 of the *Civil Procedure Rules*. There has been inordinate delay in bringing this Application for stay of execution pending Appeal and additionally, that the Appellant has failed to demonstrate that they would suffer any substantial loss should the stay not be granted. She deposed that the affidavit in support of the application is incompetent and that the application is based on mere apprehensions.
4. She urged that as a precondition for stay pending appeal the Appellants pay to the Respondent half the Decretal Sum plus full costs and the remaining half of the decretal sum be deposited in a joint interest earning account as security for the appeal.

Analysis & Determination

5. The sole issue for determination is; Whether the orders for stay of execution pending appeal should issue.
6. The principles applicable in the determination of Applications for stay of execution pending Appeal are well settled and are as set out in Order 42 Rule 6(2) of the *Civil Procedure Rules* as follows:

“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. What constitutes “substantial loss” was explained in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, by Gikonyo J in the following terms:

“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.”

8. In this instance, the applicant has not demonstrated to the court what substantial loss he would be occasioned if the orders of stay of execution are not granted. In fact, he has not even mentioned that he would suffer substantial loss as his concern is that the appeal shall be rendered nugatory. It is therefore my considered view that the applicant has acceded that he shall not suffer substantial loss if the orders are not granted.



9. The impugned judgment was delivered on 09/12/2024 and the present application was filed on 13/12/2025 which is 35 days which, in my view is not an inordinate delay.

10. Moving on to the final limb which is security, the purpose of security was clearly reiterated in the case of *Arun C. Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, as follows:

“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.”

11. The Supreme court had occasion to deal with the question of the exercise of discretion by courts in terms of the provisions of Order 42 Rule 6(1) of the *Civil Procedure Rules* which empowers a trial or Appeal’s court to require a litigant to furnish security for the costs of the defendant, Appellant, or as the case may be in the litigation in question. It is noted inter- alia that within our legal system that for courts to function fairly they must ensure rules that regulate their proceedings in adjudicating disputes these rules often require parties to a dispute to take certain steps to ensure seamless flow of events within the trial. Sometimes parties view the rules to the extend that they constitute a limitation of the right to access to court, however in absence of a constitutional challenge to a particular rule having that effect a litigant’s complaint would only remain for him or her to seek the remedy that the rule was not properly applied by the court.

12. In the instant case, the record shows that the Applicant had been granted conditional stay to deposit security pending hearing and determination of the Appeal. There is no evidence that he complied with that condition. The application before this court is for all intents and purposes asking this court to exercise review jurisdiction. In my considered view the Applicant has not satisfied the criteria on review under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*.

13. The applicant has not mentioned anything about security in the application. He has not proposed any security or mentioned the form he would like to have the security in. It follows that on this limb, the application has also failed.

14. Upon considering the application and responses thereto, I find as follows;

- i. The application dated 13/02/2025 is dismissed in its entirety for lack of merit
- ii. Costs to the respondent.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 29TH DAY OF APRIL 2025

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R. NYAKUNDI

JUDGE

