



**Ouma v Makokha (Civil Appeal E195 of 2024)
[2025] KEHC 6202 (KLR) (28 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 6202 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E195 OF 2024**

**S MBUNGI, J
APRIL 28, 2025**

BETWEEN

NELSON ODUOR OUMA APPELLANT

AND

AGNETTA TUBULA MAKOKHA RESPONDENT

RULING

1. The Applicant filed a notice of motion application dated 4th November 2024 under section 1A and 1B, section 3A and section 79G of the [Civil Procedure Act](#), Order 42 Rule 6 of the civil procedure rules seeking the following orders;
 - a. That this matter be certified as urgent and be admitted for hearing *ex parte* in the first instance. (spent)
 - b. That this Honorable court be pleased to stay execution of the *ex parte* judgment and Decree made on the 18th July 2024 and all other consequential orders pending the hearing and determination of this application.
 - c. That this Honorable Court be pleased to stay execution of the *ex parte* Judgment and Decree made on the 18th July 2024 and all other consequential orders pending the hearing and determination of the Appeal.
 - d. That this Honorable Court be pleased to issue such further orders or directions that it may deem fit in the interest of justice.
 - e. That the costs of this Application be provided for.
2. The Application is premised on the grounds set out on its face and on the supporting affidavit sworn on 4th November 2024 by the applicant.



3. In his supporting affidavit, he stated that an ex parte judgment in Butere PMCC No E54 of 2019 Agnetta Tubula Makokha vs. Nelson Oduor Ouma was entered for the Respondent against the Applicant on 11th July 2023 for Kshs. 2,951,200 which arose from a road traffic accident that occurred on 24th July 2016 which involved his motor vehicle registration number KCB 216 S Toyota Allion.
4. He claimed that he was served with the judgment on 26th January 2024 and immediately instructed his advocates to come on record to set aside the ex parte judgment.
5. He stated that his advocates were unable to access the file at the registry since the file was pending ruling on the Bill of cost and immediately they accessed the file, they applied for setting aside the ex parte judgment claiming he was never served with notice to enter appearance.
6. He opines that his appeal has a high chance of success, claiming that the ex parte judgment was irregular and he desired a chance to be heard on merit.
7. He further claims that his motor vehicle, which stands the risk of being executed, was insured with Xplico Insurance company, who had been served with a demand notice, however they repudiated the claim saying that they were not liable to satisfy the judgment and decree for it had been placed under receivership and a moratorium already issued to the policy holders for a period of 12 months.
8. Its prayer is that a stay of execution be issued pending the hearing and determination of the appeal and pendency of the Moratorium .
9. In her replying affidavit dated 20th January 2025, the Respondent says the application has no merit as it does not meet the elements required for stay of execution pending appeal. According to the respondent, Xplico insurance, though under insolvency, is not a party to the suit, and that the applicant should settle her claim and later seek judgment against his insurance company.
10. The respondent says is confined to a wheelchair and it would be unfair to deny her the fruits of her judgment.
11. The application was canvassed by way of written submissions which I have considered.

Applicant's submission.

12. in his submission dated 19th February 2025, the applicant highlighted the 3 conditions that have to be met for the stay orders to be granted.
13. He relied on the cases of Matata & another v Rono & another (Civil Appeal E034 of 2024) [2024] KEHC 2799 (KLR) .
14. On what constituted substantial loss, He relied on the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR and Kenya Industrial Estate Limited & another v Matilda Tenge Mwachia [2021] eKLR,
15. On whether the appeal will be rendered nugatory he relied on the case James Wangalwa & Another vs. Agnes Naliaka Cheseto (2012) eKLR and the case of Kenya Industrial Estate Limited & another v Matilda Tenge Mwachia [2021] eKLR .He submitted that the Respondent would not be in a position to refund him the decretal amount if the appeal is successful and relied on the case of Blue Jay Investments ltd & another (suing on behalf of the estate of Mwanza May (Civil Appeal E071 of 2022) (2023) .
16. On whether the application was made without unreasonable delay, he submitted that Butere PMCC No. E54 of 2019 – Agnetta Tubula Makokha vs. Nelson Oduor Ouma was delivered on 5th November



2024 he filed Memorandum of Appeal was filed on 5th December 2024 which was within one month and hence the appeal was filed without undue delay.

17. On the claim of whether the appeal has arguable grounds with high chances of success, he cited the case of Michael Opiyo vs. Solomon Kimeli Bor & anor (2021) eKLR where it was held that It is now trite that an arguable appeal is not necessarily one that must succeed; and that even one arguable point is sufficient for purposes of section 79G of the Civil Procedure Act...”.
18. According to the applicant, his memorandum of Appeal dated 4th December 2024 raises serious points of law and fact which would warrant the court to intervene.
19. He contends that the trial court restricted itself to the question of service of the summons to enter appearance and brushed the substantive question of whether their defence has triable issues.
20. He faulted the trial court for failing to appreciate that a delay of 3 months was reasonable, and the delay had been explained and further that a delay is curable by payment of costs.
21. On the issue of security for the due performance of the decree, he relied on the case of Tibor Transporters Ltd Vs. Absalom Dova (2012) eKLR and Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd [2019] eKLR and submitted that the issue of security is discretionary and it was upon the court to determine the same.
22. He submitted that his insurer Xplico Insurance was placed under Statutory Management on 8th December, 2023 by the Insurance Regulatory Authority as mandated under Section 67 (c), (2), (c) of the Insurance Act, Cap 487 and pray that in the interest of justice, a security not be imposed on him.

Respondent’s Submission.

23. The Respondent submitted that the applicant herein file an appeal plus the application for stay pending appeal and dated 4/11/2024. His application was considered ex parte in the first instance after which it was directed to be heard on 18/12/2024. For no apparent reason the applicant waited until 17/12/2024 and only served his Notice of Motion upon the respondent's counsel via email at 4.00 P.m on the same date. Upon failing to get interim orders ex parte, the appellant filed a similar application in the Lower Court dated 28/11/2024. The similar application is still pending in the Lower Court. He annexed the application to the Replying Affidavit as annexure MWO –

The Respondent urges this court to refuse this application dated 4/11/2024 for the following reasons;

1. The application is an abuse of the Court process. When seeking orders of stay of execution pending an appeal, the applicant is required to file the application in the trial Court. If the decision of the trial Court is unfavourable, then such an applicant has another chance to file a similar application in the Appellate Court. Such Appellate Court in reconsidering the application for stay will be seized of powers to review the orders made by the trial Court when hearing the application for stay and will also be clothed with original jurisdiction to make appropriate orders in regard to an application for stay of execution pending the determination of the appeal before it.
2. The appellant’s move to file his application in the High Court first on 5/11/2024 and thereafter file a similar application on 28/11/2024 when his application in the High Court had remained unheard demonstrates the applicant’s mischief in shopping for forums to grant him the desired ex parte orders of stay of execution.



3. The applicant seeks to gamble with the judicial process and potentially expose both the High Court and the trial Court to the embarrassment of delivery conflicting rulings on similar facts. The application is therefore an abuse of the process of the Court.
4. He referred the court to the case of Car House Ltd & Another vs Erastus Kavita Musyoka (2020)eKLR the Court held as follows; "27. To adopt a procedure where a party files an application and abandons it midstream and moves an appellate court for the same relief without withdrawing the earlier application may not only lead to an embarrassment but may be considered as playing lottery with judicial process..... 29. In my view the applicants ought to have held their horses and waited for their application before the trial court to be determined one way or the other before moving this Court. By acting in haste they have jumped the gun. Such conduct is not contemplated under the above provision and ought not to be tolerated. Accordingly, I find the instant application incompetent and it is hereby struck out with costs to the Respondent."
5. The application on its own has failed to show how the pending appeal will be rendered nugatory in the event that the stay orders are refused.
6. The application is also silent on whether the appellant will suffer substantial loss should his application collapse.
7. The applicant chose to take the court through his association with the now insolvent insurer which association cannot help or influence his case for orders of stay of execution.
8. The insurer was certainly not a party to the Lower Court's proceedings and it is also not a party to the appeal herein and the present application.
9. An applicant for stay of execution pending an appeal must provide sufficient security for the due performance of the decree in the event that the appeal fails.
10. The appellant's wordy Certificate of Urgency, the notice of motion and the affidavit in support have failed to identify any form of security to ensure due settlement of the decree in the event the appeal fails. Provision of security is crucial to secure the Lower Court's money decree.

Determination

24. I have considered the rival submissions .
25. The Applicant has not denied that there is another pending application dated 28.11.2024 seeking similar prayers like the prayers sought in this application dated 4.11.2024 before the lower court which passed the judgment sought to be stayed in this instant application.
26. It is apparent that application dated 28.11.2024 was filed when application dated 4.11.2024 was pending. The Applicant had not withdrawn this application .
27. It is not in doubt that is an abuse of court process to have identical suits/Applications in two different courts seeking similar prayers.
28. Ordinarily the procedure requires that an Application for stay be filed before the court whose Judgment/Decree or order is sought to be stayed then thereafter depending on the outcome the aggrieved party can file/appeal to the next higher court.
29. In order not to foreclose the door to the applicant to appeal against the possible outcome of the Application dated 28.11.2024 before the Lower court I will not determine this Application dated



4.11.2024 on merit but I will strike it out for being incompetent for the reason that its an abuse of the court process to have filed the two similar applications in two different courts.

30. The Applicant shall bear the costs of this Application.

31. Right of Appeal 30 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF APRIL, 2025

S.N MBUNGI

JUDGE

In the presence of :

Court Assistant – Albright Sunguti

In the absence of the parties and counsels.

