



**Ochieng v Raphael (Civil Appeal E194 of 2024)
[2025] KEHC 10947 (KLR) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 10947 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E194 OF 2024**

JM OMIDO, J

JUNE 26, 2025

BETWEEN

SHEM ODHIAMBO OCHIENG APPELLANT

AND

JOANES KEYA RAPHAEL RESPONDENT

RULING

1. The Appellant's Notice of Motion dated 4th October, 2024 is expressed to be brought under Order 42 Rule 6 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya and seeks the following orders:
 1. [Spent].
 2. [Spent].
 3. There be a stay of execution of the judgement and decree entered in Kisumu CMCC No. 213 of 2019 on 27th October, 2021 and Notice to Show Cause dated 30th September, 2024 pending the hearing and determination of the instant appeal.
 4. The costs of this application be provided for.
2. The grounds upon which the application is premised are that the lower court's impugned judgement was delivered on 27th October, 2021 and that the Appellant only came to know about the existence of the suit and the judgement on 30th April, 2024 upon being served with a Notice to Show Cause in execution. An application to set aside the judgement was filed on 16th May, 2024 and was subsequently heard and dismissed on 12th September, 2024. The instant appeal has been preferred from the ruling and order dismissing the appeal.
3. The further grounds upon which the application is preferred are that the instant appeal has overwhelming chances of success and that the same will be rendered nugatory if stay is not ordered and



the Appellant will suffer irreparable loss. The Appellant states that he is ready and willing to provide security for the performance of the decree in such terms as the court may order, in the event that his appeal is not successful.

4. The application is supported by the Appellant's affidavit sworn on 4th October, 2024, which in precis expounds and reiterates the above grounds.
5. The Respondent resists the application and to that end filed a replying affidavit that he swore on 22nd October, 2024. The Respondent has in the affidavit narrated the history of the claim before the trial court and concludes that the Appellant has not met the conditions requisite for the grant of the order of stay pending appeal.
6. The application was canvassed by way of written submissions. I have considered the application, the affidavit in support thereof, the replying affidavit filed in opposition to the motion and the submissions filed by the parties. From the material before me, I deduce the issue for determination to be whether the Appellant has met the conditions necessary for the grant of an order of stay of execution pending appeal.
7. The provision of the law that is applicable in an application for stay pending appeal is Order 42 rule 6 of the Civil Procedure Rules. Let us read the said provision:

- 42(6) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.
- (1).
 - (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.
 - (2). No order for stay of execution shall be made under subrule (1) unless—
 - (3). Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit, a stay of execution pending the hearing of a formal application.
 - (4).
 - (5). An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
 - (6). Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

8. The principles governing stay of execution pending appeal, as provided for under the above provisions of the law are well settled. The Applicant must demonstrate that substantial loss would result in



- the event that stay is not granted; the Applicant must demonstrate that the appeal will be rendered nugatory if stay is not granted; the Applicant must furnish security for the performance of the decree in the event that the appeal is ultimately dismissed; the Applicant must move the court without unreasonable delay.
9. I will proceed to consider the above conditions seriatim.
 10. With regard to substantial loss and the appeal being rendered nugatory, the position prior to this court granting a temporary stay of execution is that the Respondent had commenced execution proceedings by taking out a Notice to Show Cause why the Appellant should not be committed to civil jail. I would agree with the Applicant that it would amount to substantial loss if he is committed to civil jail and that his appeal will be rendered nugatory as he will have been incarcerated if stay is not granted. The two conditions are therefore well established.
 11. In respect of the condition requiring that the Appellant furnishes security for the performance of the decree, the Appellant states in paragraph 11 of his supporting affidavit that he is ready and willing to provide security in such terms as this court may order as a condition for the grant of the order of stay of execution. The Appellant has therefore met this condition.
 12. On the condition of bringing the application for stay pending appeal without unreasonable delay, it is instructive from the record that the order and ruling from which the Appellant has preferred the instant appeal was issued on 12th September, 2024. The Memorandum of Appeal herein was filed on 4th October, 2024, within the time provided in law. The application for stay of execution pending appeal was contemporaneously filed with the appeal on 4th October, 2024. The same was therefore filed without unreasonable delay.
 13. From my foregoing analysis, I reach the result that the Appellant has satisfied all the requisite conditions for the grant of an order of stay of execution pending appeal.
 14. The upshot then is that I will proceed to allow the application dated 4th October, 2024, which I am persuaded is meritorious, in the following terms:
 - a. That an order for stay pending appeal is hereby issued on the conditions that:
 - i. The Appellant shall deposit in a joint interest earning account in the names of the two law firms on record for the parties, with a reputable bank domiciled in and/or with a branch within Kisumu County, the entire decretal amount of Ksh.831,285/- (as per the Notice to Show Cause dated 18th March, 2024) within 45 days from the date hereof.
 - ii. In the event that the condition in (i) above is not complied with by the Appellant, the application dated 4th October, 2024 will be deemed as having been dismissed with costs, effective the date of this ruling.
 - b. Subject to compliance with a(i) above, the costs of the application dated 4th October, 2024 shall abide the outcome of the appeal.
 15. This appeal will be mentioned on 25th September, 2025 for directions. A mention notice to be served upon the Respondent.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 26TH DAY OF JUNE, 2025.

JOE M. OMIDO

JUDGE



For Appellant: Ms. Akinyi.

For Respondent: No Appearance.

Court Assistants: Mr. Ngoge & Mr. Juma.

