



**Mogo Auto Limited v Abdulahi & another (Civil Appeal E1255 of 2024)
[2025] KEHC 11755 (KLR) (Civ) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11755 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1255 OF 2024

LP KASSAN, J

JULY 31, 2025

BETWEEN

MOGO AUTO LIMITED APPLICANT

AND

FATUMA ABDULAHI 1ST RESPONDENT

EUSTACE WACHIRA MURINGO 2ND RESPONDENT

RULING

1. For determination is the motion dated 23.10.2023 filed by Mogo Auto Ltd (hereafter the Applicant) against Fatuma Abdulahi and Eustace Wachira Muringo (hereafter the 1st & 2nd Respondent/ Respondents) seeking inter alia:
 - a. Spent
 - b. Spent.
 - c. That pending hearing and determination of the appeal, the honorable Court be pleased to order stay of execution of the judgment delivered on 15.12.2023 in Nairobi Milimani CMCC No. E1567 of 2023 (hereafter the lower Court Suit), decree and all consequential order or proceedings.
 - d. That the honorable Court be pleased to make such further and or other orders and issue any order relief it may deem just and appropriate to grant in the interest of justice.
 - e. That the costs of the motion be provided for.
2. The motion was brought pursuant to Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA), Order 42 Rule 6 and Order 51 Rule of the Civil Procedure Rules (CPR) on grounds found at the supporting



affidavit of even date sworn by Erick Omondi Onditi. The gist of his deposition is that the lower Court on 15.12.2023 entered judgment in default as against the Applicant in the sum of Kshs. 2,509,550/- whereas the Applicant filed a motion to set aside proceedings and be allowed to participate in the lower Court proceeding. Vide a ruling delivered on 11.10.2024 the lower Court dismissed the said motion and being aggrieved by the same an appeal has been preferred. That the Respondents are on the verge of execution and that should execution proceed the appeal herein will be rendered nugatory occasioning the Applicant substantial loss. He states that the Applicant does not know the Respondent's financial ability as such there exists a real apprehension that if the decretal sum is paid over, the Respondents would be in no position to refund the same should the appeal succeed. He concludes by deposing that Applicant is willing to give such security as the Court may deem fit whereas the instant motion has been filed timeously therefore it ought to be allowed as prayed.

3. The Respondents opposes the motion by way of a replying affidavit dated 29.11.2024 deposed by Patrick Waiganjo Wachira. The nucleus of his response is that the Applicant's motion lacks in substance, is frivolous and vexatious given that the Applicant has not complied with the mandatory conditions to warrant the grant of the orders sought. He deposes that the Applicant has equally not disclosed to the Court the nature of substantial loss that it intends to suffer should the honorable Court decline to grant the orders sought. In summation he deposes that the motion is bereft of merit and that the same ought to be dismissed with costs.
4. Directions were taken on disposal of the Applicant's motion by way of written submissions. The parties duly complied. That said, the Court has considered the rival affidavit material and postulates that the issues for determination concern: -
 - a. Whether the Court ought to grant an order of stay of execution pending hearing and determination of the instant appeal?
 - b. Who ought to bear the costs of the motion?

Whether the Court ought to grant an order of stay of execution pending hearing and determination of the instant appeal?

5. It is trite that the power of the Court to grant stay of execution of a decree pending appeal is discretionary, however the discretion should be exercised judicially. See *Butt v Rent Restriction Tribunal* [1982] KLR 417. The Applicant's prayer for stay of execution pending appeal, is brought under Order 42 Rule 6 of the CPR which provides that: -
 - “(1) 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.
 - (2) 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”.

6. From the said provisions, it is clear that in order to succeed in an application for stay of execution, an applicant must demonstrate that substantial loss may result unless the order of stay is issued; that the motion seeking stay pending appeal has been brought without undue delay; and must give security for the due performance of any decree or order that may ultimately be found to be binding on the applicant. Further, the test on substantial loss and or prejudice likely to be occasioned to a party, where the decree sought to be appealed is a money decree appertains difficulty in paying, or loss of money if payment is made since the Respondent would be unable to repay the decretal sum was conclusively addressed in the of-cited decision of Kenya Shell Ltd v Kibiru & Another [1986] KLR 410.
7. Here, there is no dispute that the Applicants moved with alacrity in filing the instant motion given the fact that the impugned ruling of lower Court was delivered on 11.10.2024 and the instant motion alongside the appeal were lodged on 31.11.2024. On substantial loss, the Applicant has asserted the apprehension that should the Respondents proceed with execution and the appeal succeed there is a likelihood the latter would not be in a position to reimburse the said proceeds of execution. It is well settled that where the applicant expresses such reasonable fears, the evidential burden of proof shifts to the respondent to controvert the same by way of affidavit evidence as that is a matter which is peculiarly within his or her knowledge, as held in the case of National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another [2006] eKLR.
8. It is notable from the rival affidavit material on record that the Respondent’s reply was deposed by counsel and not either of the Respondents. Counsel misguidedly assailed the Applicant’s motion by deposing that the Applicants did not challenge his capacity to refund the decretal sum should the Court decline to grant the orders sought. Palpably, the Applicant aired an apprehension of the Respondents ability to refund the decretal sum should execution issue. Rather than the Respondents offering a riposte to the said apprehension counsel confoundingly took up the mantle yet he is not a litigant in the matter whereas the deposition as expressed was not made on behalf of the client but rather in counsel’s own capacity. Evidently, the Respondent’s failed to assuage the Applicant’s apprehension.
9. On the matter of security, the Applicant has expressed willingness to offer security for the order of stay of execution being sought. In Nduhiu Gitahi & Another v Anna Wambui Warugongo [1988] 2 KAR, the Court cited with approval the decision of Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198 wherein it was succinctly stated that: -

“We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff.....

It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal...”



10. With the totality of the above, this Court has equally taken the liberty of perusing the memorandum of appeal and notes that it challenges both various aspects and or facets of the impugned ruling rendered on 11.10.2024. It is trite that the arguability of an appeal is not one of the preconditions for granting an order of stay pending appeal under Order 42 Rule 6 of the CPR. As earlier noted, Respondents failed to rebuff the Applicant's apprehension on reimbursement however that does not disentitle her from enjoying the fruits of successful litigation.
11. In light of above the Court is persuaded to allow Applicant motion on condition that-;
An order of stay of execution of execution is granted pending hearing and determination of the Applicant's appeal upon the following terms-:
 - a. The sum of Kshs.1,254,775/- be deposited in an interest earning account in the joint names of the advocates of the parties in the matter within forty-five (45) days of this ruling, to act as security for the order of stay of execution pending determination of the appeal.
 - b. Costs of this application shall abide by the outcome of the Appeal.

Orders accordingly!

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF JULY 2025

LINUS P. KASSAN

JUDGE

In the presence of:-

Opiema for Applicant

No appearance for Respondent

Carol – Court Assistant

