



REPUBLIC OF KENYA



**KENYA LAW**  
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**Otieno v Sheikh (Civil Appeal E1244 of 2024)  
[2025] KEHC 11789 (KLR) (Civ) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11789 (KLR)

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

**CIVIL**

**CIVIL APPEAL E1244 OF 2024**

**LP KASSAN, J**

**JULY 31, 2025**

**BETWEEN**

**ELIJAH OTIENO ..... APPLICANT**

**AND**

**AHMEDNOOR MOHAMED SHEIKH ..... RESPONDENT**

**RULING**

1. For determination is Elijah Otieno (hereafter the Applicant) motion dated 29.10.2024 seeking inter alia: -
  - a. Spent.
  - b. That pending the hearing and determination of this appeal and in order to avoid the continued wasting away or dilapidation of Motor Vehicles Registration Numbers KCQ 522E, KCS 137H, KCW 341P, KCW 043W and KCL 417Y all registered in favour of the Applicant and presently detained at Parklands Police Station since 2021, the Honourable Court be pleased to order the release of the said motor vehicles to the custody of the Applicant herein and that the said motor vehicles to be produced or availed on demand by the Applicant as will be directed by this Honourable Court.
  - c. Spent.
  - d. Spent.
  - e. Spent.



- f. That pending hearing and determination of the Appeal, the Honorable Court be pleased to issue a stay of further proceedings and/or any other consequential orders in Nairobi Milimani CMCC No. E553 of 2021 (hereafter lower Court Suit).
  - g. That the honorable Court be pleased to give directions as to the hearing and determination of the appeal.
  - h. That costs of the motion be provided for.
2. The Applicant's motion is brought pursuant to Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA) and Order 42 Rule 6 of the *Civil Procedure Rules* (CPR) and is supported by an affidavit deposed by Applicant on even date. The gist of his deposition is that Ahmednoor Mohamed Sheikh (hereafter the Respondent), instituted the lower Court suit alongside an application whereupon on 02.10.2024 the lower Court reinstated orders for the continued detention of Motor Vehicles Registration Numbers KCQ 522E, KCS 137H, KCW 341P, KCW 043W and KCL 417Y (hereafter suit motor vehicles) at Parklands Police Station. That being aggrieved with the said order he has preferred an appeal. He goes on to depose that the Court needs to stay proceedings in the lower Court pending determination of the instant appeal on account of the irregularity of the proceedings before the lower Court. That the suit motor vehicles continue to waste away at Parklands Police Station thus causing him injustice, irreparable loss and damage. He surmises that it is in the interest of justice that the application is allowed.
  3. The Respondent opposes the motion by way of a replying affidavit dated 22.11.2024. He begins by assailing the motion as being an abuse of the Court process. Meanwhile, the gist of his lengthy affidavit is that notwithstanding the impugned order of the lower Court issued on 02.10.2024, the suit motor vehicles are the only known assets belonging to the Applicant whereas the latter has since been convicted by a competent Court for the offence of theft by servant. He therefore urges this Court not to release the suit motor vehicles and dismiss the Applicant's motion with costs.
  4. In rejoinder by way of a supplementary affidavit, the Applicant confirms his conviction and that he has since served a sentence in respect of the offence by way of a fine imposed by the Court therefore the said criminal proceedings have no bearing to the instant motion. He goes on to depose that the continued detention of the suit motor vehicle amounts to attachment before debt whereas the lower Court suit has yet to be heard. He urges the Court to allow his motion as prayed.
  5. Directions were taken on disposal of the motion by way of written submissions, to wit, the parties duly complied. That said, the Court has duly considered the respective parties' affidavit material alongside the filed submissions and authorities.
  6. At this juncture, it would be remiss if I don't mention that the Court takes great exception with the approach adopted by the parties towards canvassing the motion that is presently for determination. Rather than address the reliefs as sought in the motion vide their rival affidavit material, parties have considerably addressed peripheral issues and or issues that are a preserve of the appellate Court. Ex facie, by the live prayer in the Applicant's motion, the question for consideration at this interlocutory appellate stage is whether this Court ought to order a release of the suit motor vehicles and stay proceedings before the lower Court pending determination of the appeal herein. By opting to digress on the above twin issues, is to do a great disservice upon themselves or yet dissipate, scarce judicial time.
  7. Having addressed myself to the above, the Court proposes to contemporaneously address the twin identified issues. This Court's authority to issue an order in the effect of stay of proceedings pending appeal is donated by Order 42 Rule 6(1) 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 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.
8. Ringera, J (as he then was) in the of-cited decision of *Re Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No. 43 of 2000 spelt out the applicable considerations in determining an application for stay of proceedings, as follows: -

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

9. Further, it may be observed that the need to avoid unnecessary proliferation of proceedings and needlessly dissipating limited judicial resources, are equally key considerations in an application of this nature. The Court of Appeal in *Raymond Ruto & 5 others v Stephen Kibowen* [2021] KECA 745 (KLR) exhorted that: -

“We acknowledge at the outset, that a court will sparingly and only in exceptional circumstances will it grant an order to stay of proceedings which essentially is an interruption of the other parties right to conduct their hearing....

“The learned authors of; Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332, have also given some principles to bring to bear while considering whether or not a court should stay proceedings as follows: -

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...”

10. Aside from the above, due cognizance must be taken of the fact that there is an imposed duty on this Court by dint of Section 1A & 1B of the [CPA](#) to progress the overriding objectives towards the just, expeditious, proportionate and affordable resolution of matters before a Court. Here, having considered the rival arguments, it can be noted from the Applicant’s affidavit material, his objections gyrate around the procedural impropriety leading up to the orders of this Court on 02.10.2024, and



as earlier noted the issue is a preserve for the appellate Court. What I gather to be the Respondent's salient and omnibus retort is that the motion is an abuse of the Court process. No industry was spent by the Respondent to address the merit and or demerits of the reliefs sought by the Applicant.

11. Indubitably, stay of proceedings pending appeal ought to be granted sparingly and only in exceptional circumstances given the scarcity of judicial and necessity towards utilization of judicial time. In spite of the other necessary prerequisites to be considered in respect of the Applicant's motion, this Court must ask itself whether the application has demonstrated such exceptional circumstances notwithstanding the appeal that has since been presented before a higher Court and whether failure to stay proceedings would prejudice the Applicant?
12. To answer the above, this Court must tread lightly so as not to prejudice and or embarrass the appellate proceedings. It must be remembered that the gist of the Applicant's grouse stems from the Respondent's motion dated 26.09.2024, to wit, the lower Court granted ex parte orders setting aside its earlier orders on 20.09.2024 with the order of status quo issued on 19.10.2021 being reinstated. The purport of the orders issued on 20.09.2024, essentially vacated the order of detention of the suit motor vehicle, given that the order was to subsist for a duration of 12 months since its issuance. Consequently, by dint of the order on 02.10.2024, the suit motor vehicles were to continue being detained pending hearing and determination of the Respondent's suit.
13. The appeal before this Court seems to challenge the lower Court ex parte order for offending Order 40 Rule 6 of the *CPR*, granting ex parte substantive orders without according the Applicant an opportunity to be heard and failing to properly exercise her judicial discretion. In *Stanley Kang'ethe Kinyanjui V Tony Keter & 5 Others* [2013] eKLR the Court of Appeal stated:

“The first issue for our consideration is whether the intended appeal is arguable. This court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous, a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable”.

See also *Denis Mogambi Mong'are Attorney General & 3 Others* Civil Appeal No. Nairobi 265 of 2011 (UR 175/2011) where the Court of Appeal stated that:

“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration.”

14. In light of the latter dicta, the Court has equally taken the liberty of perusing the suit before the lower Court which essentially seeks an order of restitution in favor of the Respondent for the loss of property through breach of employee trust by the Applicant; a declaration that the Respondent is entitled to the suit motor vehicles or the proceeds of sale of the suit motor vehicles; and costs of the suit. Visibly, the Court cannot identify the prejudice likely to be suffered by the Applicant if it fails to stay proceedings before the lower Court given that the timeous hearing and determination of the lower Court suit would serve the best interest of both parties. In *George Gathura Karanja v George Gathuru Thuo & 2 Others* [2019] eKLR, the Court of Appeal stated that:

“[A]n appeal/intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible. See the case of Stanley Kangethe Kinyanjui versus Tony Ketter & 5 Others, Civil Appeal No. 31 of 2012 where this Court stated inter alia thus:



“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is irreversible, or if it is not reversible whether damages will reasonably compensate the aggrieved party.”

15. Here, at the heart of the Applicant’s appeal are the orders by the lower Court that have the resultant effect of continuing to detain the suit motor vehicles and nothing to do with the substantive suit. By proceeding to order the release of the suit motor vehicles there is a risk that the Court may have to address itself on questions that are a preserve of the appellate Court, which is likely to embarrass this Court or the appellate proceedings. Conversely, it goes without saying that this Court is alive to the Applicant’s plight towards continued wasting away or dilapidation of the suit motor vehicles. Meanwhile, the Court must guard against the dissipation of its time arising from the prospect of two different courts entertaining somewhat parallel and related proceedings. However, it warrants adding that, here the expeditious disposal of either the lower Court suit or the appeal would only serve the best interest of both parties.
16. While no good reason has been advanced towards staying of the lower Court proceedings, for good order and efficient utilization of the Court’s resources it appears more prudent that the appeal ought to be determined as a priority. That said, the Court is not inclined to allow the Applicant’s motion and the same is accordingly dismissed. However, I will proceed to direct as follows, regarding the appeal.
  - a. That the Applicant to file and serve its record of appeal within thirty (30) days of this ruling.
  - b. That the appeal be heard and determined on priority basis and be disposed of within 120 days of this ruling.
  - c. The costs of the motion in favour of the Respondent to abide the outcome of the appeal.

Orders Accordingly!

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31<sup>ST</sup> DAY OF JULY 2025.**

**LINUS P. KASSAN**

**JUDGE**

In the presence of: -

Onyango for Applicant

No appearance for Respondent

Carol - Court Assistant

