Ruiru Feeds Limited v Gadgetmend International Limited (Civil Appeal E102 of 2025) [2025] KEHC 11743 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11743 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E102 OF 2025

FN MUCHEMI, J

JULY 31, 2025

BETWEEN

RUIRU FEEDS LIMITED ..... APPELLANT

AND

GADGETMEND INTERNATIONAL LIMITED ..... RESPONDENT

RULING

Brief facts

1. The application dated 29th April 2025 seeks for orders of stay of execution in respect of the ruling in Ruiru MCCC No. E568 of 2024 delivered on 25th April 2025 pending the hearing and determination of the appeal against the respondent and their representatives barring them from executing the order under paragraph 15(i) of the said ruling allowing them to secure and take custody of the pledged collateral, specifically the appellant's Director's motor vehicle registration number KBL 600J.

2. In opposition to the application, the respondent filed a Replying Affidavit dated 16th May 2025.

Appellant's /Applicant's Case

3. The applicant states that the trial court rendered its ruling in Ruiru MCCC No. E568 of 2024 on 25th April 2025 granting orders to secure and take custody of the pledged collateral, its director's motor vehicle registration number KBL 600J. The applicant argues that the trial magistrate erred by issuing a substantive order at an interim stage. The applicant avers that the suit stems from a contract dated 9th February 2024 where it was to deliver an EPR system-Oddo Security Systems CCTV, Access Control, Electric fence, Fire Detection System, Anti-Climb fence, structured cabling and IP-Pbx. The applicant states that the respondent argues that the balance owing at the time of instituting the suit was Kshs. 3,000,833.59/- while the applicant argues the amount owing is Kshs. 202,228 as the respondent failed to deliver on the Oddo EPR System and train its employees notwithstanding several reminders.

4. The applicant avers that it terminated the contract dated 9th February 2024 as the respondent failed to deliver the system during the deadline that had been set. During a previous quote by the respondent, the Oddo EPR System was Kshs. 2 million. Thus, the applicant is taken aback by the ruling of the trial court allowing the respondent to take possession of the suit motor vehicle which was presented as collateral upon breach of the financial agreement dated 9th February 2024 without listening to the parties and deciding the main suit on merit. The said order is a substantive order which should be made upon hearing parties in the main suit wherein the trial court will be in a position to determine which party breached the said contract and make equitable orders accordingly.

5. The applicant states that allowing the respondent to take possession of the suit motor vehicle would result in the respondent selling the said motor vehicle even before the suit is heard disadvantaging it should it be successful in the main suit, there will be no recourse if the motor vehicle is sold.

The Respondent's Case

6. The respondent states that the orders granted on 30th April 2025 in respect of the applicant's application dated 3rd December 2024 were interlocutory in nature and were strictly meant to preserve the pledged collateral pending the determination of the suit.

7. The respondent states that the dispute arises from a contract dated 9th February 2024 under which the applicant engaged them to supply and install an ERP System (Oddo), CCTV Systems, access control, electric fence, fire detection system, anti-climb fence, structured cabling and IP-PBX infrastructure. Owing to the applicant's inability to finance the full scope of the project and with the express approval of the applicant, the respondent entered into a loan agreement with I&M Bank to finance the project on behalf of the applicant. As part of the security for the Financing Agreement, the applicant pledged a motor vehicle belonging to its company's director, specifically a Toyota Land Cruiser model UZJ100W registration number KBL 600J as collateral for the loan advanced in support of the applicant's project.

8. The respondent avers that it delivered and installed all security and networking equipment to the applicant as required under the agreement. The applicant issued two cheques, cheque no. 004209 for Kshs. 229,365.87 and cheque no. 003700 for Kshs. 300,000/- both of which were dishonoured upon representation. The respondent argues that the applicant has deliberately failed and neglected to honour its contractual obligations to settle the outstanding debt, which currently stands at Kshs. 3,00,833.59/- inclusive of both principal and interest, a financial burden they have unfairly left to shoulder despite discharging their obligations.

9. The respondent argues that the applicant's conduct of issuing bad cheques and evasion of contractual obligations reflects a party undeserving of discretionary orders the applicant seeks and further underscores the need to preserve the pledged collateral to prevent further loss to them.

10. The respondent further argues that the setting aside of interlocutory orders is a matter of the court's discretion and the applicant has offered no credible assurance or security that the pledged vehicle will be preserved. Further, the respondent states that the pledged collateral was voluntarily offered as security for the loan undertaken to finance the applicant's project. The risk of loss, damage or sale is real and present especially given the applicant's conduct. A mere undertaking to preserve the vehicle is not adequate security in the circumstances.

11. The respondent argues that the applicant has not demonstrated any substantial loss it is likely to suffer if the vehicle remains in their custody. On the contrary, the respondent states that it is at risk of being left without recourse should the applicant dispose of or damage the collateral before judgment is rendered.

12. The applicant filed a Further Affidavit dated 5th June 2025 and states that respondent is the one in breach of the financial agreement for not delivering the Oddo EPR System and failing to hand over the security systems already installed. The director's motor vehicle was to be attached upon default of the applicant thus the order to surrender the suit motor vehicle was premature as the trial court was not able to ascertain the question of breach of contract at an interim stage. The applicant further states that the Oddo EPR System has not been handed over to date and no handling over of the security system has been done and the same remains unutilized. The applicant further avers it denied approval for payment of cheques Nos. 004209 and 003700 because the respondent had failed to deliver on the Oddo EPR System that has not been delivered to date.

13. The applicant avers that the amount owing to the respondent is Kshs. 202,228/- only and not Kshs. 3,000,833.59/-. The applicant further pledges that it will not sell the pledged motor vehicle before hearing and determination of the main suit and will maintain it in good condition. The applicant is apprehensive that the respondent may sell its motor vehicle if the same is surrendered to them before the determination of the main suit.

The Applicant's Submissions

14. The applicant submits that the ruling was delivered on 25th April 2025 and filed the instant application on 29th April 2025, thus the application has been filed timeously. The applicant further submits that the Memorandum of Appeal raises triable issues as it is contesting the fact that the trial court did not appreciate the principles behind granting of injunctive orders. Furthermore, the trial court did not appreciate that the respondent had acted in breach of the financial agreement hence allowing them to have its motor vehicle tilting the balance of convenience in its favour.

15. On substantial loss, the applicant refers to the case of *Jason Ngumba Kagu & 2 Others vs Intra Africa Assurance Co. Limited* [2014] eKLR and submits that the suit motor vehicle was meant to be surrendered to the respondent upon breach of contract and not before the same has been established. Further, there is a risk that the respondent will sell the suit motor vehicle before the main suit is heard in the trial court rendering the proceedings before the trial court an academic exercise. The applicant submits that it will not dispose or tamper with the suit motor vehicle and the same will be surrendered to the respondent should it be successful in the trial suit.

16. The applicant submits that during the disagreement between the parties, the respondent disabled its domain as a way of strong arming it to pay them even though there was a contention with regard to services delivered. The respondent subsequently tried to strong arm it through officers at the Directorate of Criminal Investigation to ensure payment even though there is correspondence between the parties where it repetitively asked the respondent for compliance with the agreement dated 9th February 2024. Thus based on the respondent's conduct, they are not coming to equity with clean hands and are likely to use any opportunity to steal a match against it which will result to substantial loss and injustice.

The Respondent's Submissions.

17. The respondent relies on the case of *Philmark Systems Co. Ltd vs Andermore Enterprises* [2018] eKLR and submits that the trial court granted a preservatory order and did not transfer ownership. The respondent argues that there exists a real and continuing risk that the pledged vehicle, if left in the possession of the applicant, may be wasted, its value diminished or rendered unavailable as a remedy to them. The respondent continues to service the loan while the applicant remains in control of the collateral, thus equitable intervention to preserve the vehicle is both lawful and necessary.

18. Relying on the case of *Machira t/a Machira & Co. Advocates vs East African Standard* [2002], the respondent argues that the applicant has not demonstrated any actual or quantifiable risk of loss beyond speculative fear. The applicant merely asserts that the motor vehicle may be sold before the determination of the suit, a claim that is unsupported by any affidavit evidence or documents indicating that such sale is imminent or contemplated. Further, the motor vehicle remains registered in the name of the applicant and was only to be held as a financing security. Thus, the respondent submits that no substantial loss can arise from enforcement of an order that merely preserves the *status quo* and prevents wastage of a pledged asset. The respondent submits that they risk losing a secured asset without recourse.

19. The respondent relies on the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR and submits that the applicant has not offered any form of security. The respondent submits that the suit motor vehicle was pledged as collateral for the loan, not as security for alleged performance failures by themselves. The terms of the agreement are explicit, that the vehicle was to stand as security in the event of loan default. The applicant cannot simultaneously benefit from the financing and retain the security while refusing to meet its obligations.

20. The respondent submits that they continue to shoulder the financial burden of a loan it secured to implement the contract, while the applicant has consistently acted in breach of its obligations. The applicant issued dishonoured cheques, failed to complete essential handover documentation and unilaterally attempted to terminate the ERP project after delivery and implementation. Despite those defaults, the applicant has continued to use the motor vehicle that had been pledged as collateral, even after falling into default. The continuous use of the equipment and its devaluation would likely lead to the respondent to suffer irreparable harm and injury as the applicant continues to unlawfully enjoy the profits from the use of their equipment without paying for the same. To support their contentions, the respondent relies on the case of *Joseph Mbugua Gichanga vs Co-operative Bank of Kenya Ltd* (2005) eKLR and submits that granting stay at this stage would not only enable the applicant to benefit from its own misconduct but would frustrate their lawful efforts to mitigate ongoing financial loss arising from the applicant's continuing default.

The Law

Whether the Applicant Has Satisfied the Conditions Set Out in Order 42 Rule 6 of the Civil Procedure Rules for Stay of Execution Pending Appeal.

21. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) *Civil Procedure Rules*. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:-

> " 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 orders set aside.

2. 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 1st 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."

22. Thus, under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:

    1. Substantial loss may result to him/her unless the order is made;

    2. That the application has been made without unreasonable delay; and

    3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

23. Substantial loss was clearly explained in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR:-

> " 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."

24. The applicant states that it stands to suffer substantial loss as the suit motor vehicle will be sold in the hands of the respondent before the determination of the suit.

25. It is trite law that an applicant is required to show that execution shall irreparably affect him or will alter the *status quo* to his detriment therefore rendering the appeal nugatory. In the instant case, the suit motor vehicle was pledged as collateral for the financial agreement dated 9th February 2024. On further perusal of the record, the logbook provides that the applicant is the registered owner of the suit motor vehicle. The said vehicle cannot, therefore, be sold by the respondent. In that regard, the applicant's apprehensions are not substantiated. It is therefore my considered view that the applicant has not demonstrated what substantial loss it stands to suffer.

Has the Application has Been Made Without Unreasonable Delay

26. The ruling was delivered on 25th April 2025 and the applicant filed the instant application on 29th April 2025. Thus, the application has been filed timeously.

Security of costs

27. The purpose of security was explained in the case of *Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR the court stated:-

> " 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 the 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."

28. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicant has not offered any form of security for the due performance of the decree.

29. Additionally, grant of stay being a discretionary order, the court is expected to balance the interests of the successful litigant and the applicant's unfettered right to file an appeal to fully ventilate its grievances. This was well stated in the case of *M/s Porteitz Maternity vs James Karanga Kabia* Civil Appeal No. 63 of 1997 where the court held:-

> That the right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.

30. Bearing in mind the said balance and considering the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*, it is my considered view that the applicant has not met the threshold of granting stay of execution pending appeal.

31. Accordingly, it is my considered view that the application dated 29th April 2025 lacks merit and is hereby dismissed with costs.

32. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 31ST DAY OF JULY 2025.

F. MUCHEMI

JUDGE