



REPUBLIC OF KENYA



Boresha Sacco Society Limited v Cheruiyot & 5 others (Civil Appeal E035 of 2025) [2025] KEHC 11330 (KLR) (30 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11330 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E035 OF 2025
RN NYAKUNDI, J
JULY 30, 2025**

BETWEEN

BORESHA SACCO SOCIETY LIMITED APPELLANT

AND

RICHARD KIPKURGAT CHERUIYOT 1ST RESPONDENT

KABON CHERUIYOT 2ND RESPONDENT

KONGATO LEAH CHERUIYOT 3RD RESPONDENT

FLOSSY JEMUTAI KURGAT 4TH RESPONDENT

JOHN KIPKORIR KURGAT 5TH RESPONDENT

JEMELI KURGAT 6TH RESPONDENT

RULING

1. What is pending before this Court for determination is a Notice of Motion Application dated 21st February 2025 in which the Appellant/Applicant is seeking the following orders:
 - a. Spent.
 - b. There be stay of execution of decree in Co-operative Tribunal Case No. E417 of 2021-*Richard Kipkurgat Cheruiyot & 5 others -versus- Boresha Sacco Society Limited* pending hearing and determination of this Application inter-partes.
 - c. There be stay of execution of decree in Co-operative Tribunal Case No. E417 of 2021-*Richard Kipkurgat Cheruiyot & 5 others -versus- Boresha Sacco Society Limited* pending hearing and determination of this Appeal.
 - d. Costs of this Application be in the cause.



2. The Application is based on the following grounds;
 - a. The Appellants obtained an ex-parte judgment in Co-operative Tribunal Case Number E417 of 2021-*Richard Kipkurgat Cheruiyot & 5 others -versus-Boresha Sacco Society Limited* and commenced the execution process.
 - b. The Appellant/Applicant filed an application dated 8th June, 2024 seeking to set aside the ex-parte judgment.
 - c. The Honorable Tribunal *vide* Ruling delivered on 30th January, 2025 dismissed the Appellant's Application.
 - d. The Appellant being aggrieved by the Ruling delivered on 30th January, 2025, appealed against the said decision
 - e. On the instructions of the Respondent's herein, a firm of Auctioneers has proclaimed the assets of the Appellant.
 - f. In a proclamation notice dated 20th February 2025, the auctioneers have given the Appellant seven (7) days to settle the decretal amount plus the auctioneers' costs failure to which the auctioneers will proceed to attach and dispose of the Appellant's movable assets.
 - g. The Appellant has an arguable Appeal with high chances of success.
 - h. Should the attachment of the Appellant's movable assets proceed as planned, the Appellants will be greatly prejudiced as the instant application and Appeal will be rendered nugatory.
 - i. The Respondents will not be prejudiced in any way should this Application be allowed as they will have a fair chance to be heard in the Appeal.
3. The Application is supported by the annexed affidavit sworn by the Appellant/Applicant who avers as follows;
 - a. That the Appellants obtained an *ex-parte* judgment in Co-operative Tribunal Case Number E417 of 2021-*Richard Kipkurgat Cheruiyot & 5 others -versus- Boresha Sacco Society Limited* and commenced the execution process.
 - b. That the Appellant/Applicant filed an application dated 8th June, 2024 seeking to set aside the ex-parte judgment.
 - c. That the Honorable Tribunal *vide* Ruling delivered on 30th January,2025 dismissed the Appellant's Application.
 - d. That the Appellant being aggrieved by the Ruling delivered on 30th January, 2025, appealed against the said decision.
 - e. That the Appellant has also requested to be supplied with certified copies of typed Proceedings and Ruling.
 - f. That on the instructions of the Respondent's herein, a firm of Auctioneers has on 20th February, 2025 proclaimed the assets of the Appellant.
 - g. That the auctioneers have given the Appellant seven (7) days to settle the decretal amount plus the auctioneers' costs failure to which the auctioneers will proceed to attach and dispose of the Appellant's movable assets.



- h. That the Appellant has an arguable Appeal with high chances of success.
 - i. That should the attachment of the Appellant's movable assets proceed as planned, the Appellants will be greatly prejudiced as the instant application and Appeal will be rendered nugatory.
 - j. That the Respondents will not be prejudiced in any way should this application be allowed as they will have a fair chance to be heard in the appeal.
 - k. That this application has been made promptly, in good faith and in the interests of justice
4. As at the time of preparing this ruling, the Respondents had not availed a copy to the court as agreed upon in our bar bench committee. This court was also not able to access one from the CTS. However, given the time it has taken, this court cannot afford to delay further the decision-making process. On the strength of the principles governing the stay of execution pending appeal from an inferior court/tribunal, I bear in mind that the right of appeal is a constitutional imperative, therefore, the risk of prejudice and injustice on the part of the Respondents in absence of their responses maybe minimal to say the very least.

Decision

5. This application was canvassed by way of written submissions from both parties dated 21st March 2025. The Applicant relied on the following cases to persuade this court to exercise discretion to grant stay pending hearing and determination of the appeal *James Wangalwa & Another v Agnes Naliaka Cheseto* [2013] eKLR, *Tropical Commodities Suppliers Ltd & Others v International Credit Bank Limited* (in liquidation) (2004) E.A LR 331, *Masisi Mwita v. Damaris Wanjiku Njeri* [2016]eKLR, *Equity Bank Ltd v Taiga Adams Co. Ltd* [2006] eKLR, *Focin Motorcycle Co. Ltd v Ann Wambui Wangui & Another* [2018] eKLR And *National Industrial Credit Bank Ltd V Aquinas Francis Wasike & Anor* (2006) Eklr
6. To obtain a stay of execution pending an appeal in the High Court of Kenya an applicant must demonstrate that substantial loss may result without a stay, the application was made without unreasonable delay, and that security for performance of the decree has been provided. Additionally, the application must be made before the expiry of the period filing an appeal and sufficient reason to justify the stay must be provided.
7. The approach formulated by the Court in *Linotype-Hell Finance Ltd v Baker* (1992) 4 All ER 887 is also relevant to the facts of this case as captured in the headnote as follows: -
- “Where an unsuccessful Defendant seeks a stay of execution pending an appeal to the superior court, it is a legitimate ground for granting the application that the Defendant is able to satisfy the court that without a stay of execution, he will be ruined and that he has an appeal which has some prospects of success. The old rule that a stay of execution would only be granted where the Appellant satisfied the Court that if the damages and costs were paid, there would be no reasonable prospect of recovering them if the appeal succeeded is now far too stringent a test and does not reflect the Court’s current practice.”
8. Likewise in *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* (2001) EWCA Civ. 2065, the court remarked that:

“The interest of justice is an essential factor for the court’s consideration in determining whether to grant or refuse a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether



there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused, what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgement? On the other hand, if a stay is refused and the appeal succeeds and the judgement is enforced in the meantime, what are the risks of the Appellant being able to recover any moneys paid from the Respondent.”

9. As a consequence of the above the execution of the decision and decree in Eldoret Co-operative Tribunal Case No. E417 of 2021 be and is hereby stayed pending the hearing and determination of the appeal. (ii) The applicant is granted time to file the record of appeal arising from the judgment of the Tribunal within 30 days from today’s date. (iii) That a final status conference be held on 17th of September 2025 that the Applicants do deposit half of the decretal sum in a joint earning interest account with a reputable financial institution within 45 days or in the alternative provide a bank guarantee of equal amount to be deposited with the Deputy Registrar of the High Court. The costs of this application to abide the outcome of the appeal.

GIVEN UNDER MY HAND AND SEAL OF THE COURT PUBLISHED VIA CTS AND EMAILS OF THE RESPECTIVE COUNSELS THIS 30TH JULY 2025 AT ELDORET HIGH COURT

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R. NYAKUNDI

JUDGE

