



Coast Mail Company Limited & another v Awal Enterprises (Civil Appeal E183 of 2024) [2024] KEHC 11405 (KLR) (30 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11405 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E183 OF 2024
JK NG'ARNG'AR, J
SEPTEMBER 30, 2024**

BETWEEN

COAST MAIL COMPANY LIMITED 1ST APPLICANT

COAST BUS (MOMBASA) LIMITED 2ND APPLICANT

AND

AWAL ENTERPRISES RESPONDENT

RULING

1. The 1st and 2nd Applicants filed a Notice of Motion application dated 26th June 2024 under Certificate of Urgency pursuant to Section 1A, 1B, 3A, and 63 (e) of the *Civil Procedure Act*, Order 42 Rule 6 (1) and (2), Order 22 (1) and Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law.
2. The Applicants seek an order of stay of all consequential orders issued vide the ruling of Hon. Nyariki J. (SRM) delivered on 4th June 2024 and erroneously dated 22nd August 2023 and warrants of arrest emanating therefrom pending the hearing and determination of the intended appeal. That costs of this application be provided for.
3. The application is premised on grounds on its face and the Supporting Affidavit sworn on 28th June 2024 by Ajaz Mohamed Mirza that Hon. J. Nyariki delivered a ruling on 4th June 2024 and erroneously dated it 23rd August 2023 in which he ordered inter-alia that the Applicants be arrested and committed to civil jail. That the Applicants are not the judgment debtors and neither are they the proprietors of the subject motor vehicle, and have therefore been wrongly cited. That the Respondents have not lifted the corporate veil and therefore the Applicants' directors cannot be held personally liable for their debts in any event. That the Applicants desire to appeal against the aforementioned ruling, that the intended appeal has a reasonable chance of success and if the Applicants are arrested, the same will render the appeal nugatory. That there has been no delay in filing this application, that parties do not



stand to suffer any prejudice if the orders sought are granted, and that it is in the interest of justice that this application ought to be allowed.

4. The Respondent filed Grounds of Opposition dated 5th June 2024 that the application is an abuse of the court process as the 1st and 2nd Applicants are serial abusers of the court process, particularly the ruling of Odenyo, J. delivered on 19th September 2012. That the Applicants have approached this court with soiled hands and are not entitled to the exercise in their favour. That the matter is res judicata, there is no legal basis upon which the court may make the orders prayed for, and that the Applicants have failed to meet the conditions necessary for the grant of stay of execution. That the application is made mala fides and if granted it will be extremely prejudicial to the Respondent. That the application therefore has no merit and should be dismissed with costs.
5. The Respondent also filed a Replying Affidavit sworn on 5th July 2024 by Reynard Ochieng', the advocate for the Respondent, that the Applicants have made constant attempts to derail the cause of justice. That the Respondent took out warrants of attachment and sale as against the Judgment Debtor in Mombasa MCCC No. 251 of 1993 and the same were issued on 27th February 2009. That Work No Words Auctioneers successfully attached assets belonging to the Judgment Debtor. That the Applicants/Objectors vide Notice of Objection filed on 10th March 2009 stayed the execution process and the objection proceedings were heard to their logical conclusion with a ruling delivered on the same day by Odenyo, J. on 19th September 2012. That the ruling allowed the Applicants/Objectors objection with respect to 3 motor vehicles but KAM 689S. That warrants of attachment and sale dated 4th October 2013 has been rendered impossible as the auctioneers have been unable to trace the motor vehicle registration number KAM 689S.
6. That the application dated 1st April 2016 was heard to its logical conclusion with a ruling delivered by Ho. J. Nyariki (SRM) on 4th June 2024 allowing the Respondent's application dated 1st April 2016. That the Applicants/Objectors have been found to be in contempt of the court orders and that they have failed to meet the conditions for the grant of orders of stay. That granting stay orders would render the decree useless.
7. The application was canvassed by way of written submissions. The Applicants filed written submissions dated 20th July 2024 while the Respondent filed written submissions dated 15th July 2024.
8. I have considered the Notice of Motion application dated 26th June 2024, Grounds of Opposition dated 5th June 2024, the Replying Affidavit sworn on 5th July 2024, and submissions by the parties. The issues for determination are: -
 - a. Whether the ruling delivered by Hon. Nyariki J. (SRM) was erroneously dated
 - b. Whether the issue of Res Judicata arises
 - c. Whether the Applicants have met the conditions for stay of execution of the ruling of Hon. Nyariki J. (SRM) delivered on 4th June 2024
 - d. Who should bear costs of this application
9. On the first issue, the Applicants stated that Hon. J. Nyariki delivered a ruling on 4th June 2024 but erroneously dated it 23rd August 2023. This court's perusal of the ruling shows that it is indeed dated 23rd August 2023 but it does not have the benefit of confirming when the ruling was indeed delivered as the court is yet to be supplied with proceedings. However, the Respondent, as well, has referred to the ruling as having been delivered on 4th June 2024 which this court believes is the correct position.



The said erroneous date is a typographical error that can be corrected pursuant to Section 99 of the *Civil Procedure Act* which provides: -

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court either of its own motion or on the application of any of the parties.”

10. In *Republic v Attorney General & 15 others, Ex-Parte Kenya Seed Company Limited & 5 others* [2010] eKLR, it was further observed as follows: -

“27. It is a codification of the common law doctrine dubbed ‘the Slip Rule’, the history and application of which has a wealth of authorities both locally and from common law jurisdictions. It is a rule that applies as part of the inherent jurisdiction of the court, which would otherwise become functus officio upon issuing a judgment or order, to grant the power to reopen the case but only for the limited purposes stated in the section.

28. Some of the applications of the rule are fairly obvious and common place and are easily discernible like clerical errors, arithmetical mistakes, calculations of interest, wrong figures or dates. Each case will, of course, depend on its own facts, but the rule will also apply where the correction of the slip is to give effect to the actual intention of the Judge and/or ensure that the judgment/order does not have a consequence which the Judge intended to avoid adjudicating on.”

11. On the issue of Res Judicata, the same was raised by the Respondent in their response to the application and submitted on extensively. The Respondent argued that the Notice of Objection filed on 10th March 2009 was heard to its finality by the court and a ruling delivered on 19th September 2012 where the objection to the attachment and sale of motor vehicle registration number KAM 689S was dismissed. That neither an appeal was filed nor was there an application for review of the ruling. The matter is therefore barred by Res Judicata from being re-argued and relitigated.

12. Section 7 of the *Civil Procedure Act* defines Res Judicata as follows: -

No court shall try any suit of issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit of the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

13. The Applicants have stated that since they are not the judgment debtors, they are therefore not obliged to satisfy the decree. This court has, however, noted that they are the ones who laid claim and ownership of the motor vehicle registration number KAM 689S, which issue was determined with finality in the Notice of Objection whose ruling was delivered on 19th September 2012. However, it is the opinion of this court that delving into this issue would amount to discussing merits of the appeal whereas what is before this court is an application for orders of stay pending the appeal. This then leads to the next issue for determination.

14. On the issue of whether the Applicants met the conditions for grant of stay orders, this court has relied on Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules* which sets out the conditions to include:



whether there will be substantial loss; whether the application has been filed without unreasonable delay; and whether there is security for due performance of such decree or order as follows: -

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 referred may apply to the appellate court to have such order 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 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.
15. On substantial loss, the Applicants submitted that neither them nor their directors are judgment debtors to the suit, that committing them to civil jail is putting their liberty at stake and that if the intended execution proceeds, it will render the appeal nugatory. It is therefore the finding of this court that the Applicants have satisfied this ground.
16. On whether the application has been filed without unreasonable delay, this court has noted that the impugned ruling was delivered on 4th June 2024 whereas the application herein was filed on 24th June 2024. There was therefore no inordinate delay in filing the instant application.
17. On the issue of security for due performance of the decree or order, this court relied on the holding in *Arun C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates* [2014] eKLR that: -

“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 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.”
18. The Applicants submitted that they are willing to abide by any conditions and terms as the court may deem fit to impose. This court however has the discretion to make orders on security for the interest of justice.
19. In conclusion, I allow the 1st and 2nd Applicant’s Notice of Motion application dated 26th June 2024 in the following terms:
 - a. The ruling delivered by Hon. J. Nyariki (SRM) but erroneously dated 23rd August 2023 shall be amended to indicate the correct date being 4th June 2024.
 - b. The 1st and 2nd Applicants shall deposit the decretal sum and interest thereon in a joint interest earning account in the names of advocates for the parties in a reputable commercial bank



within 30 days from the date herein, or without prejudice to the foregoing, the 1st and 2nd Applicants shall produce the attached motor vehicle registration number KAM 689S within 30 days, failure to which the warrants of committal to civil jail shall be enforced.

- c. Warrants of committal to civil jail issued on 4th June 2024 against the 1st and 2nd Applicants are hereby suspended until the appeal is heard and determined.
- d. Costs of this application shall be paid to the Respondent.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF SEPTEMBER, 2024.

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Okongo Advocate for the 1st Applicant

No appearance Advocate for the 2nd Applicant

No appearance Advocate for the Respondent

Court Assistant – Mr. Samuel Shitemi

