



REPUBLIC OF KENYA



**Moiz Motors Limited v Oprisianu & 3 others (Civil Appeal E285 of 2024)
[2024] KEHC 13337 (KLR) (Civ) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13337 (KLR)

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

CIVIL

CIVIL APPEAL E285 OF 2024

AN ONGERI, J

OCTOBER 31, 2024

BETWEEN

MOIZ MOTORS LIMITED APPELLANT

AND

DANIEL OPRISIANU 1ST RESPONDENT

WILFRED OMATTO 2ND RESPONDENT

JACKSON KHAGULI GALAYA 3RD RESPONDENT

WILFRED KAKAU BURUDI 4TH RESPONDENT

RULING

1. The application dated 29/2/2024 seeks stay of execution of the judgment entered on 9/12/2022 pending appeal.
2. The 3rd defendant/respondent did not oppose the application.
3. The 1st defendant/respondent opposed the application dated 29/2/2024 and filed a Notice of Preliminary Objection dated 15/4/2024 as follows;
 - i. That the memorandum of appeal dated 22nd December, 2023 is incompetent, incurable and fatally defective, and ought to be struck out for want of compliance with mandatorily provisions of Section 79G of the *Civil Procedure Act*.
 - ii. That the instant appeal and the notice of motion have been filed without leave of the court.
 - iii. That the appeal was filed out of the statutory time of 30 days from date of delivery of the decision without leave of court in breach of Section 79G of the *Civil Procedure Act*.



- iv. That this honourable court lacks the requisite jurisdiction and suitability to entertain, hear and determine this appeal under the provisions of Section 79 of the *Civil Procedure Act*.
4. The parties filed written submissions in both the application and Notice of Preliminary Objection as follows;
5. The appellant submitted that it appealed against the ruling herein within the prescribed time. The appellant argued that it so non service of summons by the 1st respondent that resulted in the judgement being entered against the appellant and as such the 1st respondent conduct led to the loss of time for the appellant to appeal. That it is clear that upon being aware of this matter the appellant moved the court without delay and filed this appeal. The ruling was delivered on 9/2/2024, this appeal was filed on 28/2/2024 within 14 days. This appeal is against the ruling dated 9/2/2024 but it touched on the judgement.
6. The appellant argued that in this case the 1st respondent has not demonstrated any harm it will suffer of the stay is granted considering that the accident motor vehicle has been sold. The appellant argued that it is imperative that in order to protect both the substance of this appeal and the appellants rights and interests, a stay of execution has to be granted against the judgement of 9/12/2022. If a stay is not granted, the appellants application might be rendered moot.
7. The appellant argued that the time allocated to the appellant to satisfy the condition for payment of half the decretal sum was constrained and it was difficult for the appellant to raise the sum required. The appellant appeal has high chances of success as the appellants statement of defence raises triable issues that the appellant ought to have been allowed to defend.
8. The appellant argued that by bot setting aside the judgement entered on 9/12/2022 the appellant is likely to suffer irreparable damage as the judgement will be executed. The appellant had only been made aware of the case after interlocutory judgement had been entered and when auctioneers presented it with warrants of attachment. The appellant had not been served with any summons to enter appearance and thus condemned unheard.
9. The appellants failure to comply with the conditions in the ruling delivered on 18/8/2023 was not intentional but was as a result of an omission on the part of its advocate on record who failed to notify it of the said ruling and that inadvertent error by it counsel ought not be visited upon the appellant.
10. The 1st respondent submitted that the applicant is seeking to review the ruling delivered by the lower court on 18/8/2023. The application for review was dismissed with costs on 9/2/2024. It was argued that the appellant having opted to apply for review of the ruling cannot seek to appeal from the same ruling after the application for review was dismissed. The 1st respondent relied on HA v LB [2022] eKLR where it was held;

“In this case, the appellant having sought to review the order made on 27/5/2021 cannot now purport to appeal against the same. he can only appeal against the decision made on 4th November 2021”
11. The 1st respondent argued that the appellant seeks to stay execution of the judgement delivered on 9/12/2022. The same was filed on 29/2/2024 which is more than one year after. The appellant ought to have obtained leave from the court before filing the appeal and in the instant case no leave was sought.
12. The 1st respondent submitted that the present application has not met the threshold to warrant stay of execution pending appeal. The 1st respondent argued that the applicant has not demonstrated how



he stands to stand to suffer substantial loss if the orders are not granted and lastly that he is willing to furnish security for due performance of the decree.

13. The issues for determination in the Notice of Preliminary Objection and application are as follows;
 - i. Whether this honourable court has the requisite jurisdiction to entertain, hear and determine this appeal under the provisions of Section 79 of the *Civil Procedure Act*.
 - ii. Whether the applicant has a right of appeal out of time having exhausted the right to review.
 - iii. Whether the applicant is entitled to stay of execution pending appeal.
14. The jurisdiction for review is provided for in Section 80 of the *Civil Procedure Act*, Cap 21, Laws of Kenya, and order 45 Rule 2 of the Civil Procedure Rules which provides as follows;

“S.80. Review

Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 Rule 1;

Application for review of decree or order;

- (1) Any person considering himself aggrieved—
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”.

15. I find the right to review does not extinguish the right of appeal.
16. The applicant had not preferred an appeal at the time he applied for review.
17. The governing provision for stay pending appeal is Order 42 Rule 6 (1) and 2 of the Civil Procedure Rules which stipulates as follows;



- 6.(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 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.

18. I grant the applicant stay of execution pending appeal on condition that the entire decretal sum is deposited in court within 45 days of this date.

19. The costs of the application assessed at Ksh.25,000.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31ST DAY OF OCTOBER, 2024.

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A. N. ONGERI

JUDGE

In the presence of:

- for the Appellant
- for the 1st Respondent
- for the 2nd Respondent
- for the 3rd Respondent
- for the 4th Respondent

