



**Maina v Auto Advance Logbook Loans Kenya Limited & another (Civil Appeal E302 of 2024) [2024] KEHC 13502 (KLR) (Civ) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13502 (KLR)

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

**CIVIL  
CIVIL APPEAL E302 OF 2024**

**AN ONGERI, J  
OCTOBER 29, 2024**

**BETWEEN**

**ZELIPHA NYOKABI MAINA ..... APPLICANT**

**AND**

**AUTO ADVANCE LOGBOOK LOANS KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**THE FAMOUS GEORGE AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application coming for consideration in this ruling is the one dated 4/3/2024 brought under Sections 1, 1A, 1B 3, 3A of the *Civil Procedure Act* Order 42 Rule 6 Order 12 Rule 7 and Order 51 Rule 1 & 15 of the Civil Procedure Rules seeking the following prayers;
  - i. That this Application be certified as extremely urgent and be heard exparte in the first instance.
  - ii. That there be interim stay of proceedings and the execution of an order and ruling in Nairobi City Milimani Commercial CMCCC No. E005 of 2024 made on 29.02.2024 pending the hearing and determination of this application.
  - iii. That there be temporary stay of proceedings and the execution of an order and ruling in Nairobi City Milimani Commercial CMCCC No E005 of 2024 made on 29.02.2024 pending the hearing and determination of the appeal.
  - iv. Cost of the application be provided for.
2. The application is based on the following grounds;
  - i. That this Hon. Court issued a ruling against the Applicant herein on the 29.02.2024.



- ii. That the Applicant has since filed an appeal in the High Court that is awaiting directions and hearing.
  - iii. That the memorandum of appeal filed raises triable issues whereof the Applicant needs a day in court necessitating stay of execution of the orders granted.
  - iv. That the Appellants appeal shall be rendered academic if the stay is not granted and the Respondent proceeds to execute the orders
  - v. That it is just and equitable that the orders herein be granted.
3. It is supported by the affidavit of Zelipha Nyokabi Maina sworn on 4/3/2024. In it she stated that she sued the respondents herein seeking a temporary injunction and the court ruled in favor of the respondents.
  4. Dissatisfied with the ruling she has since appealed the same. The attached memorandum of appeal raises triable issues and thus she should be given an opportunity to ventilate it.
  5. She deponed that prior to instituting the application and the suit the respondents were at an advanced stage of execution and if a stay is not granted the respondents will be at liberty to continue with the execution and that would also render the appeal herein nugatory.
  6. The respondent filed a replying affidavit sworn by Fredrick Muhasworn on 15/3/2024. In it he deponed that the matter herein is based on a loan voluntarily entered between the applicant and the 1<sup>st</sup> respondent on 3/11/2022. The applicant should therefore not be left to benefit from her own breach by stalling the process. The respondents are currently incurring storage costs which accrue daily for the motor vehicle still being held in the yard.
  7. He stated that there has been no indication by the applicant on how she intends to sought the defaulted loan and the storage charges. The applicant has thus approached this court with unclean hands and should not be left to benefit from her flagrant failure to uphold her loan obligations.
  8. Further, that the application as filed does not meet the threshold set under Order 42 Rule 6 of the Civil Procedure Rules and should thus be struck out.
  9. The parties filed written submissions as follows; the applicant submitted that with the provisions of Section 3, 3A, 1A & 1B of the *Civil Procedure Act* and Article 159 2 (d) of *the constitution* the courts are no longer limited to the provisions of Order 42 Rile 6 of the Civil Procedure Rules. The applicant argued that courts are given powers to make decisions which are pertinent to the ends of justice and an order for stay of execution is one.
  10. The applicant submitted that they have filed an appeal which is subject to the court's determination. The applicant contended that should the orders be executed the appeal herein would be rendered nugatory.
  11. The applicant further argued that since there was no money decree at trial save the directions to have the matter referred to arbitration, security for due performance does not apply.
  12. The respondent alternatively submitted that the appellant should deposit as security of costs Kshs.500,000. The 1<sup>st</sup> respondent incurred costs on hiring an advocate to defend the lower court suit and in defending the instant appeal. The appellant ought to thus demonstrate to the court that she is actually willing and capable of paying the decretal sum and costs in the event of losing this appeal.



13. The respondent argued that the applicant is attempting to rewrite an express loan agreement that exists between her and the 1<sup>st</sup> respondent through the interim order she is seeking.
14. The respondent further contended that the court has no obligation to rewrite agreements entered into voluntarily by two parties with capacity to contract under the law. The court should therefore not relieve the applicant from her part of the bargain by varying terms of the contract.
15. The sole issue for determination is whether the applicant should be granted stay of the ruling pending appeal.
16. There is a dispute as to whether there was a contract between the parties herein.
17. The Trial court ordered that the matter be referred to Arbitration.
18. This is not a money decree and no order for deposit of security is available.
19. In the case of Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd (2019) eKLR, the court held that;
 

“.....the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security.”
20. It is in the interest of justice that the ruling delivered by the trial court be stayed awaiting the appeal.
21. I allow the application dated 4/3/2024 on the following conditions;
  - i. That the applicant prosecutes the appeal within 60 days of this date.
  - ii. That the applicant pays the costs of this application assessed Kshs.20,000 before the appeal is heard.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29<sup>TH</sup> DAY OF OCTOBER, 2024.**

.....

**A. N. ONGERI**

**JUDGE**

In the presence of:

.....for the Applicant

.....for the Respondent

