



**Thuo v Momentum Credit Limited (Commercial Appeal E040 of 2024)
[2024] KEHC 16810 (KLR) (Commercial and Tax) (29 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 16810 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E040 OF 2024**

**BM MUSYOKI, J
NOVEMBER 29, 2024**

BETWEEN

GRACE NJERI THUO APPELLANT

AND

MOMENTUM CREDIT LIMITED RESPONDENT

RULING

1. This ruling is in respect to the appellant’s notice of motion dated 16th June 2024 in which she sought the following orders;
 1. The application be certified as urgent and service be dispensed with in the first instance.
 2. Pending the inter-partes hearing and determination of this application, an order of stay of execution do and is hereby issued restraining the respondent whether in its personal capacity or through their agents, Antique Auctioneers, or any other agent from auctioning, interfering with or in any way disposing off the motor vehicle registration KBM 758Y.
 3. Pending hearing and determination of the appeal herein, an order of stay of execution do and is hereby issued restraining the respondent whether in its personal capacity or through their agents, Antique Auctioneers, or any other agent from auctioning, interfering with or in any way dispensing off the motor vehicle registration KBM 758Y.
 4. The cost of this application be in the cause.
2. The application was supported by affidavit of the appellant sworn on 16th June 2016. In the said affidavit, the applicant avers that the respondent confiscated the motor vehicle from her on 15th June 2024 despite the same being subject of this appeal. She added that she had taken a loan of Kshs 135,000.00 and despite her having paid a sum of Kshs 188,961.00, the respondent kept on demanding



more payment which culminated to her filing suit in the small claims court. She claimed that her property was in the verge of being cannibalised if the order of stay of execution was not granted. Annexed to the supporting affidavit were: a letter from Sub County Police Commander of Makadara Sub County to industrial area police dated 24th May 2024 which was forwarding a court order in Misc E755 of 2024 dated 14th May 2024; letter dated 28-05-2024 from industrial area police station confirming verification of the said court order; letter dated 27-05-2024 from court administrator of milimani commercial courts verifying court order in Misc application number E755 of 2024; letter from the OCS industrial area police station to the executive officer of tribunals court dated 27-05-2024; letter dated 5-06-2024 confirming that the applicant in the matter had paid for police security and application form for deployment of police officers. All these annexures related to an application by the respondent's appointed auctioneers for security and police assistance to enable them repossess the motor vehicle from the appellant.

3. By a replying affidavit sworn by Sheila Imali on 5th July 2024, the respondent opposed the application. The deponent stated that, after the trial court delivered judgment dismissing the appellant's claim, the respondent on 17th June 2024 advertised the subject motor vehicle for sale which sale was carried out on 25th June 2024 for Kshs 354,000.00. In her opinion, the application had been overtaken by events and the orders if granted, would be in vain. To the affidavit, it was attached newspaper cutting of Daily Nation newspaper of 17th June 2023 showing the advertisement for sale, certificate of sale dated 25th June 2024, letter from the respondent to its appointed auctioneers dated 26th June 2024 authorising release of the motor vehicle to one Stanley Kariuki Wambugu the purchaser and deposit slip for NCBA bank dated 25th June 2024.
4. The application was disposed of by way of written submissions. The applicant's submissions are dated 29th August 2024 while the respondent's are dated 3rd October 2024. Looking at the face and prayers of the application, the applicant seems to be applying for stay of execution in form of an injunction. The prayers in the application do not state which decree or order is being sought to be stayed. One can only assume that it is the decree in milimani small claims court claim number E5215 of 2024 dated 19th January 2024 which is being sought to be stayed.
5. That said, this court notes that the lower court decree was a dismissal of the appellant's claim and it is of the view that, in the circumstances, there is nothing to stay as there is nothing to be executed. I have not been given the benefit of the judgment of the lower court since it has not been exhibited or produced but from the plain reading of the pleadings and documents filed in this matter, I discern that there is no order from the lower court capable of being executed by the respondent. In my view, a negative order does not deserve and should not attract any order for stay of execution. In *Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 Others* (2021) KECA 465 (KLR), the Court of Appeal sitting in Kisumu held that;

‘With regard to the first prayer, a cursory perusal of the record herein shows that the High Court vide its judgment dated 30th July 2020, merely dismissed the applicant's case with costs to the respondents. The parties were not ordered to do anything or refrain from doing anything. What was therefore issued by the High Court is in nature of a negative order incapable of execution and as such there is nothing to stay. See *Western College of Arts and Applied Sciences v EP Oranga & 3 Others* (1976) eKLR where the Learned Judges stated thus;

‘What is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church*, the High Court had ordered the trustees of a fund to make



payment out of the fund. In the instance case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for stay. It is so ordered.’

6. The prayers in the notice of motion in this matter also seem to border on application for injunction. I would therefore place it under Order 42 Rule 6(6) of the Civil Procedure Rules which allows the court to issue an order of injunction provided that the procedure for filing appeal has been complied with. That seems to be the path the applicant has taken going by the contents of her submissions. The conditions for grant of an injunction are well settled. It is trite law that an applicant for an order of injunction must convince the court that he has a prima facie case with a probability of success and that he is likely to suffer loss which would not be compensated by an award of damages and if in doubt, the court will decide the application on a balance of conveniences.

7. The first two conditions must be established in conjunction meaning that if the applicant fails in satisfying one of them, the application must fail. It was so held in *Petrazo Limited (Formerly Brighton Limited) & Another v New Oshwal Distributor Limited & 4 Others* (2022) KEELC 15457 (KLR), where Honourable Justice L. Naikuni stated as follows;

‘Additionally, on the same issue, the Court of Appeal in the case of *Nguruman Limited -Versus- Jan Bonde Nielsen & 2 Others*, [CA No. 77 of 2012](#), laid down three triple requirements required for grant of an order of injunction. The applicant has to: -

- a. Establish his case only at prima facie level.
- b. Demonstrate irreparable injury if a temporary injunction is not granted, and allay any doubts to (b) by showing that the balance of convenience is in his favour.

All these conditions must be met for injunctive orders sought to be grant.’

8. This being an appeal and not an original suit, in my opinion that the first condition should, in the spirit of Order 42 Rule 6(6) of the Civil Procedure Rules be adjusted to the extent that the applicant should convince this court that she has an arguable appeal with high chances of success. The other two conditions remain intact as established. She must prove that she stands to suffer irreparable loss if the application is not allowed or show that it will be convenient in the circumstances for the court to allow the application.

9. In her submissions, the applicant admits that she took a loan from the respondent and alleges further that she had repaid it in full. She denies having obtained a further loan. According to her, she was granted a loan of Kshs 135,000.00 and secured it with her motor vehicle worth Kshs 450,000.00. The applicant has not placed the proceedings of the trial court before me. She has not exhibited the judgment of the lower court and in the circumstances, I am unable to make a decision in one way or the other on whether the appeal is arguable or has a probability of success.

10. The memorandum of appeal contains 7 grounds majority of which are based on matters of facts. Section 38(1) of the [Small Claims Court Act](#) restricts appeals from that court to this court to matters of law. Even in her submissions, the appellant has dwelt on matters of whether or not the loan was paid in full. She picks out a holding she claims is from the judgement to the effect that the court found that she had not established that she had paid the loan in full. To me, that is an issue of fact which this court cannot delve into owing to the statutory limitation of the Section I have cited above. Even if I had jurisdiction to interrogate the issue, no material has been placed before me in proof of repayment



of the loan. The annexures to the appellant's supporting affidavit relate to the process of repossession of the vehicle and not proof of repayment of the loan. In this regard, I find that the applicant has failed to demonstrate that her appeal has high chances of success.

11. Has the applicant demonstrated that she is likely to suffer irreparable damage if the application is not allowed? The application has been restricted to the preservation of the motor vehicle and not any other property. The respondent has deponed that the motor vehicle was sold on 25-06-2024 after following due process of repossession and disposal of the motor vehicle and has exhibited documents to that effect. It is clear from the averments of the applicant that as at the time an order for stay of execution and transfer of the motor vehicle was granted by Honourable Justice Prof (Dr) Sifuna, the respondent had sold the motor vehicle. Order number 5 of the court's directions dated 18-07-2024 granted;

‘In the meantime, a temporary stay of execution and/or transfer of motor vehicle KBM 758Y pending hearing and determination of this application’.

12. The respondent's affidavit is not clear whether the transfer of the motor vehicle was done. That is the only limb of the above mentioned court order which could be enforced at this stage since the sale had been completed before the order was issued. In my view, even if the transfer was done in violation of the said court order, which has not been proved, the same would be subject to a different application such as contempt of court or restitution whose standard of proof would be different from what we are dealing with in this application.
13. The value of the motor vehicle is ascertainable and applicant has not proved that the respondent will not be able to compensate her in the event the appeal succeeds. These circumstances, in my opinion do not demonstrate likelihood of loss which cannot be compensated by an award of damages. I therefore hold that the second condition for grant of an order of injunction has not been established.
14. Having found that the applicant has not established that her appeal has high chances of success and that she is likely to suffer loss which cannot be compensated by an award of damages, there is not need for me to consider the third limb of convenience.
15. The upshot of the above analysis is that the application is found to lack merits and it is hereby dismissed with costs to the respondent

DATED SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Ruling delivered in presence of the appellant in person and Mr. Ndirangu for the respondent.

