



**Al-Husnain Motors Ltd v Okwoba (Suing as the legal representative of the Estate of Phaustine Nengo Opemi - Deceased) & another (Civil Case E056 of 2021) [2024] KEHC 16602 (KLR) (23 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16602 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL CASE E056 OF 2021  
S MBUNGI, J  
DECEMBER 23, 2024**

**BETWEEN**

**AL-HUSNAIN MOTORS LTD ..... APPELLANT**

**AND**

**EDMOND OPEMI OKWOBA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PHAUSTINE NENGO OPEMI - DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**PETER NJUGUNA KAMAU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The appellant filed a motion under certificate of urgency seeking the following orders:
  - i. Spent.
  - ii. Spent.
  - iii. That pending hearing and determination of the application dated 29/10/2024 this Honourable Court be pleased to grant an order of stay of execution of the decree in Mumias SPMCC NO. 72 of 2019 and stay of execution the judgment delivered herein on 11<sup>th</sup> October, 2024.
  - iv. Spent.
  - v. That costs of this application be in the cause.
2. The application was supported by an affidavit by the Branch Manager of the applicant who stated that on 29.10.2024 the 1<sup>st</sup> respondent sent auctioneers to proclaim against the applicant despite them having filed the present application in the morning on the same day. He stated that unless the orders



sought were granted, the applicant's assets shall be sold and/or auctioned off causing it extreme loss and hardship.

3. The 1<sup>st</sup> respondent filed grounds of opposition in response to the application and stated that the application as drawn was fatally defective, bad in law, a non-starter, full of contradictions, misconceived and unsustainable since the applicant has not complied with the orders issued on 29/10/2024 and the certificate of urgency alongside an affidavit dated 30/10/2024 is an abuse of the court process and has no bearing to any application for being filed without leave.
4. He further stated that the applicant unilaterally liquidated the bank guarantee offered as security when the appeal was still pending and has therefore come to court with unclean hands.
5. Moreover, he stated that the Honourable Court is bereft of jurisdiction and is functus officio by dint of its judgment delivered on the 11/10/2024 and urged that the application be dismissed with costs.
6. He also filed a preliminary objection on the following grounds:
  - a. That pursuant to Rule 12 (d) of the Auctioneers Rules, 1997, the application has been overtaken by events.
  - b. That execution is a lawful process and the court is functus officio.
  - c. That the application is fatally defective.
7. The court issued a temporary stay of execution pending this ruling and directed that the application and preliminary objection be canvassed by way of written submissions.

#### **Applicant's Case.**

8. The applicant in its submissions stated that the essence of the application and the orders sought was because the applicant, having been dissatisfied by the judgment by this court, had filed and served a notice of appeal against the judgment.
9. It was the applicant's submission that the appeal met the requirements of Order 42 Rule 6 of the Civil Procedure Rules since the appeal raises triable issues. Further, the applicant averred that the 1<sup>st</sup> respondent had already taken out warrants and attached the applicant's motor vehicle in execution of the decretal sum of Kshs. 2,733,849/- and if successful in the appeal, the money paid is unlikely to be recovered from the respondents thus resulting in great loss and damage to the applicant.
10. Lastly, the applicant submitted that they are willing and ready to deposit the entire decretal sum in a joint account in the names of the advocates of both parties. In addition to this, the appellant stated that they are ready and willing to pay the taxed costs of the appeal as a sign of good faith.

#### **1<sup>st</sup> Respondent's Case.**

11. It was the 1<sup>st</sup> respondent's submission that the application had been overtaken by events by dint of rule 12(d) of the auctioneer's rules, 1997. He submitted that execution had already been done and hence there was nothing to be stayed as prayed by the applicant. Further, the 1<sup>st</sup> respondent stated that the applicant had not demonstrated what substantial loss it would suffer in the event execution ensued.
12. It was his submission that the applicant lodged the application in court after commencement of the execution process. He submitted that the applicant only lodged the application after the proclamation and imminent attachment hence the application fails since the applicant failed to redeem the proclaimed goods as provided for under rule 12(b) and (c) of the Auctioneers rule.



13. The 1<sup>st</sup> respondent further submitted that this court is functus officio, having proclaimed itself in its judgment delivered on 29.10.2024 thus lacks the jurisdiction to hear and determine the instant application filed by the applicant. He averred that the court in its judgment dismissed the appeal, and that the court cannot grant stay on a negative order. He placed reliance in the case of *Kamwara & 5 others vs Mwenda* ELCA No. E007 of 2023.

### **Analysis and Determination.**

14. I have looked at the application and submissions by both parties. The first issue for determination is whether this court is functus officio as raised in the preliminary objection by the 1<sup>st</sup> respondent thus lacking the jurisdiction to entertain this application.

15. The Supreme Court in *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) EA 696, where the Court held as follows:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

16. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.

17. The issue of jurisdiction is an issue which disposes off the suit. The 1<sup>st</sup> respondent’s counsel argues that this court having rendered its decision on the merits of the appeal preferred against the lower court decision, the court cannot go back and issue any order in respect to the appeal. He cited the case of *Kamwara & 5 others vs Mwenda* ELCA No. E007 of 2023. I have read the authority; it is not binding to this court. I have a contrary view. The present application, this court is not being asked to look at the merits or demerits of its decision with a view of changing the decision. It is merely being asked to stay its decision so that the applicant can have a chance to challenge it in the court of appeal. Therefore, the preliminary objection has no merit. This court has jurisdiction to stay or not stay its own decision pending an appeal in the Court of Appeal. It is only functus officio on the merits and demerits of its decision on the appeal preferred from the lower court.

18. The second issue for determination is whether this court should issue stay of execution to the applicant.

19. Order 42 rule 6 of the *Civil Procedure Rules* states as follows: -

Stay in case of appeal [Order 42, rule 6.]

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 preferred 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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

20. The power of a court to grant stay of execution is discretionary. This discretionary power must not be exercised capriciously or whimsically but must be exercised in a way that does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the appeal overturn the trial court's decision. (see *Butt vs. Rent Restriction Tribunal* [1979]).
21. The three conditions to be fulfilled can be summarized as follows;
  - i. that substantial loss may result to the applicant unless the order is made.
  - ii. application has been made without unreasonable delay
  - iii. security as the court orders for the due performance.
22. This court entered judgment against the applicant on 11.10.2024. The present application seeking stay of execution was filed on 29.10.2024. I therefore find that there was no inordinate delay on the part of the applicant.
23. Secondly, the applicant has stated that they stand to suffer loss if the orders sought are not granted, since the respondent is threatening to execute the decree from the trial court by selling and/or auctioning off the applicant's assets.



24. In the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR the court expressed itself as follows:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

25. The applicant further states that the appeal has high chances of success, and if successful, the respondent is unlikely to pay back the decretal sum since he is a man of straw. The respondent never filed any affidavit of means to show or prove that indeed if he is paid the decretal sum and the appeal is successful, he will be in a position to refund the decretal sum paid to him. There is no proof that the respondent is financially liquid and capable of refunding the decretal sum if paid out.

26. In the case of *National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another* (2006) eKLR the Court of Appeal held thus;

“Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”

27. Guided by the above authorities and in the absence of the requisite proof from the Respondent that he is a person of means, I find that the Applicant has satisfied this court that they will suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined in the Court of Appeal. The applicant has therefore fulfilled this condition.

28. On the issue of security, the applicant submitted that it is willing and ready to deposit the entire decretal sum in a joint account in the names of the advocates of both parties. In addition to this, the applicant has stated that they are ready and willing to pay the taxed costs of the appeal as a sign of good faith.

29. In the case of *Joseph Schmaderer* (supra), the court stated as follows with regard to security: -

“... On the other hand, the Applicant’s in their Supporting Affidavit at paragraph 8 have stated that they are ready to furnish such reasonable security as shall be ordered by court. 33. The offer of security by the Applicant is bona fides that the stay application is not a mere exercise to deny the Respondent the fruits of its judgments. The offer for security therefore satisfies a ground for stay. This is as was held in the case of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* (2018] Eklr...”

30. The court in the case of *Richard Muthusi* (supra), stated as follows on the issue:

“...It is deposed in supporting Affidavit that applicants are ready and willing to offer such security as the court may deem fit, proper and just in the circumstances, including depositing the decretal sum in a joint interest earning account by the corresponding firm of advocates pending the outcome of the present appeal. 19. This will secure the interests of both parties



without and bias. The Defendants/Applicants have satisfied the threshold required for an application to be allowed."

31. The above analysis makes me find that the applicant has made out a case to warrant this court to exercise its discretion in its favor. I will allow stay of this court's judgment dated 29.10.2024 on condition that the appellant/applicant deposits the decretal amount awarded in the lower court in a joint interest earning bank account in the names of the advocates representing the parties pending the outcome of the appeal. The decretal amount to be deposited within the next 60 days from this date of the ruling. The applicant to also pay the respondent the taxed costs of the appeal within 60 days after the taxing master taxes the costs.
32. I admonish the applicant for liquidating the bank guarantee earlier given as submitted by the counsel for the 1<sup>st</sup> respondent. However, for the sake of protecting his sacred and constitutional right of appeal, I shall let it pass.
33. Since the applicant's motor vehicle had already been attached and moved to the auctioneer's yard, the motor vehicle may be released to the applicant on condition that the applicant pays the auctioneer's costs.
34. Right of appeal 30 days explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 23<sup>RD</sup> DAY OF DECEMBER, 2024.**

**S.N MBUNGI**

**JUDGE**

**In the presence of:**

Mr. Odhiambo holding brief for Mr. Yogo for the Applicant/appellant present online.

Mr. Abok for the 1<sup>st</sup> Respondent present online.

Court Assistant – Elizabeth Angong'a

