



REPUBLIC OF KENYA



**Solza Limited v Juma (Civil Appeal E189 of 2024)  
[2024] KEHC 15949 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15949 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E189 OF 2024  
AC BETT, J  
DECEMBER 19, 2024**

**BETWEEN**

**SOLZA LIMITED ..... APPELLANT**

**AND**

**EDWARD SAYA MALAVI JUMA ..... RESPONDENT**

**RULING**

1. The Appellant herein filed a Notice of Motion dated 20<sup>th</sup> November 2024, brought under Order 42 Rule 6(1) and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the [Civil Procedure Act](#) where he sought for the following orders:
  - a. Spent
  - b. Spent
  - c. Spent
  - d. That pending the hearing and determination of the Appeal, this Honourable court be pleased to grant a stay of proceedings in MCL & E Case No. E260 of 2024.
  - e. That pending the hearing and determination of the appeal, this Honourable court be pleased to grant a stay of execution of prayer 3 of the orders issued by Hon. Z.J Nyakundi on 28<sup>th</sup> October 2024.
  - f. That the costs of this suit be in the cause.
2. The Motion is premised on the grounds set out on its face and on the supporting affidavit sworn on 25<sup>th</sup> November 2024 by Michael Wanganga, who is the Appellant's country manager.
3. The Appellant asserts that an ex-parte order for the unconditional release of motor vehicle registration number KCV xxxY was issued by Honourable Z.J Nyakundi (SPM) in MCL & E Case No. E260



of 2024 on 28<sup>th</sup> October 2024, without hearing the Appellant herein. The Appellant avers that the Respondent owed the Appellant an amount of Kshs. 979,333.58 as at 31<sup>st</sup> October 2024 pursuant to a logbook loan facility advanced on 1<sup>st</sup> March 2024 by the Appellant to the Respondent upon his request and which the Respondent has refused and/or neglected to pay. He maintains that the Appellant is now in imminent danger of losing the suit motor vehicle registration number KCV xxxY which was used as security in acquiring the loan facility.

4. The Appellant avers that the Respondent has paid an amount of Kshs. 302,963/= less than what he ought to have paid by 31<sup>st</sup> October, 2024. He claims that the loan statement annexed to the supporting affidavit shows that the Appellant received an amount of Kshs. 800,000 on 28<sup>th</sup> October 2024 after the motor vehicle was sold to a third party but the said money was refunded to the new buyer after the Appellant received a court order stopping the sale, hence the reversal. He argues that the Respondent obtained a logbook loan facility from the Appellant in the amount of Kshs. 848,737/= inclusive of the capitalized fees to be paid in monthly installments of Kshs. 59,526/= for a period of thirty six (36) months and the Respondent used his motor vehicle as collateral.
5. The Appellant contended that an amount of Kshs. 764,000/= exclusive of the processing charges was disbursed on the Respondent's bank account. He stated that to secure the Appellant's interests, the Respondent allowed to have the suit motor vehicle registered in the joint names of both the Respondent and the Appellant. He posited that the monthly installment of Kshs. 59,526/= was inclusive of a 4% interest per month as espoused at clause 8 of the terms and conditions of the loan facility, calculated on the base of the principal loan amount plus capitalized fees. He stated that the Respondent was required, without default, to pay a total of Kshs. 2,142,936/= at the end of the 36 months.
6. He averred that under clause 9 of the terms and conditions of the loan agreement, the Respondent was liable to pay a penalty of 10% of the monthly installment on the third day of lateness on each monthly installment, Kshs. 2000/= on the 7<sup>th</sup> day, Kshs. 5,000/= on the 10<sup>th</sup> day while an amount of Kshs. 30,000/= was supposed to be paid on the 19<sup>th</sup> day of lateness as repossession fees. He claimed that despite these clear provisions, the Respondent made inconsistent and late payments. He averred that the Respondent was duly issued with demand letters including those dated 28<sup>th</sup> June 2024 and 27<sup>th</sup> July 2024.
7. He stated that since the Respondent failed to adhere to demands made and pursuant to clause 1 of the loan agreement which allows the Appellant to realize the collateral in case of default, the Appellant issued instructions to auctioneers leading to proclamations. He asserted that the Respondent was served with a proclamation notice on 14<sup>th</sup> September 2024 via his email address. He stated that at the time the Respondent was issued with a proclamation notice, he was required to pay a total of Kshs. 321,110.12/= which included penalties that accrued from April. He stated that the Respondent only made a partial payment of Kshs. 257,963/= as of 14<sup>th</sup> September 2024. He claimed that the motor vehicle was repossessed and advertised for sale by way of advertisement dated 7<sup>th</sup> October 2024. He avers that the Respondent was served with a notice of sale on 7<sup>th</sup> October 2024. It was averred that by an email dated 18<sup>th</sup> October 2024, the Respondent requested for an extension of time until 25<sup>th</sup> October 2024 to clear his arrears but he did not make the payment and the motor vehicle was consequently sold for Kshs. 800,000/=.
8. The Appellant averred that if this Honourable court does not grant the orders sought herein, it will suffer irreparable loss and damage.



9. The Respondent is opposed to this application and in doing so, he relies on a Replying Affidavit he swore on 3<sup>rd</sup> December 2024. He stated that the orders of the lower court were not unmerited since the Appellant and its agent acted contrary to the law in the repossession of the suit motor vehicle. He averred that the amount owing and due to the Appellant is in dispute and exaggerated. He posited that the Appellant and its agent did not comply with Section 23 of the Auctioneers Act and Rule 12 thereof. He asserted that upon receiving the instructions notice, the agent prepared a document it christened “proclamation” which the document is undated and returned the document to the Appellant for alleged dispatch to him. He contended that annexure MW-11 is an email from one Margaret Kioko to the Respondent yet she is not an auctioneer since the firm is owned by one Muremi G. Kinyua. He advanced that the proclamation in issue is illegal and contrary to Section 23 and Rule 12 of the Auctioneers Rules.
10. The Respondent posited that he is aware that the auctioneer is supposed to sign a certificate at the time of physical proclamation of the property in issue, confirming service of the proclamation form. He contended that he was therefore not served with the proclamation as required by Rule 12 of the Auctioneers Act and thereby he was denied the right to redeem his property. He posited that his first encounter with the auctioneers was when the motor vehicle was taken away and he was left with a letter of instructions dated 12<sup>th</sup> September 2024. He averred that procedural propriety is as fundamental as the substance and that a repossession process that flaunts procedure denies the Respondent his right of redemption. He relied on the case of Cooperative Bank Ltd Vs Kangathe & 5 others (2017) eKLR and the case of Syrilla A. Barasa Vs Margaret Aseko & another where the courts emphasized on the importance of compliance of the Auctioneers rules. He advanced that the alleged proclamation was not dated and was not issued physically at the time of attachment as specified in Rule 22 of the Auctioneers Rules. He claimed that the Appellant is not truthful since it is not keen on giving him his full statement of Account since their relation began earlier than March. He posited that the orders sought be declined.

### **Analysis**

10. I have considered the application of the Appellant herein and the response of the Respondent. I find that the main issues for determination are:
  - a. Whether this court should grant an order of stay of proceedings in MCL & E Case No. E260 of 2024.
11. Stay of proceedings is governed by order 42 rule 6(1) of the Civil Procedure Rules which provides that: -

“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 preferred may apply to the appellate court to have such order set aside.”
12. Based on the aforesaid, it is evident that the power to grant stay of proceedings is an exercise of the discretion of the Court on sufficient cause being shown by an Applicant.



13. In the Case of Re Global Tours & Travel Limited (Nairobi) H.C. Winding up Cause No. 43 of 2000 quoted with approval the case of Kenya Wildlife service -versus- Mutembei (2019) eKLR and stated that: -

“In deciding whether to order a stay, a court should essentially weigh the pros and cons of granting or not granting the order, and in considering those matters it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not or whether it is an arguable one. The scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.... “...Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceedings is high and stringent...”

14. Similarly, the court in William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR laid down six principles for the grant of stay of proceedings pending the hearing and determination of an appeal as follows;

“A scan of our decisional law reveals that our Courts have established the following principles for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. See: Kenya Shell Limited v Benjamin Karuga Kibiru & ano. [1986] eKLR; Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000); David Morton Silverstein v Atsango Chesoni [2002] eKLR:

- a. First, there must be an appeal pending before the higher Court.
- b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly.
- c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable.
- d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted.
- e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
- f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.”



15. Therefore, from the above authorities, it is clear that courts have set stringent parameters before a party is granted an order for stay of proceedings.
16. From the authorities cited above, the following are the issues this court should consider in deciding whether or not to grant a stay of proceedings as sought in this application: -
  - i. Whether the Appellant has established that it has a prima facie arguable case.
  - ii. Whether the Appellant has demonstrated that there are exceptional circumstances which make the stay of proceedings warranted.
  - iii. Whether the Appellant has demonstrated that the Appeal would be rendered nugatory if the stay of proceedings is not granted.
17. On whether the Appellant has established that it has a prima facie arguable case, a cursory look at the Memorandum of Appeal by the Appellant, filed on the 20<sup>th</sup> November 2024 shows that the Appellant appeals against prayer 3 of the order issued on 28<sup>th</sup> October 2024 on the following grounds: -
  - i. That the learned magistrate erred in law and fact by issuing final orders *ex parte*, without affording the Appellant an opportunity to be heard in violation of the principles of natural justice and the Appellant's constitutional right to a fair hearing under Article 50 of *the Constitution*.
  - ii. That the learned magistrate erred in law and fact by improperly exercising judicial discretion to issue final orders for the release of the motor vehicle, thereby rendering the main suit nugatory and prejudicial to the Appellant.
  - iii. That the learned magistrate erred in law and fact in failing to appreciate that the suit motor vehicle was collateral for a defaulted loan and had been lawfully repossessed and advertised for sale in accordance with a loan agreement.
  - iv. That the learned magistrate erred in law and fact by disregarding the Appellant's evidence that the Respondent was served with a demand letter, a proclamation notice, a notice of sale of the motor vehicle and the motor vehicle was further advertised in the newspapers.
  - v. That the learned magistrate erred in law and fact by determining the dispute at an interlocutory stage without considering the adverse impact of the Appellant's right under the loan agreement.
  - vi. That the learned magistrate erred in law and fact by issuing *ex parte* orders in contravention of established legal procedure and without sufficient justification for the urgency or necessity of such orders.
18. Without delving into the merits of the appeal, I opine that the grounds in the Memorandum of Appeal raise triable issues. Additionally, from the annexures on the Appellant's affidavit, I find that the Appellant has set out a prima facie case with a chance of success.
19. On whether the Appellant has demonstrated that there are exceptional circumstances which make the stay of proceedings warranted, the Appellant in the Notice of Motion stated that it is apprehensive that the Respondent might repossess the suit motor vehicle and remove the trackers placed, making it difficult to trace the Respondent and the Appellant is not aware of the Respondent's whereabouts or his ability to produce the motor vehicle or refund the monies equivalent to the motor vehicle if the appeal succeeds. Having established the Respondent's multiple defaults in paying the principal debt, the Appellant's apprehension on failing to get compensation in the case that the appeal succeeds is



well founded since it is backed with evidence of the Respondent's continuous defaults through the loan statement marked MW3. I therefore find that the Appellant has demonstrated the existence of exceptional circumstances to warrant the stay of proceedings.

20. Flowing from the aforesaid, I subsequently find that the Appellant has established that this Appeal will be rendered nugatory if a stay of proceedings of the lower court is not issued.

b. Whether this court should grant a stay of execution of prayer 3 of the orders issued by Hon. Z.J Nyakundi on 28<sup>th</sup> October 2024

21. The conditions which a party must establish before a court can order a stay of execution are provided for under Order 42 rule 6(2) Civil Procedure Rules as follows: -

“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.”

22. Basically, the Appellant herein must satisfy the following conditions in the instant case:

- i. That substantial loss may result to the applicant unless the order is made
- ii. That the application has been made without unreasonable delay; and

23. Substantial loss was clearly explained in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR where the court stated 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.”

24. The Appellant in the Notice of motion states that it is likely to suffer substantial loss after the Respondent takes the motor vehicle as it has no knowledge of the Respondent's means and assets/ or his liability to refund the loan facility owed if the suit motor vehicle is lost and if the appeal is successful.

25. The court in the case of Muthui v Kasivu [2024] eKLR stated as follows on this issue:-

“On the ability of the Respondent financial incapability of paying back the decretal sum being one of the reasons the orders should be granted as submitted by the Applicant, I beg to differ. The onus of proving the Respondent's inability goes beyond throwing an allegation without evidence. It is upon the Applicant who alleges the same to go ahead and prove it. Nonetheless, the court has settled this matter and stated that this should not be the reason an order of stay is granted. This was held in Stephen Wanjohi vs. Central Glass Industries



Ltd. Nairobi HCCC No. 6726 of 1991, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonorable miscreant without any form of income.”

26. In this case, the Appellant has demonstrated the reluctance of the Respondent to settle the debt owed to it. Additionally, the suit motor vehicle, being the security of the loan facility, is the most credible and reliable means the Appellant may use to recover its debt. I therefore find that in the event that the Respondent repossesses the car and resumes its daily use, the value of the car continues to depreciate and the Appellant bears the risk of not recovering the true value of the debt owed to it if the value of the security depreciates and the interests of the debt appreciate.
27. I also find that this application was brought without delay.

### **Determination**

28. Flowing from the findings above, I find that the Appellant has met the threshold for grant of the prayers sought and I hereby make the following orders:-
- a. That proceedings in MCL & E Case No. E260 of 2024 are hereby stayed.
  - b. That the orders issued by Hon. Z.J Nyakundi on 28<sup>th</sup> October 2024 are hereby stayed pending the hearing and determination of this appeal.
  - c. Costs are in the cause.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 19<sup>TH</sup> DAY OF DECEMBER 2024.**

**A. C. BETT**

**JUDGE**

In the presence of:

No appearance for Appellant

Respondent in person

Court Assistant: Polycap

