



**Mwiki PSV Sacco Society Limited & another v Dodhia Motors Limited & 2 others (Civil Appeal E459 of 2022) [2023] KEHC 1293 (KLR) (Civ) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1293 (KLR)

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

**CIVIL**

**CIVIL APPEAL E459 OF 2022**

**JK SERGON, J**

**FEBRUARY 24, 2023**

**BETWEEN**

**MWIKI PSV SACCO SOCIETY LIMITED ..... 1<sup>ST</sup> APPELLANT**

**PETER NGOINGO MWANGI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DODHIA MOTORS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**KELVIN KIONI WANYEKI ..... 2<sup>ND</sup> RESPONDENT**

**SIMON KARANGU ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling is predicated on the notice of motion dated June 28, 2022 taken out by the 1<sup>st</sup> and 2<sup>nd</sup> appellants/applicants and supported by the grounds set out on its body and the facts stated in the affidavit of Joseph Mwaniki, the chairman of the 1<sup>st</sup> applicant. The applicants sought for an order for a stay of execution of the ruling delivered on June 17, 2022 and the judgment and decree previously issued on May 7, 2021 by the subordinate court in Milimani CMCC No 7794 of 2019 pending the hearing and determination of an appeal against the aforementioned ruling.
2. The 1<sup>st</sup> respondent opposed the motion by putting in the grounds of opposition dated July 19, 2022 featuring the following grounds:
  - i. That the appellants have failed to satisfy the conditions set out under order 41, rule 6 of the *Civil Procedure Rules, 2010* and an order for stay of execution pending the hearing and determination of their appeal cannot issue.



- ii. That the appellants have failed to demonstrate what substantial loss they are likely to suffer unless the orders sought are issued.
  - iii. That the appellants have not given any security for the due performance of such decree or order as may ultimately be binding on them.
  - iv. That the said application lacks merit, is flawed, untenable, misconceived and it is in the interest of justice that the application be dismissed with costs to the 1<sup>st</sup> respondent.
3. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not participate at the hearing of the motion.
  4. The instant motion was canvassed through written submissions, which I have considered together with the grounds laid out on the body of the motion; the facts deponed to in the supporting affidavit; and the grounds of opposition.
  5. I observed that the applicants sought for an order staying both the ruling delivered on June 17, 2022 and the judgment and decree issued on May 7, 2021.
  6. Upon my study of the record, it is apparent from the averments made in the motion that the aforementioned ruling was in relation to an application filed by the applicants and seeking to have the interlocutory judgment set aside; which application was dismissed by the trial court.
  7. In view of the foregoing, I find that there is nothing left to be stayed in the ruling of June 17, 2022, which leaves the order seeking a stay of execution of the judgment and decree.
  8. The guiding provision is order 42, rule 6(2) of the *Civil Procedure Rules* which sets out the conditions to be satisfied for such an order to be granted.
  9. The first condition is that the application must have been brought without unreasonable delay.
  10. The applicants state and submit that the instant motion has been brought within a reasonable time, having been filed on June 28, 2022. The 1<sup>st</sup> respondent did not address me on this subject.
  11. Going by the averments made by the parties and noted hereinabove, it is apparent that the ruling which forms the subject of the intended appeal was delivered on June 17, 2022 whereas the motion was brought less than one (1) month thereafter. In my view, the motion has been brought within a reasonable time.
  12. The second condition touches on substantial loss to be suffered by an applicant.
  13. The applicants on their part state that unless an order for a stay of execution is granted, the 1<sup>st</sup> respondent will proceed to execute the decree, thereby causing them to suffer irreparable loss.
  14. The applicants by way of their submissions further argue that they stand the risk of having the motor vehicle registration number KCL 969K belonging to the 2<sup>nd</sup> applicant attached by the 1<sup>st</sup> respondent and yet the said motor vehicle was not involved in the accident which formed the subject of the suit before the trial court.
  15. The applicants also argue that the interlocutory judgment was obtained illegally and irregularly, and hence a denial of an order of a stay of execution will render the appeal nugatory.



16. In reply, the 1<sup>st</sup> respondent submits that the applicants have not shown the manner in which they stand to suffer substantial loss in the event that the order sought is denied, citing the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR, where the court expressed itself thus:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment. The applicant has not given to court sufficient materials to enable it to exercise its discretion in granting the order of stay.”

17. It is the ordinary course of principle for a successful party to be granted the privilege of enjoying the fruits of his or her judgment.

18. Consequently, the legal position is that execution is a lawful process and hence a party cannot simply argue that a stay of execution is necessary in order to halt or prevent execution. It is on this basis that the court in the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR cited in the submissions by the applicants, rendered itself thus:

“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. This is what substantial loss would entail...”

19. Upon my consideration of the circumstances set out by the applicants, I am satisfied that they have reasonably demonstrated that they stand to suffer substantial loss if the order for a stay of execution is not granted.

20. Under the final condition which is the provision of security for the due performance of the decree or order, the applicants state and submits that they are ready and willing to provide security in line with the conditions that will be given by this court, citing the case of *Focin Motorcycle Co Limited v Ann Wambui Wangui & another* [2018] eKLR in which the court reasoned that:

“Where the applicant proposes to provide security as the applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The applicant has offered to provide security and has therefore satisfied this ground for stay.”

21. In retort, the 1<sup>st</sup> respondent proposes that the decretal sum be deposited in a joint interest earning account in the names of the parties’ advocates.

22. In the end therefore, the notice of motion dated June 28, 2022 is found to be meritorious and hence it is allowed on the following terms:

- i. There be an order for stay of execution of the judgment and decree previously issued on May 7, 2021 in Milimani CMCC No 7794 of 2019 pending the hearing and determination of the intended appeal on the condition that the applicants deposit the entire decretal sum in an interest earning account in the joint names of the advocates or firms of advocates for the



applicants and the 1<sup>st</sup> respondent within 45 days from the date of this ruling in default of which the stay order shall lapse.

- ii. Costs of the motion shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2023.**

.....

**J. K. SERGON**

**JUDGE**

**In the presence of:**

..... for the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Applicants

..... for the 1<sup>st</sup> Respondent

..... for the 2<sup>nd</sup> Respondent

..... for the 3<sup>rd</sup> Respondent

