



**West Media Limited v Naliaka t/a Everexcelling Ventures (Commercial Appeal E037 of 2022)
[2023] KEHC 1330 (KLR) (Commercial and Tax) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1330 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E037 OF 2022**

A MSHILA, J

FEBRUARY 24, 2023

BETWEEN

WEST MEDIA LIMITED APPELLANT

AND

CATHERINE NALIKA T/A EVEREXCELLING VENTURES RESPONDENT

RULING

1. The Notice of Motion dated March 28, 2022 was brought under article 50 and 159(2) of the Constitution, section 43 of the Small Claims Act, 2016, sections 1A, 1B, 3A and 65 of the Civil Procedure Act, 2010, rule 25 and 28 of the Small Claims Courts Rules, 2019, order 21 rule 7 and 8(2) and (5), order 42 rule 6, order 51 rules 1 of the Civil procedure Rules. The application was supported by the sworn Affidavit of Ann Kingola and seeks the following orders;
 - a. There be a stay of execution, *ex parte* in the first instance, of the decree issued by trial court on application by the respondent and the warrants of sale and/or attachment of property dated March 23, 2022 to Fantasy Auctioneers and the notice of proclamation dated March 24, 2022 be stayed pending the hearing and determination of this notice of motion inter partes.
 - b. There be an order staying the execution of the judgment and decree of the small claims court delivered on March 7, 2022 and consequential orders pending the hearing and determination of the appeal lodged in this court.
 - c. There be an order setting aside the decree, the proclamation dated 2March 4, 2022 and the warrants of sale and/or attachment of property dated March 23, 2022 to Fantasy Auctioneers upon which the said auctioneers purported to proclaim the appellant/applicant's movable goods on March 24, 2022.



- d. The court make such further or other order as it may deem just and expedient in this case.
 - e. The respondent and/or its advocates should bear the auctioneers charges arising from the illegal, irregular decree and warrants of sale and/or attachment dated March 23, 2022 and the proclamation dated March 24, 2022.
 - f. The costs of this application be borne by the respondent.
2. The respondent filed grounds of opposition dated April 27, 2022 on the following grounds;
- a. There is no substantial loss that will result to the Applicant if the order for stay is not granted, the Applicant having demonstrated that it can raise the judgment sum quickly and without any difficulty.
 - b. The application for stay of execution was not made without unreasonable delay.
 - c. The applicant did not comply with the order to deposit the decretal sum with the court on or before the April 4, 2022 and, there being no application or leave to deposit the said sum out of time, the Applicant is not deserving the order of stay of execution pending appeal.
 - d. The applicant's narrative on the proceedings and judgment before the trial court skewed intended to mislead this court.
 - e. The Respondent, a prominent business lady and politician is capable of restitution in the unlikely event that applicant's appeal succeeds.
 - f. The appeal is not arguable and the same is otherwise a ploy to delay the respondent from benefiting from the fruits of her judgment.

Applicant's Case

3. It was the Applicant's case that judgment was delivered on March 7, 2022 in its absence without notice. On March 23, 2022, the respondent allegedly procured warrants of execution from the court and on March 24, 2022 auctioneers proclaimed movable property of the applicant purportedly in execution of the judgment of the court delivered on March 7, 2022. No decree was attached to the warrants or even shared with the appellant/ applicant before or even during the proclamation.
4. Further, rule 25(1) of the *Small Claims Court Rules, 2019* provides that any order or decree of the Court shall be enforceable in accordance with the *Civil Procedure Rules*. Under order 21 rules 7 and 8 of the *Civil Procedure Rules, 2010*, a decree must be extracted from the judgment which agrees with the judgment for its execution. In the present suit, no decree was extracted before obtaining the warrants of execution of March 23, 2022. No draft decree was ever presented to the applicant for approval thus the basis of assertion that there was no decree extracted from the judgment. These facts are admitted by the silence of the respondent on them. Those warrants of 23rd March, 2022 obtained without extracting the decree from the judgment and the proclamation of 24th March, 2022 are illegal and unenforceable.
5. The applicant submitted that no draft decree was presented to the applicant in compliance with the provisions of Order 21 Rule 8 of the Civil Procedure Rules, 2010 for approval. Order 21 Rule 7 of the Civil Procedure Rules, 2010 provides that the decree shall agree with the judgment. None was extracted and the figures in the warrants do not agree with the judgment. The judgment was for Kes 349,137.93. The warrants of execution stated that the decretal amount is Kes 426,376.00, Taxed costs blank (nil) and interest on decretal amount Kes 574.00. These figures in the warrants do not agree with



the judgment of the Court. In *Eco Bank Limited v Elsek & Else (Kenya) Limited & 3 Others* (2015) eKLR, the Court stated that a decree that does not conform to the judgment must be set aside.

6. On whether the appellant/applicant has made a case for stay of execution of the judgment of the court of March 7, 2022; the applicant submitted that the general principle is that this Court will grant the stay of execution if there is no hindrance in so granting in order to protect the appellant/applicant's undoubted right of appeal as was stated in *Butt v Rent Restriction Tribunal* (1982) eKLR.
7. The appellant impleaded in the body of its notice of motion that its appeal as set out in the memorandum of appeal filed in this Court is not idle and has overwhelming chances of success and that will suffer substantial loss if stay is not granted which is irreversible as set out in paragraph 18 of the supporting affidavit of Ann Kingola.
8. The execution of the judgment will entail payment of the said sum partly to third parties including Kenya Revenue Authority in the form of taxes and auctioneers charges which will require elaborate and tedious process including institution of another suit thereby making the applicant to suffer substantial loss in the recovery process and being susceptible to irrecoverable costs and attendant contingencies. The applicant urged the court to grant a stay of execution of the judgment pending the determination of the appeal given that the judgment sum has already been secured by depositing it in this court. The respondent will suffer no prejudice.

Respondent's Case

9. In response, the respondent submitted that on the issue of whether this court has jurisdiction to set aside a decree, proclamation or warrant of attachment in an application for stay of execution pending appeal as sought in prayer (d) of the appellants' application, the court does not have such a power.
10. The respondent pointed out that a "Decree" is defined under section 2 of the *Civil Procedure Act* as " ..the formal expression of an adjudication which,.. conclusively determines the rights of the parties with regard to all... the matters in controversy in the suit." It is, in other words, the summary of the judgment.
11. It was therefore the respondent's argument that the appellant is appealing against the judgment of the small claims court delivered on the March 7, 2022, whose formal expression is the decree which the appellant prays that the same be set aside at this stage. The appellant has not provided any evidence at all that the judgment before the small claims court was delivered in its absence and without its knowledge. The narrative the appellant gives about the proceedings before the trial court has been disputed by the respondent. The appellant ought to have supplied to this court a transcript of proceedings before the trial court to show how its advocate was misled by the said court.
12. In addition, this court is barred by section 34 of the *Civil Procedure Act* from entertaining any questions relating to the execution, discharge or satisfaction of the decree. Whilst the matter before this court is not a separate suit but an appeal, at this stage, this court's powers are confined to order 42 rule 6 of the *Civil Procedure Rules* which deal only with stay of execution and not setting aside of decree or order.
13. Further, once the court has made an order of stay of execution of a decree or order pending appeal, the court need not make a further order of setting aside a proclamation or warrant of attachment that prompted the application for execution. That would be making orders in vain as the stay, if granted, suspends everything pending the hearing and determination of the appeal.
14. With regard to the alleged substantial loss the appellant is likely to suffer, the appellant avers at ground 14 of the application that it will be difficult to recover the decretal sum from the respondent whose financial status is not known, that the respondents' physical and financial means are unknown and



that the appellant's payment would extend to payment to such parties as Kenya Revenue Authority and auctioneers. It was therefore the respondent's submission that the appellant has not fulfilled the conditions of stay set out in order 42 rule 6 of the Civil Procedure Rules.

Issues For Determination

15. Having considered the application, response and the written submissions, the court drafts the following issues for determination;
 - a. Whether an order of stay of execution should issue?
 - b. Whether the decree should be set aside?

Analysis

Whether an order of stay of execution should issue?

16. Order 42 rule 6(1) and (2) of the Civil Procedure Rules provides as follows:
 - (1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 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.”
17. In light of the above, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in order 42 rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
18. In the case of Butt v Rent Restriction Tribunal [*supra*], the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.



19. The purpose of the stay of execution pending appeal was reiterated in [RWW v EKW](#) [2019] eKLR, where the court stated:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellant with those of the Respondent.”

20. Will the applicant suffer substantial loss? The court in [James Wangalwa & another v Agnes Naliaka Cheseto](#) [2012] eKLR, defined what a substantial loss is and stated that:

“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.”

21. The applicant argued that the execution is for recover of the decretal sum of Kes 425,450 and if the appeal succeeds it will be difficult to recover from the respondent whose financial status is unknown to the Applicant and the respondent might not be in a position to refund the same if the intended appeal is successful.
22. On the other hand, the respondent stated that not only is she a prominent business lady but attached two logbooks of two motor vehicles proving that she is the owner of the vehicles and as such she will be able to refund the decretal sum. It is the Court’s opinion that attaching two logbooks is not sufficient proof of ones ability to pay as the value of the cars also remain unknown.
23. Has the application has been made without unreasonable delay? This court is satisfied that there has been no inordinate delay in bringing the instant appeal as the judgment and decree being appealed against was delivered on March 7, 2022 and the memorandum of appeal filed on March 28, 2022.
24. On the issue of security, the Court on March 30, 2022 had directed the applicant to deposit into court the sum of Kes 349, 137 on or before April 4, 2022. The applicant confirmed that the said amount was indeed deposited in court.
25. In light of the above, the court is satisfied that the Applicant has fulfilled the requirements for grant of stay of execution pending appeal as required under order 42 rule 6 of the [Civil Procedure Rules](#).

Whether the decree should be set aside?

26. On whether the decree should be set aside, this is an issue to be determined after the hearing of the applicant’s appeal and it would therefore be premature to make any reference to the decree. The present



application is an application for stay of execution and that is the issue sought to be addressed by the court.

Findings And Determination

27. The application is thus found to be partially successful and an order of stay of execution pending appeal is hereby granted to the applicant; the security deposited into court to be retained there as security pending determination of the appeal;
28. The applicant to prepare and serve record of appeal within thirty (30) days;
29. Mention on March 23, 2023 before the Deputy Registrar for compliance.
30. The applicant to bear the costs of this application.

Orders Accordingly

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

HON. A. MSHILA

JUDGE

In the presence of;-

Opwaka for the Appellant/Applicant

Masore for Nyang'au for the Respondent

Lucy-----Court Assistant

