



REPUBLIC OF KENYA



Alginza Automobiles Limited v Mulei; Muisyo & another (Interested Parties) (Civil Appeal E077 of 2021) [2023] KEHC 1012 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1012 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E077 OF 2021
GMA DULU, J
FEBRUARY 16, 2023**

BETWEEN

ALGINZA AUTOMOBILES LIMITED APPLICANT

AND

SOLOMON YUMBYA MULEI RESPONDENT

AND

CATHERINE MWIKALI MUISYO INTERESTED PARTY

ROBERT NGANGA MUISYO INTERESTED PARTY

RULING

1. Before me is an application by way of Notice of Motion dated 27th April 2022 filed under Order 22 Rule 22 of the *Civil Procedure Rules*, as well as section 3A of the *Civil Procedure Act* (Cap. 21).
2. The application has three (3) prayers, two of which have been spent as follows –
 1. (Spent)
 2. (Spent)
 3. That there be an order for stay of execution herein pending the hearing and determination of the appeal herein.
3. The application has grounds on the face of the Notice of Motion, that auctioneers had commenced execution by proclaiming the applicant's properties on 25/04/2022.
4. The application was filed with a supporting affidavit sworn on 25th April 2022 by Hannif Muhammad a Director of the applicant which amplifies the grounds of the application, and states that the appeal filed has high chances of success, and that it will be rendered nugatory if execution is effected.



5. The said Hannif Muhammad filed a further affidavit sworn on 24/05/2022 in reply to the replying affidavit.
6. The application is opposed through a replying affidavit sworn by the respondent Solomon Yumbya Mulei on 24/05/2022 in which it was deponed that the applicant had filed a similar application in the magistrates court dated 15/11/2021 which was yet to be heard and that judgment herein was delivered way back on 29/09/2021.
7. The application was canvassed through written submissions. In this regard, I have perused and considered the written submissions filed by Eliakim Owala & Company advocates for the applicant, and the submissions filed by Nyaata & Nyaata advocates for the respondent.
8. This being an application for stay of execution of judgment or decree, it is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules, especially Rule 6(2).
9. This court has discretionary power to grant stay of execution in order to do justice to the parties, and each case depends on its own peculiar or special fact, but the principles to be applied by courts in determining such an application are stated in Order 42 Rule 6(2) Civil Procedure Rules.
10. I have noted that the appeal was filed in 2021, but the application filed in April 2022 after execution had commenced. In the circumstances of this case where the applicant denied ownership of the subject motor vehicle and the case proceeded to formal proof in respect of the other two defendants, and since the applicant filed this application immediately they became aware of execution commenced against them, I find that the application herein was filed without unreasonable delay.
11. Will the applicant suffer substantial loss if the stay orders sought are not granted? In my view the answer is in the affirmative, as the applicant/appellant still maintains that they sold the vehicle to the other defendants sued in the trial court and had no control over them. Thus in my view, the issue of sale to be determined on appeal will clear the air on who can be executed against. However, in my view, this appeal should be heard within the year 2023.
12. With regard to provisions of security, the applicant has indicated willingness to pay the decretal amount if the appeal is successful.
13. In view of my above findings, I allow the application on the following terms:-
 - i. I hereby order stay of execution of decree/judgment pending hearing and determination of the appeal herein.
 - ii. The appellant/applicant will ensure that the appeal is heard within this year 2023, otherwise at the end of this year the stay orders granted herein will automatically lapse.
 - iii. The costs of the application will follow determination of the appeal.

DELIVERED, SIGNED & DATED THIS 16TH DAY OF FEBRUARY, 2023, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE

