



Docwide Business Centre (K) Ltd v Abdalla & another (Sued as the legal representatives and administrators of the Estate of Bwana Adi Abdalla - Deceased) (Civil Appeal E046 of 2022) [2023] KEHC 3182 (KLR) (31 March 2023) (Ruling)

Neutral citation: [2023] KEHC 3182 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E046 OF 2022
OA SEWE, J
MARCH 31, 2023**

BETWEEN

DOCWIDE BUSINESS CENTRE (K) LTD APPELLANT

AND

ALI BWANA ADI ABDALLA 1ST RESPONDENT

SALMA BWANA ADI ABDALLA 2ND RESPONDENT

**SUED AS THE LEGAL REPRESENTATIVES AND ADMINISTRATORS OF THE
ESTATE OF BWANA ADI ABDALLA - DECEASED**

RULING

1. Before the court for determination is the amended notice of motion filed on October 17, 2022. It was brought by the appellant, Docwide Business Centre (K) Ltd, under article 159 of the [Constitution](#) of Kenya, 2010, and sections 1A, 1B and 3A of the [Civil Procedure Act](#), chapter 21 of the Laws of Kenya and sections 4, 5 and 10 of the [Insurance \(Motor Vehicles Third Party Risks\) Act](#), chapter 405 of the laws of Kenya as well as order 42 rules 6 of the [Civil Procedure Rules](#). The appellant thereby seeks orders that:
 - (a) spent
 - (b) Spent
 - (c) Spent
 - (d) Pending the hearing and determination of the appeal, an order staying the ruling of Hon J.B Kalo, delivered on March 17, 2022 and judgement delivered by Hon F. Kyambia on August 3, 2021 be issued;



- (e) Pending the hearing and determination of High Court civil case No E008 of 2020: Docwide Business Centre (K) Ltd v APA Insurance, an order staying execution of the ruling of Hon J.B Kalo delivered on March 17, 2022 and judgment delivered by Hon F. Kyambia delivered on August 3, 2021 be issued.
- (d) The costs of the application be provided for.
2. The application is based on the ground that the respondent obtained a judgment/decree which was delivered by Hon F. Kyambia on August 3, 2021; and that the respondent proceeded to proclaim and attach the appellant's property on October 26, 2021 with the intention of selling the same after seven days. In reaction thereto, the appellant filed an application dated October 27, 2021, seeking stay of execution pending the hearing and determination of Mombasa HCCC No E008 of 2020. The appellant was granted the orders of stay pending hearing of the application dated October 27, 2021 on November 29, 2021 which have now lapsed after the trial court dismissed the application dated October 27, 2021.
3. The appellant averred that, as a consequence of the dismissal, it was exposed to precipitate action, granted that the respondent was intent on proceeding with execution, yet his suit against the insurance company was yet to be determined. It further averred that, being dissatisfied with the decision of Hon Kalo, it filed the instant appeal on March 29, 2022; which appeal, in its view, has a high chance of success. The appellant further averred that the application has been brought without undue delay; the impugned ruling having been delivered on March 17, 2022.
4. The application was supported by the affidavit sworn by Michael Mwakio and the documents annexed thereto. At paragraph 17 of that affidavit, Mr Mwakio, a director of the appellant, averred that the appeal has a high chance of success and supplied the reasons for that belief. He further posited that unless the orders sought are granted, the appellant shall suffer substantial loss; while the respondent stands to suffer no prejudice at all, as the pending dispute is on liability as between the appellant and its insurers. Thus, Mr Mwakio averred that it is in the interest of justice that the application be allowed.
5. Upon presentation of the instant application, the appellant was granted stay of execution pending further orders. The interim orders were extended from time to time and directions given for the filing of a response. Although Ms Azei indicated, on September 20, 2022 that a response had been filed on behalf of the respondents, who have since been placed on record as the administrators of the estate of the deceased, Bwana Adi Abdalla, no such document is on the file. Nevertheless, directions were given that the application be canvassed by way of written submissions; and on behalf of the application, written submissions were filed on November 3, 2022 by Mr Nyongesa for the appellant. He relied on section 7 of the [Civil Procedure Act](#) in his endeavour to persuade the court that the instant application is *res judicata* in so far as it raises the same issue as the application before the lower court dated October 27, 2021.
6. Other than the issue of *res judicata*, Mr Nyongesa proposed the following issues for determination:
- (a) Whether the appeal is arguable and whether it be rendered nugatory unless stay of execution is granted;
- (b) Whether the applicant shall suffer substantial loss and whether the respondent will suffer any prejudice;
- (c) Whether the application was brought without unreasonable delay;
- (d) Whether there is sufficient security.



7. Mr Nyongesa pointed out that the lower court rejected the appellant's application for stay of proceedings on grounds that no judgment had been passed at that point in time. The appellant thereafter filed another application dated October 27, 2021 following the delivery of judgment by the lower court on August 3, 2021. The latter application was dismissed on the grounds that it was *res judicata*. It was on this account that Mr Nyongesa urged the court to find that the appeal is arguable.
8. On substantial loss, Mr Nyongesa submitted that, unless stay is granted, the orders issued by Hon Kalo shall be executed. A second implication, he added, is that HCCC No E008 of 2020 which is predicated on the insurer's liability to settle the claim, shall be rendered nugatory; yet the appellant paid premiums to its insurers and therefore had the legitimate expectation that the insurer would indemnify him from the subject liability. According to Mr Nyongesa, the respondent has not presented any material as to his ability to repay the decretal sum in case the appeal succeeds; or in case the appellant succeeds in HCCC No E008 of 2020. He therefore posited that, in the circumstances it will be difficult to recover the funds. Thus, it was the submissions of counsel that the appellant has demonstrated that it stands to suffer substantial loss.
9. On unreasonable delay, Mr Nyongesa urged the court to find that the application was brought without unreasonable delay, considering that the decision the subject of the appeal was made on March 17, 2022. On security for costs, counsel relied on *Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd* [2019] eKLR that the purpose of security is ensure due performance of the decree; and is not a matter of willingness by the applicant, but for the court to determine. Nevertheless, he pointed out that the applicant is willing to deposit a bank guarantee from a reputable bank as security. He therefore urged the court to find that the instant application is meritorious and to allow it with costs.
10. On behalf of the respondents, Ms Azei proposed the following issues for determination:
 - (a) Whether the orders sought are capable of being granted;
 - (b) Whether the applicant has met the requirement for grant of an order of stay of execution;
 - (c) Whether an order of stay of execution can be issued pending the hearing and determination of HCCC No E008 of 2022.
11. Ms Azei submitted that the order of the lower court dated March 17, 2022 is a negative order not capable of execution; the lower court having struck out the appellant's application with costs for being *res judicata*. She added that the lower court neither ordered any party to do something or abstain from doing anything or pay any money. She relied on *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 others* [2016] eKLR and *Milcab Jeruto Tallam t/a Milcab Faith Enterprises v Fina Bank Limited & another* [2013] eKLR.
12. As regards the limb of the appellant's application by which it seeks stay of execution of the judgment delivered by Hon Kyambia, Ms Azei pointed out that the appeal herein is in respect of the ruling of Hon Kalo dated March 17, 2022; and therefore that the appeal has nothing to do with Hon Kyambia's judgment. She made reference to *Suleiman Sumra & another v Said Mohamed Said* [2018] eKLR for the proposition that the jurisdiction of the court to grant stay is only invoked by the filing of an appeal and not before.
13. On whether the appellant has satisfied the conditions precedent to the granting of an order of stay of execution, Ms Azei relied on order 42 rule 6 of the *Civil Procedure Rules* and submitted that there is a plethora of judicial authorities on the point that substantial loss is a factual issue which must be raised in the supporting affidavit; and that the onus is on the applicant to demonstrate that it is likely to



suffer such loss should stay be refused and the appeal succeeds. In her submission, the appellant has not demonstrated that there is any imminent threat of execution in this matter. To buttress her arguments on substantial loss, Ms Azei relied on the following additional authorities:

- (a) [Bubble Engineering Company Limited v Maseno University](#) [2015] eKLR;
- (b) [Stephen Gakere Macharia v NIC Bank Limited](#) [2019] eKLR;
- (c) [Kenya Shell Limited v Benjamin Karuga Kibiru & another](#) [1986] eKLR;
- (d) [Mumilora Limited v Lucy Wambui Yinda](#) [2021] eKLR

14. On whether the appellant has provided sufficient security, counsel pointed out that nothing has been attached to the supporting affidavit to back up the appellant's assertion that it is willing to furnish a bank guarantee as security. She accordingly urged the court to find that the requirement as to security has not been met. She also urged the court to disregard the appellant's submissions as to the prospects of the appeal, contending that it is not a requirement under order 42 rule 6, [Civil Procedure Rules](#). Thus, Ms Azei urged that the application dated October 9, 2022 be dismissed with costs.

15. I have given due consideration to the application in the light of the averments set out in the supporting affidavit as well as the documents annexed thereto. I have similarly considered the written submissions filed herein by the advocates for the parties. The background of the application is fairly straightforward. A perusal of the impugned ruling by Hon Kalo, CM, dated March 17, 2022 shows that judgment was entered in favour of the plaintiff by Hon Kyambia on August 3, 2021 in the lower court matter, being Mombasa CMCC No 1107 of 2017: *Bwana Adi Abdala v Docwide Business Centre*, in the sum of Kshs 1,402,000/=.

16. It is also common ground that the plaintiff/deed holder, who is now deceased had applied for execution; whereupon the appellant's goods were proclaimed with a view of sale. In order to forestall any precipitate action by the plaintiff, the appellant filed an application for stay of execution dated October 27, 2021. Upon considering the said application, the learned magistrate took the view that it was *res judicata* and accordingly struck it out with costs. Here is the view he took in the matter:

“...the plaintiff has deposed in the replying affidavit that the defendant filed an application similar to this before the High Court seeking the same orders being sought herein. His counsel has submitted at length on the issue and laid down the law that is applicable.

On his part, the defendant has maintained a studious silence in the face of the rather serious allegations contained in the replying affidavit. It has neither filed a further affidavit to deny the allegations that the application herein is *res judicata* nor has its counsel denied them in his submissions. The allegations by the plaintiff that the application is *res judicata* is therefore uncontroverted.

If indeed the defendant filed an application in the High Court seeking similar orders as the ones being sought herein and the application was heard and dismissed, then the present application offends the provisions of section 7 of the [Civil Procedure Act](#)...

The averments by the plaintiff being unchallenged and in the absence of any other explanation, the court finds that the present application offends the said provisions of section 7 of the [Civil Procedure Act](#). Consequently the application is struck out with costs.”

17. Being aggrieved by that decision, the appellant filed the instant appeal on March 30, 2022, contending that:



- (a) The learned magistrate misdirected himself in law and principle by dismissing the appellant’s application dated October 27, 2021 on grounds that it was *res judicata* to the application dated October 6, 2021;
 - (b) The learned magistrate erred in law and fact by failing to appreciate the fact that the two applications sought different orders and the subject matter in both applications were different;
 - (c) The learned magistrate erred in law and fact by failing to appreciate the appellant’s detailed submissions to the application dated October 27, 2021;
 - (d) The trial magistrate erred in law and in fact by making directions with respect to an application that was not before him and based on mere submissions by the respondent that the application dated October 27, 2021 was *res judicata*.
18. Consequently, the appellant filed the instant application to forestall sale of its attached property in the lower court matter, granted that a proclamation of attachment had been made on October 26, 2021. It is therefore plain from the foregoing that, although the impugned ruling was consequential to the judgment and decree issued by Hon Kyambia, the fact of the matter is that the appellant has not appealed that judgment. His appeal is in respect of the ruling dated March 17, 2022. In the same vein, I hasten to add that, whether or not the application dated October 27, 2021 was properly struck out for being *res judicata* is the subject of the pending appeal. That issue, though extensively covered by Mr Nyongesa in his submissions, does not fall for determination at this stage. Indeed, the arguability of the pending appeal is not one of the considerations for stay for purposes of order 42 rule 6 of the [Civil Procedure Rules](#).
19. That said, the issues for consideration, as correctly pointed out by Ms Azei, are:
- (a) Whether the applicant has met the requirements for grant of an order of stay of execution in respect of Mombasa CMCC No 1107 of 2017: *Bwana Adi Abdala v Docwide Business Centre* pending the hearing and determination of this appeal;
 - (b) Whether an order of stay of execution can be issued herein but predicated on the pendency of HCCC No E008 of 2022.
20. For purposes of stay of execution pending appeal, order 42 rule 6(2) of the [Civil Procedure Rules](#) provides that: -
- (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.
21. Thus, the appellant had to satisfy the court that, it stands to suffer substantial loss unless the order for stay of execution is made; that it made the application without unreasonable delay; and finally, that it has provided security for the due performance of the order as may be made by court. However, before embarking on a discussion of the conditions it is imperative for the court to consider the nature of the order sought to be stayed and whether it is amenable to stay.
22. The focus of the court’s determination in this ruling is the ruling and orders of Hon Kalo, CM, dated March 17, 2022. As has been demonstrated in paragraph 16 hereinabove, the outcome was that the



- application dated October 27, 2021, was struck out for being *res judicata*. In effect that was a negative order and therefore not amenable to stay.
23. Indeed, in *Cooperative Bank Limited v Banking Insurance & Finance Union Kenya* [2015] eKLR, the Court of Appeal explained that:
- “An order of stay of execution is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposed the existence of a situation to stay – called a “positive order”- either an order that has not been complied with or has partly been complied with...The court has identified negative orders that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order.”
24. The same approach had been taken by the Court of Appeal in *William Wambugu Wabome v Registrar of Trade Unions & another* [2006] eKLR, thus:
- “By dismissing the judicial review application, the Superior Court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted, it will have the effect of reviving the dismissed application. This court cannot undo at this stage what the superior court has done. It can only do so after the hearing of the appeal.”
25. Another decision of the Court of Appeal in this regard is *Kanwal Sarjit singh Dhiman v Keshavji Jivraj Shah* [2008] eKLR, in which it reiterated the position thus:
- “The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on December 18, 2006. The order of December 18, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences v Oranga & others* [1976] KLR 63 at page 66 paragraph C).”
26. Accordingly, it matters not that in this case execution had been put in motion by way or proclamation in respect of the predicate judgment delivered by Hon Kyambia. As pointed out herein above, that judgment has not been appealed. In this regard, I entirely agree with the position taken in *Republic v Kenya Revenue Authority, ex parte Rayan Logistics Ltd* (supra) that:
- “...A broader holding would be that whenever a court strikes out a suit and refuses to grant the substantive orders sought by the court a stay of execution is not available since any such stay of execution would not be directed at a decision against which the intended appeal is not directed.”
27. In the premises, it is plain that the orders issued *vide* the ruling dated March 17, 2022, being negative orders, are incapable of being stayed. To stay those orders would be to revive and reinstate an application which has, for all intents and purposes, been struck out. It is within that context that I find it unnecessary to engage in a discussion of the two issues aforementioned.
28. In the result, the amended notice of motion filed herein on October 17, 2022 lacks merit and is hereby dismissed with costs.



It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 31ST DAY OF MARCH
2023**

OLGA SEWE

JUDGE

