



**Nobel Trading Company Limited v Nduati (Civil Appeal
E035 of 2022) [2023] KEHC 24545 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 24545 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E035 OF 2022
MN MWANGI, J
APRIL 28, 2023**

BETWEEN

NOBEL TRADING COMPANY LIMITED APPELLANT

AND

JOHN CHEGE NDUATI RESPONDENT

RULING

1. On September 2, 2022, the appellant/applicant filed a Notice of Motion dated September 1, 2022 brought under the provisions of Sections 1A, 1B, 3A and 78 of the [Civil Procedure Act](#), Order 42 Rule 6 of the [Civil Procedure Rules](#) and all other enabling provisions of the law. The applicant seeks the following orders -
 - i. Spent;
 - ii. Spent;
 - iii. That this Honourable Court be pleased to grant a stay of execution prohibiting the respondent from the proclamation and attachment of the property of the appellant/applicant in execution of the decree of the Chief Magistrate's Court at Voi in Civil Suit No. 6 of 2020; *John Chege Nduati v Nobel Trading Company Limited* pending the hearing and determination of the appeal; and
 - iv. That the costs of the application be provided for.
2. The application is premised on the grounds on the face of it and is supported by an affidavit and a further affidavit sworn on September 1, 2022 and September 5, 2022, respectively, by Ahmad Imtiaz, a Director of the applicant company. In opposition thereto, the respondent filed a replying affidavit sworn on September 12, 2022 by John Chege Nduati, the respondent herein.



3. The application was canvassed by way of written submissions. The applicant's submissions were filed by the law firm of Oundo, Muriuki & Company Advocates on October 12, 2022, whereas the respondent's submissions were filed on October 14, 2022 by the law firm of Waithera Ngigi & Company Advocates.
4. Mr. Juma, learned Counsel for the applicant submitted that this being an application for stay of execution pending appeal, it turns on the three principles enunciated under Order 42 Rule 6 of the [Civil Procedure Rules, 2010](#). On the issue of whether the applicant has an arguable appeal with chances of success, he relied on the Court of Appeal decision in [National Bank of Kenya Ltd & another v Geoffrey Wabome Muotia & another](#) [2016] eKLR, where the Court defined what entails an arguable appeal. He submitted that the applicant has an arguable appeal since the Trial Magistrate failed to interrogate whether the applicant had instructed the law firm of Kiarie Kariuki & Company Advocates despite the fact that the said law firm had filed a replying affidavit and written submissions confirming that they never received instructions from the applicant, as they were instructed by Monarch Insurance Company Limited, which had insured the suit motor vehicle on behalf of Ilham Farid Mohamed.
5. The applicant's Counsel further submitted that the Trial Magistrate dismissed the applicant's application only on account of a finding that there was proper service of summons, without taking into account other equally salient factors and the peculiar circumstances of the case such as the fact that the applicant was the only defendant sued by the respondent for the occurrence of the alleged accident involving motor vehicle registration No. KCP xxxx, which was registered in the applicant's name at the time of the accident. He stated that the driver and the insured of the said motor vehicle at the time of the alleged accident, was one Ilham Farid Mohamed who had purchased the vehicle from the applicant was not sued and as such, the applicant has an arguable appeal with high chances of success thus warranting an order for stay of execution pending appeal.
6. On the issue of substantial loss, Mr. Juma submitted that the applicant stands to suffer quite a substantial loss in the event that stay of execution is not granted since the unsettled fraction of the decretal sum is in excess of Kshs. 14,071,504.87, which amount has the potential of economically devastating the applicant and occasioning undue hardship on it. He urged this Court to grant stay of execution despite the fact that the decree is a money decree. He cited the case of [Jairus Momanyi Buranda & another v Ojwang Emmanuel Ochieng](#) [2021] eKLR and submitted that there is no indication that the respondent would be in a position to refund the said sum in the event that stay of execution is not granted and the appeal is successful since he is not a man of means and he has not discharged his burden of proving that he would be able to refund the decretal sum in the event that the appeal succeeds.
7. On whether the application has been filed timeously, the applicant's Counsel asserted that the impugned ruling was delivered on August 29, 2022, whereas the application herein was filed on September 2, 2022 hence there was no inordinate delay in bringing the instant application.
8. In the respondent's written submissions, Ms. Ngigi, learned Counsel for the respondent relied on the decisions in [Co-operative Bank Limited v Banking Insurance & Finance Union Kenya](#) Nairobi application No. 133 of 2015 cited in the case of [Douglas Oribu Matoke v William Sagini Oribu](#) [2022] eKLR, and [Municipal Council of Kisumu v Kenya Power & Lighting Company Limited](#) [2017] eKLR and stated that a stay of execution is only granted from the order or decree appealed from and where such an order is a positive order.
9. She referred to the provisions of Order 42 Rule 6(1) & (2) of the [Civil Procedure Rules, 2010](#) and asserted that the applicant has not met the conditions for grant of an order of stay pending appeal.



10. On the issue of substantial loss, Ms. Ngigi relied on the case of *Edward Gachari Njuki & 2 others v AK* [2021] eKLR where the Court discussed what entails substantial loss and stated that the applicant had a duty to demonstrate that it would suffer loss if an order for stay of execution is not granted, since granting such an order is equivalent to denying the respondent who is a successful litigant the fruits of his judgment. She also relied on the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR where Platt, Ag, JA stated that if there is no evidence of substantial loss to be suffered by an applicant, it would be a rare case when an appeal would be rendered nugatory by some other event.
11. Ms. Ngigi cited the case of *UAP Insurance Company Limited v Ephantus Kanyua Ngugi & another (Suing on their own behalf and as the true Administrators of the Estate of the Late Daniel Mwatele Kanyua – Deceased)* [2017] eKLR and submitted that the applicant has not raised any doubt that the respondent will not be able to refund the decretal sum in case the appeal succeeds, thus the respondent does not bear the burden of proving his means.
12. On the issue of deposit of security, the respondent's Counsel submitted that there is no purpose that would be served by depositing the decretal sum in a joint account since the applicant has failed to demonstrate what substantial loss it will suffer in the event that the decretal sum is paid out to the respondent.
13. On whether the applicant has an arguable appeal, Ms. Ngigi asserted that the applicant has not demonstrated that the Trial Magistrate exercised her discretion improperly. She submitted that the instant appeal is against a ruling by the Trial Court delivered on August 29, 2022 where the Court declined to set aside an *ex parte* judgment delivered on January 31, 2022 on the ground that the applicant was served with summons to enter appearance on two different occasions that is on January 21, 2020 and July 30, 2020. She stated that thereafter, the applicant handed over the summons to the insured Ilham Farid Mohamed who is also the buyer of the suit motor vehicle so that she could have the suit defended by her insurance company. Ms Ngigi contended that the insurance company had ostensible authority to instruct an Advocate to act for the applicant in the primary suit

Analysis And Determination.

14. I have considered the application filed herein, the grounds on the face of it, and the two affidavits filed in support thereof. I have also considered the replying affidavit by the respondent and the written submissions by Counsel for the parties. The issue that arises for determination is whether the instant application is merited.
15. In the affidavit filed by the applicant, it deposed that on May 25, 2022 it was served with warrants of attachment of movable property and warrants of sale of property in execution of a decretal sum of Kshs. 12,271,004.87 by Makini Auctioneers. That vide a proclamation of attachment dated May 25, 2022, the said Auctioneers sought to recover Kshs. 14,071,504.87 inclusive of their charges of Kshs. 1,800,500/= in execution of a decree in Voi CMCC No. 6 of 2020 *John Chege Nduati v Nobel Trading Company Limited*. That subsequently, the applicant being stunned by the said documents instructed its Advocates on record to peruse the Court file in Voi CMCC No. 6 of 2020.
16. The applicant averred that upon perusal of the same, its Advocates on record found out that the respondent vide a plaint dated 16th January, 2020 instituted a suit against the applicant for general and special damages on account of a road traffic accident involving motor vehicle registration number KCP xxxx which was at the time of the accident registered in the name of the applicant. That there was an affidavit of service on record indicating that the applicant had been served with summons and that the law firm of Kiarie Kariuki & Company Advocates had filed a memorandum of appearance and statement of defence on the applicant's behalf and the matter went on for hearing. That



judgment on liability was entered against the applicant at 100% and the respondent was awarded Kshs. 14,223,206.00 in general and special damages. It was stated by the applicant that thereafter, the respondent made an application for execution dated May 23, 2022 which indicated that there had already been a partial settlement of Kshs. 3,000,000/=, thus the respondent sought to recover Kshs. 12,271,004.87 from the applicant.

17. The applicant stated that it filed an application dated May 30, 2022 seeking among other orders, the setting aside of the judgment and decree of the Trial Court on the ground that it did not instruct the law firm of Kiarie Kariuki & Company Advocates to act for it in the suit before the Trial Court, and that in as much as on March 9, 2018 when the alleged accident occurred it was the registered owner of the suit motor vehicle, the beneficial and insured owner was one Ilham Farid Mohamed, who had bought the said vehicle from the applicant on deferred payment terms.
18. The applicant stated that vide a ruling delivered on August 29, 2022, the Trial Magistrate dismissed the said application and that it had since filed an appeal against the said ruling which has high chances of success since it raises several arguable and important issues of law. The applicant averred that it stands to suffer substantial loss and the instant appeal will be rendered nugatory in the event the application herein is disallowed.
19. The applicant stated that it is willing to abide by any terms and conditions as to security as the Court may deem fit to impose.
20. In the replying affidavit by the respondent he deposed that the orders sought herein cannot be granted since the applicant has filed an appeal against the Trial Court's ruling dismissing the applicant's application seeking to set aside its Judgment delivered on January 31, 2022. He averred that the Trial Magistrate rightly found that the applicant was fully aware of the primary suit having been served with summons to enter appearance hence the Court did not err by holding that the applicant was represented through the insured of the subject motor vehicle
21. This Court's jurisdiction to grant an order for stay of execution pending appeal is derived from the provisions of Order 42 Rule 6(1) & (2) of the *Civil Procedure Rules, 2010* which state as hereunder –
 - “1). No appeal or second appeal shall operate as a stay of 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.”
22. It is evident from the above provisions that stay of execution is granted against an order and/or decree appealed from. In this application, a perusal of the Memorandum of Appeal dated September 1, 2022 filed by the applicant reveals that the appeal herein is against the Trial Court's ruling delivered on August 29, 2022 dismissing the applicant's application dated May 30, 2022 seeking to set aside the



Judgment of the lower Court delivered on January 31, 2022, a fact which is not disputed by either of the parties herein.

23. In the case of *Raymond M. Omboga v Austine Pyan Maranga* Kisii HCCA No.15 of 2010 cited with authority in *Abubaker Mohamed Al Amin v Firdaus Siwa Somo* [2018] eKLR Makhandia J (as he then was) held as follows-

“The court cannot see how it can order stay of the decree that is not the subject of an appeal. Had the aforesaid order been the subject of this appeal then different considerations would have applied. The court would have looked at it alongside the settled principles aforesaid for granting stay of decree...”

24. In the present application, I agree with the submissions by Counsel for the respondent that stay of execution can only be granted against an order or decree appealed from, therefore this Court cannot order stay of a decree that is not the subject of the instant appeal. To put the foregoing into perspective, paragraph 3 of the application dated September 1, 2022 reads as follows-

“This Honourable Court be and is hereby pleased to grant stay of execution prohibiting the respondent from the proclamation and attachment of the property of the appellant/ applicant in execution of the decree of the Chief Magistrate’s Court at Voi in Civil Suit No. 6 of 2020: *John Chege Nduati –vs- Nobel Trading Company Limited* pending the hearing and determination of the appeal”

25. In view of the fact that the order for stay of execution being sought is against a decree which is not the subject of the instant appeal, the said orders cannot issue. It must be noted that the judgment giving rise to the decree was delivered by the lower Court on 31st January, 2022. The said Judgment is the one which has given rise to the proclamation and attachment of the applicant’s property in Voi CMCC No. 6 of 2020 *John Chege Nduati v Nobel Trading Company Limited*. It is also worth noting that there is a regular judgment and decree in place which have neither been appealed against nor set aside. There is therefore nothing to warrant this Court to keep away the respondent who is a successful litigant from enjoying the fruits of his judgment.

26. The above notwithstanding and looking at the Memorandum of Appeal, the subject of the instant appeal is a ruling dismissing the applicant’s application dated May 30, 2022 seeking to set aside the Trial Court’s judgment. This in itself is a negative order that cannot be executed. The Court of Appeal in the case of *Kanwal Sarjit Singh Dhiman v Keshavji Juvraj Shah* [2008] eKLR, when dealing with an application for stay of execution made the following observation -

“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 vs. Oranga & Others* [1976] KLR 63 at page 66 paragraph C).”

27. In view of the fact that in the application herein, the order dismissing the application dated May 30, 2022 is a negative order, there is nothing for this Court to stay. Consequently, the application dated September 1, 2022 is devoid of merit and it is dismissed with costs to the respondent.

It is so ordered.



**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF APRIL, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of-

Mr. Juma for the Appellant/Applicant

No appearance for the Respondent

Ms B. Wokabi – Court Assistant.

