



REPUBLIC OF KENYA



KENYA LAW
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**Nyamari v Muchendizi & another (Civil Appeal E087 of 2022)
[2023] KEHC 3910 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3910 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E087 OF 2022
JRA WANANDA, J
APRIL 28, 2023**

BETWEEN

JOSEPHAT NYAMARI APPELLANT

AND

KEVIN MUCHENDIZI 1ST RESPONDENT

ERICK KAYELI MASIEMO 2ND RESPONDENT

RULING

1. This Appeal arises from objection proceedings challenging an attempt by the Appellant to seize a motor vehicle in execution of a decree. However, what is before the Court for determination at this stage is the Appellant's Application dated 20/07/2022 filed on the same date.
2. In the Application, the substantive prayers sought by the Appellant is that pending the hearing and determination of this Appeal, this Court do issue orders of stay of execution of the Ruling delivered in Eldoret CMCC No. 806 of 2021 on 23/06/2022, stay of proceedings in the said suit and an order that the Appellant continue keeping the motor vehicle registration number KBK 420B.
3. From the record, in summary, the chronological events material to this Appeal are as follows:
 - i. By an Agreement dated 28/05/2020, the Appellant sold to the 1st Respondent the said motor vehicle Registration number KBK 420B, Toyota Noah at a purchase price of Kshs 500,000/-.
 - ii. By the Plaintiff filed in the said Eldoret CMCC No. 806 of 2021 dated 27/09/2021, the Appellant sued the 1st Respondent claiming that the 1st Respondent failed to complete payment of a balance of Kshs 100,000/-. The Appellant therefore prayed for general damages with interest, repossession of the motor vehicle, permanent injunction restraining the 1st Respondent from transferring the vehicle and costs of the suit.



- iii. The 1st Respondent did not defend the suit and as a result a default Judgment was entered against him. Subsequently the suit proceeded for formal proof after which a substantive Judgment was entered on 07/04/2022 granting all the prayers sought in the Plaint.
 - iv. Armed with the Judgment and Decree, the Appellant proceeded to execute the Judgment by repossessing the motor vehicle which was at that point in time in the possession of the 2nd Respondent. According to the 2nd Respondent, the repossession was carried out on or about 28/04/2022.
 - v. Unfortunately for the Appellant a “spanner was thrown into the works” when on 29/05/2022, the 2nd Respondent filed an Application under Order 22 Rule 51(2) of the Civil Procedure Rules objecting to the attachment or repossession of the vehicle in execution of the decree.
 - vi. The 2nd Respondent claimed that he was the registered owner of the motor vehicle having purchased the same from the 1st Respondent, that despite being the owner thereof he was never joined in the suit as a party and that he was therefore a stranger to the suit.
 - vii. The Application was canvassed and it appears that by the Ruling delivered on 23/06/2022, the trial Court was satisfied that the 2nd Respondent was lawfully in possession of the vehicle, allowed the Application and ordered the Appellant to surrender the vehicle back to the 2nd Respondent. I use the phrase “it appears” because neither of the parties has exhibited a copy of the Ruling to any of the Affidavits filed herein.
 - viii. Aggrieved by the said Ruling, the Appellant filed this Appeal on 28/06/2022 challenging the Ruling and praying that the same be set aside.
4. As aforesaid, on 20/07/2022 the Appellant also filed the present Application of the same date seeking stay of execution, stay of proceedings and an order that the Appellant continues to keep the said vehicle pending the hearing and determination of the Appeal
 5. By the directions given on 28/07/2022, the Appellant was, in the interim, granted conservatory orders for stay of execution pending the hearing and determination of the Application.

Grounds of the Application

6. Basically, the grounds of the Application can be summarised to be that on 07/04/2022 the trial Court allowed the Appellant to repossess the vehicle, pursuant thereto he effected the repossession, upon the 2nd Respondent’s Application the trial Court subsequently ordered him to release the vehicle back to the 2nd Respondent, he is dissatisfied with the orders hence he filed this Appeal, it is in the interest of justice that the Application be allowed, he has an arguable and meritorious Appeal, he will be greatly prejudiced if the matter were to proceed in the form in which it is now, he will suffer irreparable prejudice, loss and damage if the orders sought are not granted and the Application has been brought without delay.

Affidavits filed by the parties

7. In support of the Application, the Appellant relied on his Supporting Affidavit sworn on 20/07/2022. He reiterated the grounds referred to above and added that he is aggrieved by the trial Court’s refusal to allow him to call his witness, the refusal amounted to curtailing his right to be heard as guaranteed under Article 50 of the Constitution, the suit is scheduled for mention, the Appeal will be rendered nugatory if the stay is not granted, the 2nd Respondent will move to repossess the vehicle if the orders



- are not granted and that he is willing to provide security pending hearing and determination of the Appeal.
8. In opposition, the 1st Respondent filed his Replying Affidavit sworn on 11/08/2022. He deponed that he filed an Application seeking to stay the Judgment entered by the trial Court, the Appellant has come to Court with unclean hands since on 23/09/2021 he executed an Agreement indicating that the 1st Respondent had cleared the debt, he (1st Respondent) had since sold the vehicle to the 2nd Respondent, he does not owe the Appellant any money, the 2nd Respondent has since registered the vehicle in his name and the Appellant will not suffer any harm since he sold the vehicle to the 1st Respondent.
 9. The 2nd Respondent also opposed the Application and filed his Replying Affidavit sworn on 10/08/2022. He deponed that he was not a party to the trial Court suit despite being the owner of the vehicle, he was never served with any documents in the suit despite having purchased the vehicle, the Appellant never requested for any witness to be called and since he was represented by a Counsel he requested that the matter proceed by way of written submissions which they did.
 10. The 2nd Respondent added that the Court ruled in favour of the 2nd Respondent, the Appellant will not suffer any harm since he had sold the vehicle to the 1st Respondent, pursuant to the Agreement dated 23rd September 2021 the 1st Respondent had paid the Appellant, before purchasing the vehicle the 1st Respondent had informed the 2nd Respondent that the Appellant had no claim regarding the vehicle, in fact the 1st Respondent had an agreement indicating that the 1st Respondent had indeed paid the Appellant, after purchasing the vehicle he was issued with a log-book by the seller upon which he effected a transfer in his favour and that it is in the interest of justice that the Application be dismissed to enable the 2nd Respondent enjoy his right to property as provided for by Article 40 of *the Constitution*.
 11. In reply, the Appellant filed a Further Supporting Affidavit sworn on 14/09/2022. He deponed that he sold the vehicle to the 1st Respondent and the 2nd Respondent sold it to the 2nd Respondent thus disobeying Court Orders, he reiterated that the 1st Respondent left behind a balance of Kshs 100,000/-, he (Appellant) only entered into the agreement dated 28/05/2020 and he is not aware of any second agreement dated 29/09/2021, upon realizing that it was a fraud he walked out with his witness however the 1st Respondent proceeded to manufacture the said agreement dated 29/09/2021 and that the agreement is contradictory since the 1st Respondent was in possession by the time he was alleging taking possession.
 12. He added that the vehicle had been held in an undisclosed location which made it difficult for the auctioneers to access it, the 2nd Respondent has not produced any evidence that he had purchased the vehicle from the 1st Respondent, he (Appellant) is a stranger to the 2nd Respondent since he had never done any transaction with him, the 2nd Respondent had mysteriously transferred the vehicle which this Court should order the police to investigate, the 2nd Respondent has not shown how he acquired the vehicle from the 1st Respondent who had not obtained full title to the vehicle and that even according to National Transport & Safety Authority (NTSA) the previous owner was one Bruce Welimo who never did the transfer to the 2nd Respondent.
 13. He further deponed that the log-book showing the 2nd Respondent as the registered owner was obtained in an opaque, mysterious manner which was fraudulent, the 1st and 2nd Respondent colluded while the case was ongoing to disenfranchise the Appellant from obtaining the vehicle as a result of the breach of contract by the 1st Respondent and that the transfer was done on 26/11/2021 in a bid to deny him the fruits of justice.



Appellant's Submissions

14. In summary, the Appellant has submitted that he has an arguable Appeal with a high chance of success, if the orders are not granted the Appeal will be rendered nugatory, since repossessing the vehicle in execution of the trial Court's decree he has been the one in possession of the vehicle, the status quo ought to be maintained and that he has met the threshold for the grant of stay of proceedings.

1st Respondent's Submissions

15. In opposition to the Application, Counsel for the 1st Respondent submitted that for this Court to grant a stay of proceedings the Appellant ought to show that he has an arguable appeal with high chances of success such that if stay of proceedings is not granted the Appeal will be rendered nugatory. He cited the decision in *Global Tours & Travels Limited; Nairobi Winding-Up* Cause No. 43 of 2000.
16. He submitted that the Application for stay of proceedings is a delaying tactic by the Appellant meant to defeat the ends of justice pursuant to Article 159 of the *Constitution*, such an order is a serious matter and should only be entertained in the most deserving cases as it impacts the right to expeditious trial and that the Appellant has acknowledged that he sold the vehicle to the to the 1st Respondent.
17. Regarding the prayer for stay of execution, Counsel submitted that after the Appellant sold the vehicle to the 1st Respondent, the 1st Respondent in turn sold it to the 2nd Respondent, in the circumstances the vehicle should be in possession of the 2nd Respondent who purchased it for value, the 1st Respondent has no objection if the same is released to the 2nd Respondent, the Appellant has not met the threshold for grant of stay and hence the Application should be dismissed with costs.

2nd Respondent's Submissions

18. In opposition to the Application, Counsel for the 2nd Respondent too submitted that the prayer for stay of proceedings does not meet the threshold established by law and precedent, and the same is a delaying tactic by the Appellant which goes against the timely, cost-effective and proportionate resolution of disputes in order to ensure access to justice by parties as provided under Article 159 of the *Constitution*. He cited the decision in *Kenya Wildlife Service v James Mutembei* [2019] eKLR and also the already referred to *Global Tours & Travels Limited (supra)*.
19. He too submitted that stay of proceedings is a grave matter and should be entertained only in the most deserving of cases as it impacts the right to expeditious trial, the Appellant has not shown and/or given any good reason why the Court should give the stay, the Appellant sold the vehicle to the 1st Respondent who in turn sold it to the 2nd Respondent, the orders sought being so grave should be dismissed, the vehicle should be surrendered to the 2nd Respondent to enable him enjoy his right to property as provided under Article 40 of the *Constitution*, the Appellant has frustrated the 2nd Respondent for the longest of time and the Application should be dismissed with costs.

Analysis & determination

20. The duty of an appellate Court was set out in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where the Court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine



whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

21. In my view, the issues that arise for determination in this appeal are the following;
 - i. Whether an order of stay of proceedings should be issued.
 - ii. Whether an order of stay of execution should be issued.

22. I now proceed to analyse and determine the said issues.

i. Whether an order of stay of proceedings should be issued

23. This Court’s jurisdiction to grant stay of proceedings is derived from Order 42 rule 6 (1) of the [Civil Procedure Rules](#). A decision on whether or not to grant stay of proceedings is discretionary.
24. In the case of *Re Global Tours & Travel Ltd* HCWC No.43 of 2000, Ringera, J (as he then was) held that:

“...As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...”

25. Further, in the case of [Kenya Wildlife Service –vs- James Mutembei](#) [2019] eKLR, it was held as follows:

“...Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent...”

26. In the instant suit, the 1st Respondent who was the defendant therein failed to defend the suit and therefore an ex parte Judgment was entered in favour of the Appellant. From the material placed before me, my understanding is therefore that the suit has already been determined and concluded. Unless the ex parte Judgment is set aside by the trial Court, the suit remains concluded. It is also evident that the Appeal herein relates only to the execution of the decree and not the Judgment itself.
27. The Appellant has not explained exactly what nature or stage of the proceedings he still seeks to stay in an already concluded suit. He has also not explained how and in what way he shall be prejudiced if the order of stay of proceedings is not granted. In the circumstances I find that the facts before the Court do not favour grant of stay of proceedings.
28. In any case, the provisions of Article 159(2)(a)(b)(c) and (d) of the [Constitution](#) of Kenya as read with Sections 1A and 1B of the [Civil Procedure Act](#), Cap 21 enjoins this court to foster and facilitate the



overriding objective of the Act to render justice to parties in all Civil Proceedings in a just, expeditious, proportionate and affordable cost to parties.

29. For the above reasons, the prayer for stay of proceedings is disallowed.

ii. Whether an order of stay of execution should be issued

30. Order 42 rule 6(2) of the [Civil Procedure Rules](#) provides as follows:

“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.”

31. In [Visbram Ravji Halai vs. Thornton & Turpin](#) Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal reiterated that the High Court’s jurisdiction to grant an order of stay of execution pending Appeal under Order 41 rule 6 of the [Civil Procedure Rules](#) is fettered by three conditions, namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further, the application must be made without unreasonable delay.

32. In this instant matter, I appreciate that the 2nd Respondent is already registered as the owner of the said vehicle. However, it is not in dispute that the Appellant lawfully repossessed the vehicle after obtaining a lawful decree from the trial Court given on 07/04/2022. Although the 2nd Respondent subsequently filed objection proceedings whereof on 23/06/2022 the Court directed the Appellant to release the vehicle to the 2nd Respondent, it is not in dispute that this latter order has not been executed.

33. It is also not in dispute that by the subsequent orders issued by Hon. Justice E. Ogola on 28/07/2022 in this Appeal, the Appellant obtained interim conservatory orders allowing him to continue retaining the vehicle.

34. It is therefore not in dispute that since the repossession it is the Appellant who has continuously been and continues to be in possession of the vehicle. In the circumstances, I am persuaded that disrupting the status quo by ordering the Appellant to release the vehicle to the 2nd Respondent at this stage of the Appeal will cause much more loss and inconvenience to the Appellant than it will cause the 2nd Respondent.

35. It is therefore, in my view, more convenient to maintain the prevailing status while awaiting the determination of this Appeal.

36. I therefore grant the prayer for stay of execution but impose the condition that the Appellant deposits a security of Kshs 100,000/- in Court within thirty (30) days from the date of this Ruling. The security will cater for any damage or wastage that may occur on or to the vehicle while under the Appellant’s possession and which may be deemed to arise from deliberate neglect or wastage and not to have arisen from normal and/or ordinary effects of wear and tear. The Appellant is therefore forewarned to ensure that he takes good care of the vehicle and keeps it in good and working condition.

37. To ensure that the Appellant does not “go to sleep” after obtaining the order of stay of execution, I direct and order him to prosecute this Appeal within a period of six (6) months from the date of this



Ruling. He will be at liberty to seek extension of time from this Court should he have good reasons for not complying with this timeline. In default, this Appeal shall be dismissed.

Final Order

38. In the premises, I issue the following orders:

- i. The prayer for stay of proceedings is declined.
- ii. The prayer for stay of execution is allowed and granted in terms that an order is hereby issued staying execution of the Ruling made on 23/06/2022 in Eldoret CMCC No. E806 of 2021.
- iii. The order of stay in (ii) above is granted on the condition that within thirty (30) days from the date of this Ruling, the Appellant deposits in Court a sum of Kshs 100,000/- as security to cater for any damage or wastage that may occur on or to the motor vehicle registration number KBK 420B and which may be deemed to arise from deliberate neglect or wastage and not to have arisen from normal and/or ordinary effects of wear and tear.
- iv. The Appellant to prosecute this Appeal within a period of six (6) months from the date of this Ruling and shall be at liberty to seek extension of time from this Court should he have good reasons for not complying with this timeline. In default, this Appeal shall be dismissed.
- v. Pending the hearing and determination of this Appeal, there shall be no transfer, disposal or parting of ownership or possession of the said motor vehicle.
- vi. Costs shall await conclusion of the Appeal.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 28TH DAY OF APRIL 2023

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JOHN R. ANURO WANANDA

JUDGE

