



Coast Raha Limited v HY minor suing through NZA & another (Miscellaneous Application E007 of 2022) [2023] KEHC 21659 (KLR) (26 April 2023) (Ruling)

Neutral citation: [2023] KEHC 21659 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
MISCELLANEOUS APPLICATION E007 OF 2022**

SM GITHINJI, J

APRIL 26, 2023

BETWEEN

COAST RAHA LIMITED APPLICANT

AND

HY MINOR SUING THROUGH NZA 1ST RESPONDENT

MAKINI AUCTIONEERS LIMITED 2ND RESPONDENT

RULING

1. In court for determination is the applicant's notice of motion dated June 27, 2022 filed on June 28, 2022 and brought under the provisions of sections 3A, 79G and 95 of the [Civil Procedure Act](#), cap 21 and order 2 rule 22, order 4 rule 6, order 50 rule 6 and order 51 rules 1 and 3 of the [Civil Procedure Rules, 2010](#). The orders sought are tailored as follows:
 1. Spent.
 2. That this honourable court be pleased to order interim stay of execution against exparte judgment in SPMCC 09 of 2020 Lamu Law Courts.
 3. Spent.
 4. That this honourable court be pleased to issue any other orders that it may deem fit, just and expedient in the interests of justice.
 5. That the costs of this application be in the cause.
2. The application is supported by the affidavit of one Nyabero Bokoo Brasiny, advocate for the applicant.
3. The applicant's case is that following a ruling delivered ex-parte by the lower court in Lamu SPMCC 09 of 2020, they face the risk of execution without having an opportunity to know the ruling delivered



or even appeal against it as they intend to. According to the applicant, ruling was to be delivered on May 30, 2020 when the trial court indicated that it shall deliver the same on notice. Since then, the applicant was not able to access the court file until it was served with warrants of attachment and proclamation by the 1st respondent.

4. The applicant avers that it stands to suffer irreparable loss and damage as there is a likelihood that it will be unable to recover the decretal sum if the same is paid to the respondent. It is their case that their appeal raises arguable issues with high chances of success and that failure to stay the execution proceedings therein, the appeal stands to be rendered nugatory.
5. The 1st respondent opposes the application through her advocate Kitonga Kiiva and vide a replying affidavit dated August 30, 2022. Counsel deposed that the 1st respondent commenced the suit against the applicant on August 12, 2020 before the lower court, seeking redress for injuries sustained in a road traffic accident. Summons were taken out and served upon the applicant on August 25, 2020 as exhibited in an affidavit of service evenly dated. The applicant failed to enter appearance and the matter proceeded to formal proof. Judgment was subsequently delivered in favour of the 1st respondent on November 25, 2021. On January 19, 2022, counsel served upon the applicant notice of entry of judgment dated December 12, 2021.
6. Thereafter, so counsel deposed, he prepared a statement of costs which was assessed in court and a certificate of costs dated December 7, 2021 issued. Counsel added that the applicant failed to respond which prompted them to take out warrants of attachment. It was after this move that the applicant filed an application dated January 31, 2022 seeking orders inter alia stay of execution, to set aside the interlocutory judgment and for leave to file their statement of defence. That application was subsequently dismissed by the trial court vide a ruling delivered virtually on May 30, 2022.
7. To the 1st respondent, the present application is based on deceit and falsehood, misrepresentation of facts and non-disclosure of relevant information hence it must fail.
8. Parties agreed to file written submissions but only the 1st respondent complied.
9. I have considered the application, grounds thereof, supporting affidavit and annexures. I have also considered the replying affidavit and submissions together with case law cited by counsel for the 1st respondent. I find that the sole issue for determination is whether the notice of motion dated June 27, 2022 is merited.
10. Order 4 Rule 6, order 50 rule 6 and order 51 rules 1 and 3 of the [Civil Procedure Rules, 2010](#) which are substantially not the correct provisions in relation to the orders sought herein. The correct provision of law would have been under order 42 rule 6 of the Civil Procedure Rules which provides for stay of execution pending appeal. Courts have however previously held that in the spirit of article 159 (2) of the [Constitution](#) and Section 1 A and B of the [Civil Procedure Act](#), failure to cite the correct provisions of law is not fatal and would not on its own warrant a dismissal of the application. See [Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu \(Suing for and on behalf of 112 Plaintiffs\)](#) Civil Appeal No 212 of 2015 [2019] eKLR.
11. I will therefore go into the merits of the application. I must however first point out the deliberate or inadvertent confusion in the application. The Applicant prays for an order of stay of execution of the judgment delivered in the lower court but proceeds to argue the same in a manner that implies that whatever they seek to stay is the ruling dated May 30, 2022. I will, in the interest of justice, presume that the orders sought to be stayed are those related to the ruling.



12. The test for applications for stay of execution is set out in order 42 rule 6 of the *Civil Procedure Rules, 2010* 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 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.”

13. Therefore, the applicant 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.

14. The ruling was delivered on May 30, 2022 and the application filed on June 28, 2022; I am satisfied that there has been no inordinate delay.

15. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, 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.”



16. In the instant case, the Applicant avers that it stands to suffer substantial loss if stay is not granted as there is a likelihood that it will not be able to recover the decretal sum. The Applicant has not stated its reasons for such a likelihood and as such I am not satisfied that substantial loss has been proved.
17. Given the foregoing, I am inclined to dismiss the present application for lack of merit.
18. In any event, even if I was to take it that the Applicant seeks an order for stay of execution pending appeal of the judgment of the lower court, the application would suffer the same fate. I say so because the Applicant having had an opportunity to seek for review and/or setting aside of the judgment before the lower court, its option for appeal was and is out of the picture.
19. Under Section 80 of the *Civil Procedure Act* pursuant to which the Applicant predicated the application for review of the trial Magistrate’s judgment, where a party opts to apply for review such a party cannot after the review is rejected exercise the option to appeal against the same order he sought review of.
20. Order 45 of the *Civil Procedure Rules* which provides the procedure and the conditions that an applicant must satisfy in an application for review equally makes it clear that a party cannot seek review of an order and appeal the same order: -

Section 80 provides:

- “ 80. Any person who considers himself aggrieved –
- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

Order 45 rule 1(a) and (b) in addition to setting out the conditions that an applicant in an application for review must satisfy in order to succeed in the application, reiterates the proviso of Section 80(a) and (b) which in my view makes it plainly clear that the options of a review and an appeal cannot run parallel and at the same time to an aggrieved party. Once a party has opted for a review the option of an appeal is unavailable. Sub-rule (2) of Order 45 of the Civil Procedure Rules further makes the matter clearer. It provides: -

Order 45 (2):

“A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for review.”

21. I need not belabor this point further. The outcome is that the notice of motion dated June 27, 2022 lacks merit and is hereby dismissed.

RULING FOR GARSEN READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 26TH DAY OF APRIL, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Mr Ngaira for the Respondent

