



REPUBLIC OF KENYA



Wangeci v Ngure (Civil Appeal 126 of 2022) [2023] KEHC 20748 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20748 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA**

CIVIL APPEAL 126 OF 2022

OA SEWE, J

JULY 27, 2023

BETWEEN

FLORENCE WANJIKU WANGECI APPELLANT

AND

FRANCIS WARUINGE NGURE RESPONDENT

RULING

1. Being dissatisfied with the decision of Hon J.B Kalo, Chief Magistrate, delivered on August 23, 2022, the appellant, Florence Wanjiku Wangeci filed this appeal seeking that the court be pleased to set aside the lower court's determination and substitute it with a decision of its own; and that the costs of the appeal be awarded to her. The appeal was premised on the following grounds:
 - (a) That the learned magistrate erred in law and fact by finding that the appellant needed to obtain the leave of the court before withdrawing the suit and in proceeding to recall the notice of withdrawal;
 - (b) That the learned magistrate erred in fact by holding that the appellant's act of withdrawing the suit against the respondent who happens to be her ex-husband was not done in good faith.
 - (c) That the learned magistrate erred in law and fact in failing to appreciate that on the basis of the material and evidence placed on record the appellant had an undeniable right to withdraw the suit against the respondent.
 - (d) That the learned magistrate erred in law in finding that the court was not *functus officio* and proceeded to order the appellant to comply with the court orders issued on September 16, 2019 within 3 days.
 - (e) That the learned magistrate erred in law in disregarding the appellant's submissions.



- (f) That the learned magistrate erred in law and in fact in failing to make an award on loss of future earning capacity.
2. Concomitantly, the appellant filed the notice of motion dated August 25, 2022 under sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, chapter 21 of the Laws of Kenya as well as order 42 rule 6 and order 51 rule 1 of the *Civil Procedure Rules* seeking the following orders:
- (a) Spent
 - (b) Spent
 - (c) That the court be pleased to grant orders for stay of execution of the order delivered in Mombasa CMCC No 1241 of 2019 delivered on August 23, 2022 pending the hearing and determination of the appeal.
 - (d) Spent
 - (e) That the costs of the application be provided for.
3. The application was premised on the grounds that the appeal is arguable and has high chances of success; that if stay is not granted the appeal shall be rendered nugatory; that substantial loss may result as the suit motor vehicle will waste away at the court's parking lot; that it is in the interest of justice and equity that the orders sought be granted; and that the application was brought without unreasonable delay.
4. The application was supported by the appellant's own affidavit sworn on August 25, 2022. She averred therein that the lower court recalled the notice of withdrawal that she filed in Mombasa Chief Magistrate's civil suit No 1241 of 2019: Florence Wanjiku Wangeci v Francis Waruinge Ngure and directed that she deposits the suit motor vehicle in court within 3 days; failing which warrants of arrest would issue for her arrest. She was aggrieved by that order and consequently lodged this appeal.
5. The appellant explained, at paragraph 8 of her supporting affidavit, that the suit motor vehicle was involved in a bad road accident in Nairobi on the night of July 30, 2022 and has been in the garage ever since; and therefore that it was not possible to comply with the court order within the short timeframe given by the lower court. The appellant further indicated that she was willing to abide by any conditions and terms as to security as this court may deem fit to impose. She annexed to her affidavit copies of the notice of withdrawal dated August 12, 2022 as well as the impugned order dated August 23, 2022.
6. The respondent opposed the application and relied on his replying affidavit sworn on September 6, 2022. In his view, the instant application is an afterthought and an abuse of the process of the court in so far as it has been overtaken by events. The respondent explained that the appellant had since complied with the impugned orders and caused the suit motor vehicle, registration No KCM 653Z, to be repaired and returned to a usable condition. He added that the motor vehicle had accordingly been placed in the safe custody of the court administrator in compliance with the lower court's orders; and therefore that the photographs relied on by the appellant do not reflect the motor vehicle's current state.
7. When the parties first attended court on September 7, 2022, their counsel expressed their wish to pursue an out of court settlement and were consequently granted time for that purpose. However, by September 19, 2022, the parties were yet to come to one mind on the matter. Mr Ngure for the respondent had occasion to explain that the appellant had already complied with the impugned lower court order and handed over the motor vehicle to the senior court administrator as ordered. He also



reiterated the respondent's averment that the motor vehicle had since been repaired and therefore the photographs annexed to the appellant's supporting affidavit did not give an accurate position. He added that the respondent was content with the status quo as at September 19, 2022 and did not require any further orders pending appeal.

8. In response, Ms Mboku, learned counsel for the appellant, explained that the appellant faced imminent arrest and incarceration and was therefore under obligation to undertake quick repairs of the motor vehicle to enable compliance with the court order within three days. He insisted that their application had not been overtaken by events and needed to be heard and determined on its merits. Accordingly, directions were therefore made for the filing of written submissions to enable the court make a determination on the application.
9. In the appellant's written submissions filed on October 3, 2022, Ms Mboku made reference to order 42 rule 6(2) of the *Civil Procedure Rules* and the cases of *Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 others* [2013] eKLR and *Focin Motorcycle Co Ltd v Ann Wambui Wangui & another* [2018] eKLR in urging the court to find that the appellant has made out a good case for stay of execution. He accordingly prayed that the application dated August 25, 2022 be allowed and orders granted as prayed therein.
10. On his part, Mr Ngure relied on his written submissions filed on October 4, 2022. He provided a synopsis of the dispute between the parties and their joint ownership of the suit motor vehicle. He reiterated his stance that the appellant's application has been overtaken by events following compliance by the appellant with the orders of the lower court. He further submitted that the appellant had failed to demonstrate substantial loss and to that end relied on *Nadeem A Kana v Lucy Wambui Mwangi* [2021] eKLR *Nicholas Mutuku Mwasuna v Patricia Mueni Kilonzo* [2022] eKLR. He consequently urged for the dismissal of the application.
11. I have considered the application, the parties' respective affidavits as well as the written submissions filed herein by learned counsel. The single issue for determination is whether, in the circumstances, the appellant is entitled to an order for a stay of execution. I note that, in the appellant's written submissions dated September 30, 2022, it was expressly conceded that the appellant had complied with the impugned orders of the lower court, albeit on the pain of imminent arrest and incarceration. She nevertheless urged the court to issue an order for a stay of execution on the ground that the motor vehicle is not in good mechanical condition and requires urgent repairs, failing which its engine will waste away to the detriment of both parties herein.
12. It is now trite that stay of execution pending appeal can only be granted when there exists a situation to stay. In this regard, the Court of Appeal, in *Maasai Mara University v Daniel K. Cheboi & 3 others* [2015] eKLR, held: -

“...An order for 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 presupposes 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. See, for this general proposition, the holding of the Court of Appeal of Uganda in *Mugenyi & Co Advocates v National Insurance Corporation* (Civil Appeal No 13 of 1984) where it was stated:

“..... an order for stay of execution must be intended to serve a purpose”



A consideration of past decisions of this court will however show that the court has found it desirable to first consider the nature of the order intended to be stayed and whether the decree has been satisfied – this, before delving into a consideration of the two principles we have just set out. For instance, in *Charles Gichina Mwangi v Henry Mukora Mwangi* [2000] eKLR there was evidence that the order sought to be stayed had been complied with in that subdivision and transfer of land the subject of litigation had taken place. It was held by this court:

“..... In the circumstances there is nothing to stay. That being the position, the application for stay must be, as it hereby is, dismissed with costs”

13. In the instant matter the parties are in agreement that the appellant has already complied with the orders of the court issued on August 23, 2022, and has consequently surrendered the motor vehicle KCM 653 Z into the custody of the senior court administrator, Mombasa Law Courts. There is therefore nothing left to stay; and it matters not that the motor vehicle requires urgent repairs to keep it fit for use. It is a cardinal principle that courts of law do not issue orders in vain, and therefore it would be futile to grant an order of stay of execution when the impugned order of the subordinate court has been complied with and is therefore not amenable to stay.
14. In the case of *Intex Construction Co Ltd v Flora Marigu & another* [2016] eKLR the court held: -

“...The court cannot issue orders in vain. In the case of *Nicholas Mahimu v Ndimba Tea Factory Ltd & another* [2009] eKLR the court held that the court has a duty to ensure that its orders are at all times effective...

...The plaintiff's application has been overtaken by events as the motor vehicles have already been sold to third parties. It would be futile to grant the orders sought in this application bearing in mind that the court shall not issue any orders in vain...”
15. In view of the above, the application dated August 25, 2022 is untenable and is hereby dismissed with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 27TH DAY OF JULY 2023

OLGA SEWE

JUDGE

