



**JH Car Dealers Ltd & another v Mbenge (Civil Appeal
E073 of 2022) [2023] KEHC 20913 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20913 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E073 OF 2022
TM MATHEKA, J
JULY 26, 2023**

BETWEEN

JH CAR DEALERS LTD 1ST APPELLANT

JOHN MUENI MUANGE 2ND APPELLANT

AND

ANGELLAH MBENGE KYALO ALIAS ANGELLAH MBENGE RESPONDENT

*(Being an application for stay of execution of the Judgment of Hon Otieno
J SRM delivered on December 5, 2022 in Makueni CMCC 191 of 2019.)*

RULING

1. On December 5, 2022 Hon Otieno J SRM delivered his judgment in Makueni CMCC 191 of 2019 where he awarded the respondent liability at 100%, general damages of Ksh 200,000 and special damages of Ksh 13, 410.
2. Aggrieved by that Judgment, the appellant seek to appeal against it. In the meantime they have brought before this court the application dated December 14, 2022 under Sections 3A, 79G & 95 of the [Civil Procedure Act](#), order 22 rule 22, order 42 rules 4, 6 and 7, order 50 rule 6 and order 51 rules 1 & 3 of the [Civil Procedure Rules 2010](#) seeking *inter alia* that this honorable Court be pleased to order a stay of execution of the above mentioned judgment and that the Appellants/ Applicants be allowed to furnish the Court with bank guarantee as security. They also seek that the costs of this application abide the outcome of the appeal.
3. The application is supported by the grounds on its face and the Affidavit of the 2nd applicant sworn on the 14th December same day. He depones that the appeal has high chances of success and the respondent is likely to commence execution. The Memorandum of Appeal is exhibited as JMM-1. It is also deponed that the application has been presented without inordinate delay and the underwriter is ready, willing



and able to give a bank guarantee as security for the entire decretal sum. A copy of the Bank Guarantee is exhibited as JMM-2. It is deponed further that the respondent is a person of unknown means and may not be in a position to refund the money should the same be paid to her thus rendering the appeal an academic exercise.

4. The application is opposed through the respondent's replying affidavit sworn on February 1, 2023. She depones that the intended appeal does not raise triable issues hence the chances of succeeding are very minimal. That the applicants have not satisfied the conditions in Order 42 Rule 6 and the purported bank guarantee has an expiry date of February 18, 2023 with no certainty of renewal.
5. Further, she depones that the applicants are not parties to the bank guarantee and there is no evidence that the bank guarantee is for this specific matter. That if the court is inclined to grant the stay, the applicant should deposit 50% of the amount to his advocates and the other 50% be deposited with the court.
6. The application was canvassed through written submissions.

The Applicant's Submissions

7. Relying on Order 42 Rule 6 of the [Civil Procedure Rules](#) (CPR), they submit that the subject matter is substantial and if execution proceeds, they will suffer irreparable loss and the appeal will be rendered nugatory as the respondent is a man of straw. They contend that failure to grant the orders amounts to denying them the opportunity to exhaust their legal remedies. They submit that the respondent has not filed an affidavit of means hence there is a risk of failure to compensate them if the appeal succeeds. They rely on [G.N Muema P/A \(Sic\) Mt View Maternity & Nursing Home Miriam Bisbar & Anor](#) [2018] eKLR.
8. They submit that the application was filed without inordinate delay and that a bank guarantee is an acceptable way of furnishing security as was held in [Justin Mutinga David v China Road & Bridge Corporation \(K\) Ltd](#) [2019] eKLR.

The Respondent's Submissions

9. She has also placed reliance on Order 42 Rule 6 of the [CPR](#) and with regard substantial loss, she submits that the allegations by the applicants about her inability to refund cannot amount to reasonable grounds. She relies, *inter alia*, on [James Wangalwa & Anor v Agnes Naliaka Cheseto](#) [2012] eKLR where the Court observed;

“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... 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...”

10. As for security, she submits that the applicants have not offered any. That the purported bank guarantee is only valid for 12 months and there is no certainty of its renewal. Further, she submits that the



applicants are not parties to it and the same is a general bank guarantee. She has relied inter alia on *Nobel Trading Co. Ltd & 2 Others v Peter Odhiambo Marega* [2022] eKLR where the court stated;

“On the third condition of security, the applicant has offered a bank guarantee. There is an agreement exhibited between Diamond Trust Bank and the directors of Directline Assurance Company Ltd, who are the insurers of the applicants. The same is for a sum of Kshs 30 million. It is for a period of 12 months and it is expiring on 30th November 2021. This court takes note of the fact that the applicant is not a party to the said agreement and that there is no evidence that the said guarantee is for the benefit of this matter specifically. Moreover, there is no evidence that as at the time of this ruling, the same had been renewed.”

11. From the foregoing the only issue for determination is whether the application is merited

Whether stay of execution should be granted

12. The applicants have complied with Order 42 Rule 6 of the *Civil Procedure Rules*, with respect to time. The Judgment of the learned trial court was delivered on December 5, 2022 and this application was filed on December 14, 2022. There was no delay.

13. As to whether the applicant will suffer substantial loss the trial Magistrate found the appellants 100% liable and awarded the respondent Kshs 200,000/= as general damages and Kshs 13,410/= as special damages. This is not a substantive amount. The respondent has however indicated that the same can be split at 50% between her advocate and a deposit in court.

14. With respect to furnishing security for the due performance of the decree the applicant has annexed a document referred to as Guarantee from Family Bank. The limit is 50 million and its purpose is indicated as

“...for providing security for awards and or costs awarded in various Court cases/claims pending before Court”.

The guarantee is dated February 18, 2022 and its duration is indicated to be “12 months with an option to renew”. Evidently, the guaranteed has expired, and there is nothing to show that it is related to this matter.

15. In my view the application has some merit. That the applicant has a right of appeal while the respondent has a right to enjoy the fruits of her judgment. Though the Judgment is not attached to the application, it is evident that she was a passenger in the accident motor vehicle.

16. So what orders to issue?

- i. That an order of stay of execution of the judgment and decree in Makueni CMCC No 191 of 2019 be and is hereby issued pending the hearing and determination of the appeal.
- ii. The applicant to deposit 50% of the decretal sum with the counsel for the respondent for release to the respondent and the balance be deposited in a joint interest earning account in the names of both advocates on record.
- iii. In default of (ii) above the order of stay to lapse automatically.
- iv. The costs of this application to abide the appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY OF JULY 2023



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MUMBUA T MATHEKA

JUDGE

Court Assistant: Kyanga Mwiwa

Applicants' Advocates

Kimondo Gachoka & Co. Advocates

Respondent's Advocates

B.M Mung'ata & Co. Advocates

