



REPUBLIC OF KENYA



KENYA LAW
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**Mwananchi Credit Limited v Janoowalla (Civil Appeal E042 of 2022)
[2023] KEHC 21622 (KLR) (21 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21622 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E042 OF 2022
OA SEWE, J
AUGUST 21, 2023**

BETWEEN

MWANANCHI CREDIT LIMITED APPELLANT

AND

BURHANUDDIN NOOMAN JANOOWALLA RESPONDENT

RULING

1. Before the Court for determination is the Notice of Motion dated March 28, 2022. The application was filed under Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Chapter 21 of the Laws of Kenya; Order 40 Rule 7, Order 42 Rule 6, Order 43 Rule 1 and Order 50 Rule 1 of the [Civil Procedure Rules, 2010](#), for the following orders:
 - (a) Spent
 - (b) That the Court be pleased to set aside the decision and or directions issued by the lower court on March 24, 2022 in Mombasa CMCC No 405 of 2022: Burhanuddin Nooman Janoowalla v Mwananchi Credit Limited pending the hearing and determination of the application. (Spent)
 - (c) That the Court be pleased to set aside the decision and/or directions issued by the lower court on March 24, 2022 pending the hearing and determination of the appeal herein.
 - (d) That the Court be pleased to grant an order of stay of further proceedings in CMCC No 405 of 2022 pending the hearing and determination of the appeal;
 - (e) That costs of the application be provided for.
2. The application was premised on the grounds that the respondent lodged an application dated March 18, 2022 before the lower court seeking interim restraining orders together with mandatory orders against the appellant in respect of Motor Vehicles Registration Numbers KCR 553N and KCN 892C (hereinafter, “the security”); and that upon presentation thereof, the lower court issued an *ex parte*



order of temporary injunction as well as a mandatory injunction at an interlocutory stage directing the appellant to release the security. It was the contention of the appellant that, as the orders were irregularly issued, it immediately filed an application before the lower court seeking, inter alia, stay of execution pending inter partes hearing; and that to the appellant's dismay, the learned magistrate declined to disturb the irregular *ex parte* orders.

3. Thus, the appellant averred that, unless the Court intervenes by setting aside the above-mentioned irregular orders, and unless an order of stay of proceedings is granted pending the determination of the appeal, it shall suffer irreparable injury as it shall lose its security; and therefore that it stands the risk of being condemned unheard contrary to the salient provisions of Article 50 of [*the Constitution of Kenya, 2010*](#). The appellant further averred that, on the other hand, the respondent stands to suffer no injury if the orders sought by it are granted as prayed. It added that the application has been brought in good faith and in the interest of justice; and therefore ought to be allowed as prayed.
4. The application was supported by the affidavit of the appellant's Legal Officer, Ms. Sylvia Njoroge, sworn on March 28, 2022. Ms. Njoroge reiterated the aforementioned grounds and added that, although the courts have discretion to issue interlocutory orders, such discretion must be exercised in a judicious, equitable and fair manner, taking into account the circumstances of each case. She annexed to the Supporting Affidavit a copy of the lower court's order dated March 18, 2022, appellant's application dated March 23, 2022, as well as a copy of the respondent's application (marked Annexures "SN-1", "SN-2" and "SN-3").
5. The respondent opposed the application vide his Replying Affidavit sworn on April 4, 2022. He averred that the appellant, having deliberately ignored the impugned order, is in contempt of a lawful order of the Court and is therefore not entitled to a hearing until it purges its contempt. The respondent further averred that, as at the 25th month since taking the loan of Kshs 1,920,000/=, he had paid Kshs 3,467,100/= when he ought to have paid Kshs 3,067,100/= only. He therefore asserted that the purported repossession by the appellant for arrears of Kshs 3,281,132.97 was not warranted; and that the learned magistrate was satisfied as much before granting the orders of March 18, 2022.
6. The respondent further averred that, since he had overpaid the account by some Kshs 396,000/=, there is no irreparable injury to be suffered by the appellant if the orders sought are not granted. The respondent annexed to his Supporting Affidavit a copy of the Complaint filed before the lower court to demonstrate that the orders he obtained were not final in nature; and that there are serious issues of law to be canvassed at the hearing before the lower court.
7. This appeal was filed simultaneously with Mombasa HCCA No 43 of 2022; an appeal involving the same parties and in respect of the same subject matter. The record shows that Mombasa HCCA No 42 of 2022 arises from the order of the lower court issued on March 24, 2022 while Mombasa HCCA No 43 of 2022 is in respect of the order dated March 18, 2022. Accordingly, directions were given on April 5, 2022 that the applications separately filed in the two appeals be canvassed by way of written submissions. Further directions were given on October 25, 2022 for the consolidation of the two appeals for purposes of disposal of the two applications as well as the appeals. Accordingly, this ruling is in respect of both applications both dated March 28, 2022.
8. The appellant relied on the written submissions filed on its behalf on October 24, 2022 by the firm of M/s Muturi Gakuo & Kibara Advocates. Mr. Kibara thereby proposed the following two issues for determination:
 - (a) Whether stay of proceedings should be granted; and,
 - (b) Whether the appellant has an arguable appeal



9. Mr. Kibara relied on Order 42 Rule 6(1) of the *Civil Procedure Rules* as well as the cases of *Ezekiel Mule Musembi v H. Young & Company (EA) Ltd* [2019] eKLR, *Northwood Development Company Limited v Hussein Alibhai Pirbhai & 2 Others* [2015] eKLR and *Alios Finance Kenya Limited v Philip Mwangi Theuri & Another* [2016] eKLR, among others, to support his submission that the Court does have the powers to stay proceedings pending appeal so long as the intended appeal is arguable; and if it is shown that the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay sought. Accordingly, Mr. Kibara prayed that the orders of stay be granted as prayed.
10. [10] Mr. Omwenga for the respondent relied on his written submissions dated July 25, 2022. He submitted that the appellant is not entitled to the orders sought because, first and foremost, it is in contempt of court, for having disregarded the order dated March 18, 2022 for the return the repossessed motor vehicles. He urged the Court to note that to date, the appellant has not purged its contempt, and is therefore not entitled to the exercise of the discretion of the Court. Counsel relied on *EAM v PAA* [2017] eKLR, *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another* [2005] eKLR, and *Albert Kigera Karume & 2 Others v Kung'u Gatabaki & Margaret Nduta Kamithi (sued as Trustees of the Njenga Karume Trust) & 5 Others* [2015] eKLR in this regard.
11. The second ground relied on by the respondent in opposing the applications is the In Duplum Rule. The respondent argued that, having repaid the sum lent of Kshs 1,920,000/ by an amount of Kshs 3,720,246.62, it had paid more than doubt the amount lent, and therefore is entitled to retain the motor vehicles pending the resolution of the dispute between the parties. Mr. Omwenga relied on *Lee G. Muthoga v Habib Bank Zurich Finance (K) Ltd & Another* [2010] eKLR, *James Muniu Mucheru v National Bank of Kenya Ltd* [2019] eKLR, *Kenya Hotels Ltd v Oriental Commercial Bank Ltd (formerly known as Delphis Bank Ltd)* [2019] eKLR to support the argument that the appellant does not deserve the orders sought because the principal sum has already been paid with an excess of Kshs 1.8 million which will take care of interest and penalties.
12. I have given due consideration to the applications. The facts are largely undisputed. They are that the respondent approached the appellant sometime in March 2020 for a loan facility in the sum of Kshs 1,920,000/=. The loan was to be repaid by monthly instalments of Kshs 122,684 with effect from March 2020. According to the respondent, he had paid the appellant a total of Kshs 3,463,100 and had overshoot the loan by Kshs 396,000/= as of March 2022 when the two vehicles were seized by the appellant in exercise of its statutory power of sale. The appellant purported then that the respondent was in arrears of Kshs 3,062,987.83. It was against that backdrop that the respondent filed an application dated 18th March 2022 before the lower court seeking interim orders to restrain the appellant from taking further precipitate action against him and to compel the appellant to release the two motor vehicles, Registration Numbers KCR 553N and KCN 892C to him.
13. Upon presentation of the application, Hon. Ndegwa, SPM, granted ex parte orders as hereunder:
 1. That the application dated March 18, 2022 is certified urgent.
 2. That a temporary injunction is hereby issued restraining the Defendant/Respondent its servants and/or agents from exercising its purported statutory power of sale and disposing off the plaintiff's Motor Vehicle Registration number KCR 553N and KCN 892C or any other Motor Vehicles or properties and an Order to return the said attached Motor Vehicles forthwith or otherwise interfering with the plaintiff's quiet enjoyment of the Motor Vehicles pending inter partes hearing of this application.
 3. That application to be served for inter partes hearing on April 6, 2022 before Court 2.



14. In reaction to the *ex parte* orders, the appellant filed an application dated March 23, 2022 seeking stay of execution of the order issued on March 18, 2022 pending the hearing and determination of the application and the main suit. The appellant also prayed that the orders be reviewed, varied and/or set aside pending the hearing of the application and the main suit. The lower court however ordered that the appellant's application be served for inter partes hearing on April 6, 2022. In effect the *ex parte* prayers were declined. The appellant thereafter approached the High Court for intervention vide the two appeals.
15. It is therefore plain that the prayers for setting aside the orders of the lower court issued on March 18, 2022 and March 24, 2022 are now spent, in so far as they were intended to last pending the hearing and determination of the instant application. I note, too, that in HCCA No 42 of 2022, the appellant seeks the setting aside of the orders issued on March 24, 2022 pending the hearing and determination of the appeal, yet the same prayer is the subject of Prayer (ii) of the appeal. In the premises, I have no hesitation in holding that Prayer 3 of the Notice of Motion dated March 28, 2022 as crafted and filed in HCCA No 42 of 2022 is untenable and is hereby declined. Hence, the only cross-cutting issues arising for determination in the two applications are:
- (a) Whether the appellant has made out a good case for stay of execution of the order made in Mombasa CMCC No 405 of 2022 on March 18, 2022; and,
 - (b) Whether the appellant has met the threshold for grant of stay of proceedings of CMCC Civil Suit No 405 of 2022.
16. Order 42 Rule 6(2) of *Civil Procedure Rules*, pursuant to which the applications have been brought states: -
- (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.
17. Accordingly, the appellant was under obligation to satisfy the Court that it stands to suffer substantial loss; that the application was made without unreasonable delay and that it is ready to provide such security as the court may impose. In *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR the Court of Appeal held: -
- “...It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay...”
18. While there is no gainsaying that the two applications were filed promptly, it is disconcerting that the averments in the respondent's affidavit, particularly the averment at paragraph 5 thereof, that appellant is yet to comply with the orders of the lower court, has not been rebutted. Moreover, there appears to be no contestation that the loan amount advanced by the appellant to respondent was Kshs 1,920,000/=, and that he had paid Kshs 3,467,100/= or thereabouts when the chattels were seized by the appellant. It cannot be said, in the circumstances, that the appellant stands to suffer substantial loss when the principal sum has already been repaid. I therefore find no merit in the appellant's prayer for stay of execution pending appeal.



19. On whether the appellant has met the threshold for grant of stay of proceedings of CMCC Civil Suit No 405 of 2022, the main consideration for the court to bear in mind is whether it is in the interests of justice to grant such stay. The underlying interest ought to be that the appeal should not be rendered nugatory. Stay of Proceedings is provided for under Order 42 rule 6 (1) of the Civil Procedure Rules which states: -

(1) No appeal or second appeal shall operate as a stay of execution or proceedings 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.

20. [20] Hence, in Re Global Tours & Travel Ltd HCWC No 43 of 2000 Hon 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...”

21. In the premises, the question to pose is whether the intended appeal is arguable, bearing in mind that an arguable appeal is not necessary an appeal that must succeed. At this stage, the court is not required to go into the merits of the appeal as that is an aspect that falls for consideration at the hearing of the appeal. Moreover, it suffices that a single legitimate point worthy of consideration has been raised by the appellant.

22. Having perused the Memorandum of Appeal filed herein on the March 29, 2022, it cannot be said that the appeal is frivolous. It does raise several arguable points. Nevertheless, having found that no substantial loss has been established by the appellant, I am not convinced that the appeal will be rendered nugatory unless stay of proceedings is granted. It is therefore my considered view that no justification has been made for the grant a stay of proceedings; and that such stay will only serve to needlessly delay the matter before the lower court.

23. In view of the above, the applications dated March 28, 2022 by the appellant lack merit and are hereby is dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 21ST DAY OF AUGUST 2023

OLGA SEWE



JUDGE

