



REPUBLIC OF KENYA



KENYA LAW
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**Mwananchi Credit Limited v Mutua & 2 others (Civil Appeal
E191 of 2022) [2023] KEHC 27566 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 27566 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E191 OF 2022
F WANGARI, J
SEPTEMBER 29, 2023**

BETWEEN

MWANANCHI CREDIT LIMITED APPLICANT

AND

PATRICK SMITH MUTUA 1ST RESPONDENT

RODGERS MAUMBA CHUMA 2ND RESPONDENT

BOAZ M MULI T/A MUMU AUCTIONEERS 3RD RESPONDENT

RULING

1. This ruling relates to an application dated 18th November, 2022 which sought for the following orders:
 - a. Spent;
 - b. Spent;
 - c. That this Honourable Court be pleased to stay execution of the Ruling and Order dated 15th November 2022 pending the inter partes hearing and determination of this Appeal.
 - d. That this Honourable Court be pleased to stay further proceedings in CMCC Civil Suit No. E879 of 2022 pending the hearing and determination of this Application.
 - e. That this Honourable Court be pleased to stay further proceedings in CMCC Civil Suit No. E879 of 2022 pending the hearing and determination of the Appeal herein.
 - f. That the costs of this Application be provided for



2. The application was opposed by the 1st Respondent via the Replying Affidavit filed on 22/2/2023, stating inter alia that the vehicle in issue was fraudulently registered by the respondents without his knowledge, and that he would suffer prejudice if the application is allowed.
3. Directions were taken that the application be disposed of by way of written submissions. Both the Applicant and the 1st Respondent complied.

Analysis and Determination

4. I have considered the application, response, the parties' submissions together with the authorities relied upon by the parties as well as the law and in my respectful view, the following issues are for determination;
 - a. Whether the Appellant has made out a case for grant of orders of stay pending hearing and determination of Appeal.
 - b. Who pays the costs of the application?
5. The principles for grant of stay of execution pending appeal are settled. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the Civil Procedure Rules, 2010 which provides as follows: -
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.
 - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
6. The power of a court to grant stay of execution is discretionary and just like any other discretionary power, the same must be exercised judiciously and not capriciously or whimsically. It must be recalled that the purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of each of the parties to the dispute.



7. In *RRW v EKW* [2019] eKLR, the Court of Appeal addressed itself on this issue as hereunder: -

“...The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent...”

8. Having settled on the principles, an interrogation of whether the Applicant has met the tests above is imperative.

On substantial loss

9. The Applicant submits that the by releasing the vehicle to a stranger, the Applicant would lose the only security for the loan advanced. The vehicle is likely to be sold or damaged before the hearing and the determination of the appeal. The case of *NCBA Bank Kenya Limited (formerly NIC Bank Limited) v Peter Warui Njoki & another* [2021] eKLR was cited for this proposition. The 1st Respondent was silent on the alleged substantial loss to be suffered by the Appellant. I find that the Appellant is likely to suffer irreparable damage of the vehicle is released.

On the issue of delay

10. I note that the application was filed timeously. The ruling was delivered on 15/11/2022, and this application together with the Memorandum of Appeal was filed on 18/11/2022. I need not say more on this limb.

Security

11. The purpose of security was clearly enunciated in *Arun C. Sharma vs. Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others* [2014] eKLR, where the court stated: -

“...The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose...”

12. I agree with the Applicant that requiring it to deposit security would be unnecessary, considering that the vehicle had been given as collateral to the loan advanced. Further, the Applicant being a microfinance institution has the capacity to meet any financial obligation imposed on them. I will therefore not give an order for deposit of security by the Applicant.

13. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party.



This was well enunciated by the Supreme Court in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others [2013] eKLR. In the present circumstances, the costs should abide the outcome of the Appeal.

14. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
- a. The application dated 18th November, 2022 is has merit and is hereby allowed as hereunder;
 - i. That there be stay of execution of the Ruling and Order dated 15/11/2022 pending hearing and determination of the Appeal.
 - ii. That there be stay of further proceedings in CMCC Civil Suit No. 879 of 2022 pending the hearing and determination of this Appeal.
 - b. Costs to abide the outcome of the appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF SEPTEMBER, 2023.

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F. WANGARI

JUDGE

In the presence of;

M/S Ng'ang'a h/b for Kibara Advocate for the Appellant

Magiya Advocate for the Respondent

Barile, Court Assistant

