



**Chege v Bell Motors (K) Limited (Civil Appeal E056 of 2023)
[2023] KEHC 24676 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24676 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E056 OF 2023
RE ABURILI, J
OCTOBER 31, 2023**

BETWEEN

GLADWEL NJERI CHEGE APPELLANT

AND

BELL MOTORS (K) LIMITED RESPONDENT

RULING

1. This Ruling determines the Appellant's application dated 24th August 2023 under Certificate of Urgency. The application by Gladwel Njeri Chege seeks for orders of stay of proceedings and execution of any portion of judgment/decree including costs assessed thereto in Winam SPMCC No. E181 of 2021 pending the hearing and determination of this appeal and costs of the application.
2. Prayers 1 and 2 of the application were spent.
3. The grounds upon which the application is predicated are that the Appellant has filed an appeal challenging the judgment of the trial magistrate's court rendered on 24th March 2023; which appeal raises valid issues on the validity or legality of the Certificate of Costs and related execution documents that have been obtained by the Appellant; that if the execution or other proceedings to enforce the judgment is carried out, the appeal will be rendered nugatory and the applicant shall suffer irreparable loss and damages; that attempts to obtain stay from the trial court was dismissed on the premise that the trial court lacked the jurisdiction to issue such orders; that the Respondent has commenced execution proceedings against the applicant and that the application herein is made in utmost good faith.
4. The application is further supported by the affidavit sworn by Rodney O. Oluoch Advocate for the Appellant/Applicant reiterating the grounds in support adding that the appeal is pending admission since proceedings in the lower court had not been typed yet the Respondent had gone ahead to do a proposed bill of costs and sent to the Appellant's counsel by email.



5. That before responding to the Bill of Costs, the Respondent went ahead and filed an application for execution on 3rd July 2023, in regard to the said Bill of Costs in an illegal manner and contra statute in that the said bill of costs was filed without notice of assessment to the Appellant herein, which action are illegal and against the *Advocates Remuneration Order* hence the Applicant was not able to file Notice of Objection as stipulated in Section 11 of the *Advocates Remuneration Order*; that failure to notify the applicant of the date of taxation is contrary to Section 14 of the *Advocates Remuneration Order* and that contrary to Section 72 of the *Advocates Remuneration Order*, the court never issued the Applicant herein with a Notice of Taxation.
6. Further, that a certificate of costs was never issued and signed by the taxing officer prior to the signing and issuance of the warrants contrary to Section 68A of the *Advocates Remuneration Order*; that the Respondent had gone ahead to file warrants of attachment of movable property and attached movable property of the Applicant to recover costs of Kshs.130,230 despite the foregoing illegalities; that the process leading to the issuance of warrants was unlawful; hence this court should not allow itself to be made part of the illegality or to perpetuate an illegality; that therefore stay to be granted so that the applicant exercises her right to be heard before she is condemned to pay costs so as to protect the rule of law and as her objection have not been considered; that there are procedural improprieties; that the appeal shall be rendered nugatory if stay is not granted because the applicant has appealed both against dismissal of her suits and the order condemning her to pay costs of the dismissed suit.
7. That the application is made in good faith and that this court has jurisdiction to hear and determine the application opposing the application herein.
8. The Respondent filed an affidavit in reply sworn by Ahmad Riaz a Director of the Respondent company Bell Motors (K) Limited. The extremely long Replying affidavit comprising 30 paragraphs and 8 pages simply challenges the type of application that is before this court for determination contending in deposition that as the prayer for interim measures of stay was not granted at the exparte stage, then the same is not available.
9. Further, that prayer 3 is not available because the Memorandum of Appeal as filed does not disclose whether the Appellant appeals against part or the whole of the judgment delivered on 24th March 2023 in the primary suit.
10. That it is not clear whether the appeal is against dismissal of the suit or an award of costs yet no single ground of appeal challenges costs as awarded hence the attempt to say execution for costs is unmerited. The other deposition in paragraph 7 and 9 challenge the timelines for preparation of the filed appeal.
11. That no sufficient cause has been shown for stay to be granted; that no substantial loss has been shown to be suffered by the applicant if stay is denied; that there was inordinate delay in bringing the application and that no security for due performance of decree had been offered.
12. That after filing the memorandum of appeal, the applicant went to sleep and was awakened by an attempt to execute duly certified costs on the dismissed suit, when she filed an application on 3rd July 2023 and obtained an interim stay which was discharged after interpartes hearing on 3rd August 2023.
13. That prior to the execution process, a draft decree and certificate of costs was served on the Applicant's counsel vide letter dated 27th March 2023 sent to them via email seeking approval of draft decree but that there was no response hence the court was justified in issuing decree and certificate of costs and warrants of attachments and sale of the applicant's property.
14. It was further deposed that execution of costs it not a violation of the applicant's right to be heard as she was granted every opportunity to be heard in the lower court.



15. That the annexed warrants are stale, that the stay will keep the Respondent from accessing their reasonable costs awarded by the trial court upon dismissing the Appellant's suit.
16. That the Appellant's claim against the Respondent had been made illegitimately as she had long before sold the subject Motor Vehicle to a Third Party and relinquished her interest therein as shown by sale agreement AR 5(a) hence this appeal is not legitimate and therefore it cannot be rendered nugatory in any way and that the attempt by the Applicant to derail execution for costs awarded to the Respondent should be declined as the facts presented to the trial court are the same as those place before this court and a replication.
17. Finally, that the Respondent's company is not impecunious as it is involved in the importation of Motor Vehicles business and is capable of reimbursing the costs as it has attachable assets in Kenya which can be attached and sold to recover the costs if paid and the appeal succeeds hence this application should be declined.
18. The application was argued orally on 13th October 2023 with the parties' counsel reiterating the pleadings and depositions reproduced above. I shall therefore repeat what counsel submitted on here but the same is considered in this Ruling.

Analysis and Determination

19. I have considered the application, grounds, supporting affidavit, the Replying affidavit and annexures.
20. I have also considered the arguments reiterating the depositions by both counsel for the parties. The mail issue for determination is whether the application as presented is merited.
21. The Applicant herein was the Plaintiff in the lower court. She filed suit against the Respondent seeking for a permanent injunction to restrain the Respondent from repossessing the Motor Vehicle which she had purchased from the Respondent on hire purchase terms but defaulted in the instalments on account of harsh economic hardship occasioned by the Covid 19 pandemic.
22. The lower court which also heard the suit had granted the temporary stay of repossession of the Motor Vehicle but after hearing the main suit, it dismissed the applicant's claim with costs.
23. The applicant had also sought for damages which claim was dismissed.
24. Aggrieved by that dismissal of her suit with costs, the applicant filed this appeal on 13th April 2023 but it was not until July 2023 that she filed an application for stay of execution of decree costs pending appeal, the application was initially filed in the lower court and dismissed. This application dated 15th September 2023 was filed in September 2023.
25. Therefore, the question is whether the application meets the conditions precedent and or the threshold for grant of stay of execution of decree or certificate of costs pending appeal.
26. These conditions are found in Order 42 Rule 6(2) of the [Civil Procedure Rules](#) which provides that:

“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.”



27. In *Butt vs Rent Restriction Tribunal* (1972) KLR 417, an age old but ever relevant decision of the Court of Appeal on matters stay of execution of decree pending appeal, the Court of Appeal stated that:

- “(1) The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- (2) The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the Judge’s discretion.
- (3) A Judge should not refuse a stay if there are good reasons/grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- (4) The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements.

The special circumstances in the *Butt vs Rent Restriction Tribunal* case were that there was a large rent amount of rent in dispute and the appellant had an undoubted right of appeal.
- (5) The court in exercising its powers under Order 41(2) (b) of the *Civil Procedure Rules* (then), can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

28. In the instant case, the applicant’s case in the lower court was dismissed with costs. One of the prayers which was declined was a permanent injunction restraining the Respondent from repossession the Motor Vehicle and the reason for declining the injunction was obvious, that the Respondent had since executed transfer documents transferring the ownership of the Motor Vehicle to the applicant herein and indeed, as it has emerged from the Replying affidavit sworn by the Respondent’s Director, the applicant herein had, infact, already sold the subject Motor Vehicle to a Third Party although she had not had it transferred to him and therefore her interest in the vehicle had been extinguished, a fact which she never disclosed to the court below and or to the Respondent who was still the Registered owner of the subject Motor Vehicle.

29. That Applicant had also sought for damages for unlawful detention of the logbook for the subject Motor Vehicle and punitive damages for unlawfully detaining the logbook for the subject Motor Vehicle and costs of the suit.

30. In other words, there were no special damages claimed by the applicant against the Respondent. That being the case, it is clear that there is no way the appeal herein, if successful, shall be rendered nugatory through execution for recovery of Party and Party costs since there is absolutely no evidence that the appeal is only against an award of costs to the Respondent.

31. In addition, it has not been demonstrated on a balance of probabilities that substantial loss will be suffered by the applicant/appellant if stay is declined.

32. Furthermore, the Respondent’s Director has sworn an affidavit to the effect that the Respondent is an importer of Motor Vehicles and is not impecunious and that should the appeal succeed after it has been paid its costs, then it will be in a position to reimburse the applicant.



33. The above deposition was never countered and neither was there any deposition by the Applicant that the Respondent is incapable of repaying the costs of just Kshs130,000 should the appeal succeed. I therefore find that no substantial loss has been established by the applicant.
34. On whether the application has been brought without undue delay, I observe that the judgment in the lower court was rendered on 24th March 2023 and the appeal was timeously filed on 13th April 2023 within 30 days of the Judgment.
35. However, no application for stay of execution of decree or costs (in any event the decree was a negative decree) until the Respondent put in motion the process of executing for costs is when the applicant filed an application in the lower court seeking for stay vide her application dated 3rd July 2023, over three months from the date of Judgment. Absolutely no reasons were given for that delay which in my view, was inordinate.
36. Furthermore, the Respondent has sworn an affidavit to the effect that prior to execution process, their advocate extracted a draft Decree and served upon the Applicant's counsel seeking for approval but that the applicant's counsel never responded thereto. This deposition was never controverted.
37. Instead, the applicant has dwelt on the allegations that the process of execution was illegal because the costs were assessed exparte, without notice to the applicant herein who was therefore deprived of the right and opportunity to be heard in opposition to the taxation or to even file an objection under paragraph 11 of the [Advocates Remuneration Order](#); that no Notice of Taxation as issued to her as required under Section 14 of the [Advocates Remuneration Order](#) and Section 72 of the [Advocate's Remuneration Order](#).
38. Further, that no certificate of taxation of costs was issued prior to issuing of warrants of attachment and sale contrary to Section 68A of the [Advocates Remuneration Order](#).
39. With utmost respect to counsel for the applicant, he has mixed up issues of the challenge to taxation of costs which is governed by the procedure set out in paragraph 11 of the [Advocates Remuneration Order](#) where a Reference would have been filed or an application for setting aside of exparte taxation, and an application for stay of execution of decree or costs pending appeal, governed by Order 42 Rule 6(2) of the [Civil Procedure Rules](#).
40. The two regimes are completely different like the East and the North. I will not belabour that point save to conclude that the applicant has not explained to this court why she took over 3 months to file an application for stay pending appeal in the lower court and finally, why, she, after losing the application for stay in the lower court, again she took her sweet time before filing this application.
41. It is indeed sad that the applicant herein has not come to this court with clean hands in that from the annexures filed by the Respondent to its Director's Replying affidavit, as at 24th November 2021 when the applicant filed suit against the Respondent, she had already sold the subject Motor Vehicle to George M. Ndungu at Kshs.1,200,000 and as at 30th October 2021, she had received from the said purchaser the purchase price with a balance of only Kshs.120,000 yet the applicant herein was claiming in her plaint that she had suffered in her business due to force majeure occasioned by Covid 19 Pandemic hence her default in repaying the instalments to the Respondent.
42. In my view, the Applicant is an extremely dishonest person who does not deserve the exercise of judicial discretion of this court. She is a liar per excellence and is abusing the process of this court with this kind of application.



43. No wonder that she uttered no rejoinder to the serious indictment revealed against her by the Respondent in the Replying affidavit on whether security for the due performance of decree, that may be binding on the applicant should be ordered by this court. I observe that the applicant never mentioned anything to do with security for due performance of decree.
44. Nonetheless, the court if satisfied that there is sufficient cause to grant stay can order for depositing of security for the due performance of decree.
45. In this case, I find that the Applicant has miserably failed to persuade this court that she deserved the orders sought for stay of execution of the negative decree or Certificate of Costs and therefore the question of depositing of security for due performance of decree does not arise.
46. In the end, I find and hold that the applicant has not demonstrated that she is entitled to the orders sought in her application dated 24th August 2023 which application is hereby found to be devoid of any merit and is hereby dismissed with costs to the Respondent to be assessed in the appeal.
47. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 31ST DAY OF OCTOBER, 2023

R. E. ABURILI

JUDGE

