



REPUBLIC OF KENYA



**Ambasa Bus Services Ltd & another v Ibrahim (Civil Appeal
E083 of 2023) [2023] KEHC 25788 (KLR) (28 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25788 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E083 OF 2023
EM MURIITHI, J
NOVEMBER 28, 2023**

BETWEEN

AMBASA BUS SERVICES LTD 1ST APPELLANT

BROTHERS INTELLEX INVESTMENTS LTD 2ND APPELLANT

AND

GACHU IBRAHIM RESPONDENT

RULING

1. Before this Court is the Appellants' Notice of Motion application dated 31st May, 2023. The Appellants are seeking an order of stay of execution against the ruling of 16th May, 2023 and judgment delivered in Isiolo CMCC No 9 of 2018 together with all other consequent proclamation, attachments or execution by the Respondent. The Appellants also seek that the costs of this application to be in the cause.
2. The Application is premised on the grounds on the face of it and it is supported by the affidavit sworn by Abdinasir Ali Osman, a director of the objectors herein. He deposes that the Respondent filed Isiolo CMCC No 9 of 2018 arising from a road traffic accident and sued Moyale Liner Bus Services and Dikaya Abduluhi Bagaja. That the Respondent consequently obtained a decree in his favour and the Respondent then proceeded to attach the buses registration KCX 187B, KCD 474K, KDH 477K, and KCU 175C in realization of part of the decree. That as a result, the Appellants filed objection proceedings against the Respondent and the same was disallowed in the ruling delivered in Isiolo CMCC No 9 of 2018. The Appellants faults the trial magistrate for holding that the Respondent was at liberty to attach the Applicants' buses because they share a director with the 1st Defendant in Isiolo CMCC No 9 of 2018.
3. Being dissatisfied by the said decision, the Appellants preferred an appeal which gave rise to the instant application before this Court.



4. The Appellants claim that the Respondent was paid Kshs 3,000,000/= by the defendants in Isiolo CMCC No 9 of 2018 but inexplicably turned to the Appellants to demand for the balance. That if the orders of stay of execution are not issued, the Appellant will suffer substantial loss since their proclaimed fleet of buses will be impounded and would paralyse their operations and income, taking into account that the said buses have been acquired on credit facilities and the Appellants are required to sacrosanctly meet their repayment obligations failure to which the buses would be reposed by the financiers. Further, that the appeal has very high chances of success and that the Appellants are ready to deposit security in the form of a logbook for any of the proclaimed buses since the value of each bus is more than Kshs 8 million.
5. In opposing the application, the Respondent authorized his advocate, one Seth Khisa, to swear an affidavit which he swore on 30th May, 2023. The said advocate deposed that he conducted this from inception and therefore had full knowledge and information concerning the matter. According to him, the present Application is tenuous, frivolous, scandalous, vexatious and a total abuse and mockery of this Honourable Court's process.
6. He deposed that the Applicants are undeserving of the stay orders sought as they are in contempt of court having on several attempts caused obstruction of execution proceedings by instructing goons to cause breach of peace during the legal process where the Respondent had instructed their auctioneers. Further, that the Appellants' appeal does not raise any triable or arguable issue and is bound to fail.
7. The said Respondent's advocate deposed that the Respondent is a minor who suffered severe life-threatening injuries and the continued denial of judgment duly due puts her at a great risk. He further claims that the outstanding decretal sum is now over Kshs 4,000,000/= and that the Applicants have not demonstrated that they shall be unable to recover the decretal sum and costs paid to the Respondent in the unlikely event that their appeal succeeds.

The Submissions

8. The application was canvassed by way of written submissions. It is the Appellants submission that the Respondent had in Isiolo CMCC No 9 of 2018 sued Moyale Bus Services as well as Dikaya Abduluhi Bagaja who was the driver of the motor vehicle that was involved in an accident. That consequently, judgment was entered in favour of the Respondent who was awarded Kshs 6,606,250/=. That the Respondent then initiated attachment and execution against the defendants in the primary suit and Kshs 3,000,000/= was paid towards part settlement of the decretal sum.
9. According to the Appellants, the Respondent then in a strange twist attached the Appellants' buses leading to objection proceedings which were later dismissed by the chief magistrate's court hence triggering the present appeal. The Applicants claim that they were not and have never been judgment debtors herein and only came on board when the Respondent attempted to attach its buses. They thus argue that the appeal herein has high chances of success. That the trial magistrate erred in finding that since one of the Applicants (a limited liability company) shared a director with the 1st Defendant in the lower suit (Moyale Liner Bus Services), then the Respondent was at liberty to execute against the Applicants as well. In addition, that the 1st Defendant in the lower court is a distinctly incorporated company and therefore there is no legal nexus between the said 1st defendant and the Appellants herein.
10. The Appellants further submitted that the present appeal and application were brought timeously, days after the delivery of the impugned ruling. Further, the circumstances of this case are distinguishable to requirement of provision of security under Order 42 of the *Civil Procedure Rules* as the Applicants are not contesting the judgment/decreed but rather the illegality and procedural impropriety of the decision to proclaim goods belonging to a party who is not a judgment debtor. That



the payment of Kshs 3 million that the Respondent received from the defendants in the primary suit is good enough security and that the Respondent should not be contemporaneously executing against the defendants in the lower court as well as against the Appellants herein.

11. On the part of the Respondent, it was submitted that since the Appellants did not respond to the factual depositions made in the Replying Affidavit of the Respondent, the said factual positions remain uncontested and therefore ought to be taken as true. To this buttress this position, the Respondent relied on the cases of *Mohamed & another v Haidara* [1972] E.A. 166 where the Court of Appeal rendered itself as follows:

“However, the appellants filed an affidavit in reply... The respondent made no attempt to reply to these allegations and they therefore remain unrebutted”

12. The Respondent further relied on the case of *Kenya Reinsurance Corporation v R.M. Mutiso* [2009] eKLR thus held as follows:

“There is no supplementary affidavit filed by the Respondent in response to the replying affidavit. More particularly, all the matters deponed to in the afore-quoted paragraphs of the affidavit of Esther Mukenyi Ndosi have not been controverted in any way”

13. On the issue of whether stay of execution should be granted by this Court pending hearing and determination of the appeal before it, it was the Respondent’s submission that an appeal does not operate as an automatic stay of execution or proceedings and that the Court appealed from may for sufficient cause order stay of execution of such decree. According to the Respondent, the Appellants have not satisfied any of the conditions for grant of stay of execution and thus their application is without merit and ought to be dismissed with costs. It was further submitted by the Respondent the proclaimed properties forming the subject of the objection proceedings appealed from herein have been rightfully made available for attachment and execution by the Respondent in the manner sought and therefore no prejudice will be occasioned if the same are disposed by way of execution. That there is an inseparable nexus between the judgment debtor and the Applicants herein as they trade in the same nature of business, they interchangeably have a common directorship/shareholding, they share the same postal address as well as physical address and the attached motor vehicle traded bearing the brand and fashion of the judgment debtor until when attachment was issued.
14. Finally, the Respondent submitted that the Appellants have not made any substantive indication of providing sufficient security to safeguard the decretal award in the event that their appeal is dismissed. That the Appellants should at the very least provide as security the outstanding decretal sum of Kshs 4,000,000/= to be deposited into a joint interest earning account held in the names of the firms of advocates for the within a stipulated period failure to which the stay of execution order be set aside.
15. The application was further supported by the Applicants’ supplementary submissions that were filed on 4th July, 2023. It was submitted that from the Respondent’s Replying Affidavit, there were no compelling averments to warrant a response by way of a supplementary affidavit and that whatever needed to be amplified was thrashed out in the Applicants’ written submissions. Further, that since Kshs 3,000,000/= was already paid by the defendants in the primary suit, the outstanding decretal sum is Kshs 663,280/= and not Kshs 4,000,000/= as claimed by the Respondent since the decretal award in the primary suit was Kshs 3,663,280/= and not Kshs 6,606,250/=.
16. Finally, that the Applicants herein are not judgment debtor but rather objectors who failed in their bid in their objection proceedings. That had the defendants in the primary suit seeking for stay of execution, then the court would aptly and sacrosanctly order the provision of security by way of



deposit of money or otherwise since the said defendants are the judgment debtors and have also made a substantial payment of Kshs 3,000,000/=. That moreover, the Respondent can still proceed and execute against the defendants to realize the balance of the decretal sum.

Analysis

17. I have considered the Appellants' application seeking orders of stay of execution, the supporting affidavit, the replying affidavit in opposition of the application and the submissions filed as well as the authorities relied upon.
18. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provides as follows:
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.
 - (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.”
19. The Court of Appeal in the case of *Visbram Ravji Halai v Thornton & Turpin* Civil Application No Nai. 15 of 1990 [1990] KLR 365 held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 Rule 6 of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
20. However, in light of the overriding objective stipulated in Sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. According to section 1A(2) of the *Civil Procedure Act*:

“the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective.”
21. It therefore follows that this Court must look at all pre-Overriding Objections in light of the said provisions. This does not imply that all precedents should be ignored but rather, that the same must be interpreted in a manner that gives effect to the overriding objective which aims, *inter alia*, to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.



22. Before going to the merit of the present application in this case, I find it practical to address the issue raised by the Respondent that since there was no reply to his Replying Affidavit, that the averments contained in the said affidavit remained uncontroverted. On the other hand, the Appellants aver that they did not find any compelling reason to respond to the Replying Affidavit and that any other pending issue was covered in their written submissions.
23. The explanation given by counsel for the Appellants is persuasive as all issues were addressed by the parties in their written submissions. Above all, I have not seen any prejudice that has been demonstrated shall be visited upon the Respondent if this Court delves into the substantive issues raised in the present application. In the circumstances, it is my view that the reason give by counsel for the Appellants is satisfactory and this Court should proceed and determine the application on its merit.
24. I now move to the application seeking an order of stay of execution. In such an application for stay pending appeal, balancing the interests of the parties is paramount. The Appellants contend that the present appeal has high chances of success. They contend that they are totally distinct legal entities from the 1st defendant in the primary and hence that their appeal raises weight issues. Considering the grounds of appeal raised by the Applicants, it is my view that the appeal is arguable. In the circumstances, it is in the interest of justice not to render the appeal nugatory while at the same time securing the interests of the successful plaintiff.
25. The next issue for consideration is the issue of security. Under Order 42 Rule 6 aforesaid, the Applicants are required to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder. The Applicants cannot have a blanket stay of execution without providing reasonable security. On the other hand, the law is that where an Applicant intends to exercise its right of appeal, then it should be guaranteed that it will be able to recover its money in the event that the appeal succeeds.
26. In this case, the Appellants contend that the proclaimed buses are estimated to be worth Kshs 8 million each and that they are ready to deposit security in the form of a logbook for any of the proclaimed buses. Since the outstanding decretal sum in this case is Kshs 663,280/=, the security being offered by the Appellants for performance of the any eventual decree is more than sufficient, but to avoid lengthy processes in realization of the security, an order for Bank Guarantee is preferable.

Orders

27. Accordingly, for the reasons set out above, the court mases the following orders:
 1. The application for stay of execution pending appeal is granted on conditions set out below.
 2. The Applicants give a security in the form of a Bank Guarantee for the decretal sum of 663,280/= within thirty (30) days.
 3. In default, the stay of execution order herein granted shall lapse.
 4. The Record of Appeal shall be filed within 60 days.
28. Costs in the cause.
Order accordingly.

DATED AND DELIVERED ON THIS 28TH DAY OF NOVEMBER, 2023.

EDWARD M. MURIITHI



JUDGE

Appearances:

Mr. K. Muriuki for the Appellant.

Ms. Kinyanjui for the Respondent.

