



Ambasa Bus Services Ltd & another v SA (Minor Suing Through Next Friend and Her Father AS) (Civil Appeal E078 of 2023) [2023] KEHC 25787 (KLR) (28 November 2023) (Ruling)

Neutral citation: [2023] KEHC 25787 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E078 OF 2023
EM MURIITHI, J
NOVEMBER 28, 2023**

BETWEEN

AMBASA BUS SERVICES LTD 1ST APPELLANT

BROTHERS INTELLEX INVESTMENTS LTD 2ND APPELLANT

AND

SA (MINOR SUING THROUGH NEXT FRIEND AND HER FATHER AS) RESPONDENT

RULING

1. Before this Court is the Appellants' Notice of Motion application dated 24th May, 2023. The Appellants are seeking an order of stay of execution pending appeal.
2. The Appellants herein had instituted Objector proceedings against the Respondent and the same was disallowed in the ruling delivered in Isiolo CMCC No. 8 of 2018 dated 11th May, 2023.
3. Being dissatisfied by the said decision, the Appellants preferred an appeal which gave rise to the instant application before this Court.
4. 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.
5. 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.



6. 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

7. The application was canvassed by way of written submissions. It is the Appellants submission that the Respondent had in Isiolo CMCC No. 8 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.
8. 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. 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.
9. 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/decreet but rather the illegality and procedural impropriety of the decision to proclaim goods belonging to a party who is not a judgment debtor.
10. 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”
11. 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”
12. 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.

13. 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.
14. 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 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. 3,606,250/= and not Kshs. 4,000,000/= as claimed by the Respondent.
15. 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 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

16. The court has 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.
17. 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.”

18. The Court of Appeal in the case of Vishram Ravji Halai vs. 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.
19. 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.”
20. The 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.
21. Before going to the merit of the present application in this case, I find it prudent to address the issue raised by the Respondent that since there was no reply to her 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.
22. The explanation given by counsel for the Appellants is persuasive as all issues were addressed by the parties in their written submissions. Above all, no 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.
23. On 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 illusionary while at the same time securing the interests of the successful plaintiff.
24. 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 stay of execution without providing reasonable security as necessary. The Court appreciates, respectfully, the decision of Malindi Civil Appeal NO. 36 of 2020 Tawakal Airbus Limited v. Irene Muthoni Njirat and Anor. (which was cited in in supplementary submissions



of 3/7/2023 and, therefore, the Respondent's counsel did not get a chance to respond to it) where it was held that-

“The court cannot strictly apply the traditional statutory condition precedent for deposit of security for due performance under Order 42 Rule 6 of the Civil Procedure Rules in matters involving objection proceedings.”

25. For now, the Court will cautiously require a bank guarantee as security before the issues are clarified by a final judgment on appeal in the so-called objection proceedings.

Conclusion

26. Accordingly, for the reasons set out above, the Court makes the following orders:

1. There shall be a stay of execution pending appeal upon the conditions set out here-below.
2. The Applicants shall within 30 days give security by giving a bankers guarantee to pay the outstanding decretal sum with costs and accruing interests from a reputable financial institution specific to this appeal for the whole duration of the appeal.
3. In default, the order for stay lapse and the Respondent will be at liberty to execute.
4. The Record of Appeal shall be filed within 60 days.

27. 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.

