



**Mycredit Limited v Swazuri & another (Commercial Appeal 104 of 2021)
[2022] KEHC 143 (KLR) (Commercial and Tax) (24 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 143 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL 104 OF 2021
JN MULWA, J
FEBRUARY 24, 2022**

BETWEEN

MYCREDIT LIMITED APPLICANT

AND

ABDALLAH MUHAMMAD SWAZURI 1ST RESPONDENT

JACKLINE SILANTOI LONGISA TEEKA 2ND RESPONDENT

RULING

1. Before the court is a Notice of Motion dated 18th November 2021 brought under Order 42 Rule 6, Order 51 Rule 1 of the *Civil Procedure Rules*, Section 1, 1B & 3A of the *Civil Procedure Act*. The Applicant seeks a stay of execution of a ruling and order delivered on 1st October 2021 by Hon. E. M. Kagoni (PM) in Milimani CMCC No. E186 of 2021: Prof. Abdallah Muhammad Swazuri & Jackline Silantoi Longisateeka v Mycredit Limited and the proceedings therein pending the hearing and determination of its Appeal.
2. The application is based on the grounds on the face of it and the Supporting and Further Affidavits of Sarah Wabwile, the Applicant's Legal Manager.
3. A brief background is that on 18th February 2021, the Respondents filed an application of even date in the trial court alongside the plaint seeking various orders against the Applicant in relation to motor vehicle registration number KCA 444N Toyota Land cruiser V8 Estate which had been used as security for a loan advanced to the 1st Respondent by the Applicant. On 19th February 2021, the trial court granted the Respondents interim orders directing the Applicant to immediately release the subject motor vehicle to its registered owner, the 2nd Respondent herein, as well as an injunction restraining the Applicant from interfering with her ownership of the subject motor vehicle, pending the inter partes hearing of the application.



4. The Applicant's case is that it was served with the Order of 19th February 2021 on 22nd February 2021, by which time it had already sold the subject motor vehicle at a public auction and passed the possession and title thereof to the highest bidder since the 1st Respondent had defaulted in servicing the loan advanced. Thereafter, the Respondents filed another Application dated 28th April 2021 seeking inter alia committal of the Applicant to civil jail for contempt of the court orders of 19th January 2021.
5. The Applicant later learnt through the Respondents' Advocates that a ruling in respect of the application dated 24th April 2021 was delivered on 1st October 2021 in the absence of both parties. In the said ruling, the trial magistrate found the Applicant guilty of contempt and ordered inter alia that: the Applicant's Director, David Kariuki Wangai, do appear in court on 4th November 2021 for sentencing; the forced transfer of 22nd February 2021 is declared void; and the Applicant do avail the subject motor vehicle before court on 4th November 2021 for it to be returned to the Respondents pending the hearing and determination of the suit.
6. In the circumstances and being aggrieved by the ruling and order of 1st October 2021, the Applicant filed Nairobi High Court Commercial Misc. Applic No. E831 of 2021 on 12th November 2021 and on 16th November 2021, it obtained leave of court to file an Appeal out of time as well as a temporary stay of the ruling and order of the trial court. The Applicant then filed its appeal herein. In the Applicant's view therefore, it brought the instant Application without any undue delay.
7. In opposition, the Respondents filed a joint Replying Affidavit sworn by the 1st Respondent herein on 8th December 2021 in which they urged that the Applicant's application be disallowed. It was averred that the Applicant was in contempt of court by the time it filed the instant application and is thus not entitled to either this court's audience or the orders sought in the application herein. It is also the Respondents view that in any event, the Applicant has not satisfied the conditions necessary for the grant of stay of execution pending appeal and has also not demonstrated to this Court that it has an arguable appeal.
8. Further, they averred that the Applicant has not demonstrated any prejudice that it will suffer if orders sought are not granted whereas the 1st Respondent will suffer prejudice should the orders be granted since the Applicant has already illegally transferred his motor vehicle to a third party. In the alternative, the Respondents contend that if this court is inclined to issue the orders sought in the instant application, then the Applicant must first purge the contempt of the court orders of 1st October 2021 and furnish security for due performance of the said orders.
9. In rebuttal, the Applicant stated that it cannot be in contempt of the trial magistrate's orders of 1st October 2021 when there are orders from this Court staying the said orders. Further, it was contended that there is no security that the Applicant can reasonably furnish for due performance of the trial court's order of 1st October 2021 as it is a non-monetary decree. Additionally, that the subject motor vehicle is in the possession of and registered in the name of a third party who is neither a party to the suit in the trial court nor the instant application, thus the Applicant is not reasonably able to produce the motor vehicle.
10. The application was canvassed through written submissions which have been duly considered. The Applicant herein was well within its constitutional right to appeal against the trial magistrate's ruling and order of 1st October 2021.

On Contempt of court orders



11. By filing the instant application, the Appellant exercised a legitimate right and cannot be faulted or denied audience just because it has not purged its contempt. I find guidance in the case of *NHIF v Boya Rural Nursing Home Ltd*, where the Court of Appeal held as follows :-

“It is apparent from the ruling of the learned Judge that he understood the law to be that a contemnor who has made an application to set aside the order alleged to have been disobeyed cannot be heard on such application unless and until he has obeyed the order first and then question it later. If that is so, then the learned Judge with respect misapprehended the law for a court has an absolute discretion whether or not to hear a contemnor who has not purged the contempt.

12. I am also guided by *Hadkison v Hadkison (1952) 2 All ER 567 at page 575* where Denning L.J said:

‘I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues it impedes the cause of justice by making it more difficult for the court to ascertain the truth or to enforce orders which it may make, then, the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.’

13. Two issues arise for determination:

- a. Whether the Applicant has satisfied the requirements for stay of execution pending appeal; and
- b. Whether the court should stay the proceedings in the trial court pending the hearing and determination of the appeal.

Stay of Execution

14. Stay pending appeal from the lower court is governed by Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules which provides that:

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

15. From the said provision, it is clear that in order to succeed in an application for stay of execution, an applicant must demonstrate that substantial loss may result unless the order of stay is issued; that the application has been brought without undue delay and lastly, must give security for the due performance of any decree or order that may ultimately be found to be binding on the Applicant. Taking into account the circumstances of this case as highlighted hereinabove, I hold no doubt that the instant application was filed timeously and without undue delay.
16. As regards substantial loss, the Applicant submitted that it will suffer substantial loss as it shall be compelled to avail a motor vehicle that is no longer in its possession and control given that the same already passed to a 3rd Party. The Applicant also urged that the wrong person namely David Wangai, may be cited for contempt yet he is not the Applicant's director as stated in the impugned order, but its Chief Operations Officer. Further, the Applicant is worried that should one of its main employees be sent to jail, its business will be adversely affected as it shall be viewed as an entity that engages in criminal activities and will subsequently be shunned by its customers.
17. On the other hand, the Respondents argue that the Applicant stands to suffer no loss that cannot be compensated should the appeal be successful. They maintained that they are the ones who stand to suffer irreparable loss as the motor vehicle subject of the suit in the subordinate court has already been sold and transferred to a third party and they may never recover it.
18. In the case of *Kenya Power and Lighting Co. Ltd v Khan Nassir Rustam [2013] eKLR*, Kasango J. held that substantial loss is not only restricted to financial loss. I am persuaded by the said position and hold the view the Applicant will indeed suffer substantial loss if the wrong person is jailed and/or loses his liberty.
19. On the question of security, the Applicant submitted that the same is unnecessary since the impugned order is not a monetary decree. The Respondents on their part have urged that as a sign of good faith, the Applicant must offer security for the performance of the order appealed against since it illegally sold a motor vehicle which was the subject matter of the suit in the trial court.
20. It is well settled that a court has discretion to determine the extent and nature of the security to be provided where a party is seeking stay of execution. It is noteworthy that the Applicant has appealed against an interlocutory ruling and not a final judgment where the parties' rights have been finally determined on the basis of evidence tendered. In my view therefore, there should be no need for security at this juncture since in any event, the order was not monetary in nature.

Stay of Proceedings

21. As regards stay of proceedings, it is worth noting that such an order would normally be granted to avoid a waste of valuable judicial time; to prevent the duplication of efforts by courts and multiplicity of suits and applications; and to prevent a situation where an appeal would be rendered nugatory in the event that an applicant succeeds. In *Kenya Wildlife Service v James Mutembei [2019] KLR*, Gikonyo J stated that:

“Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore the test for stay of proceeding is high



and stringent. See Ringera J in the case of Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000 persuasively stated thus;

“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 cases, 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.”

22. See also *Niazons (K) Ltd v China Road & Bridge Corporation Kenya Ltd Nairobi Milimani HCCC No. 126 of 1999* where the court rendered that:

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay...should be granted.”

Same sentiments were expressed in *Wachira Waruru & Another vs. Francis Oyatsi [2002] 2 EA 66*

23. In the instant case it is my considered view that the interest of justice will be best served if the suit in the trial court is heard and concluded expeditiously. That way, it will be expeditiously established whether the Respondents indeed have a case against the Applicant herein or not. (See *Kenya Women Microfinance Bank Limited v Ruth Ndunge Mutulu & another [2018] eKLR*). The proceedings in the trial court should therefore not be stayed pending the hearing and determination of the appeal.

24. For the foregoing, the application dated 18th November 2021 succeeds in part in the following manner:

- a. There shall be a stay of the Ruling and Order delivered in the trial court on 1st October 2021 and all the consequential orders issued in respect of that order in the said court pending the hearing and determination of the Applicant’s appeal.
- b. There shall be no stay of proceedings in the trial court.
- c. The costs of this application shall abide the outcome of the appeal.

DATED AND SIGNED THIS 24TH DAY OF FEBRUARY 2022

HON. J. N. MULWA

JUDGE

