REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CIVIL APPEAL NO. E013 OF 2022

(Being an Appeal from the refusal to vacate warrants of attachment in Sotik CMCC No. 214 of 2015 issued by

Hon. E. Muleka, Principal Magistrate at Sotik, delivered on 27th January 2022)

ENA INVESTMENT LIMITED ..... APPLICANT/APPELLANT

-VERSUS-

BENARD OCHAU MOSE & JANE BOSIBORI OCHAU

(Suing as the legal representatives in the Estate of

ENOCK ARANI MOSE – deceased) **..... 1ST RESPONDENT**

ELIMONYACO AUCTIONEERS ..... 2ND RESPONDENT

RULING

1. This Application is dated 2nd February 2022 and is filed on 4th February 2022 under Certificate of Urgency. It is premised on Order 22, Rule 22(1), Order 51 Rule 1 of the Civil Procedure Rules 2010, Sections 1A, 3A and 7 and 63 of the Civil Procedure Act, Cap 21.

2. The Applicant herein prays to Court as follows:

(i) THAT the Application be certified urgent and the same be heard ex-parte at first instance. (SPENT).

(ii) THAT pending the hearing and determination of the Application inter-parties, there be a stay of execution of warrants of attachment dated the 5th day of January 2022 and all consequential orders in favour of the 1st and 2nd Respondents till this Application is heard and determined. (SPENT)

(iii) THAT pending the hearing and determination of the main appeal, there be a stay of execution of the warrants of attachment dated the 5th day of January 2022.

(iv) THAT the parties herein be and hereby ordered to comply with the court orders dated the 9th day of November 2021.

3. The Application was filed alongside the Supporting Affidavit of Evans Anyona, the director of the Applicant Company and is premised on 11 grounds as follows:

i) That the learned trial court by the time of issuing the impugned warrants dated the 5th day of January 2022, did not have authority to issue warrants of attachments in this matter after it pronounced itself in the ruling dated the 9th day of November 2021 that this matter is *res judicata*, hence the hands of the lower court were tied and it cannot issue any orders relating to this matter at all.

ii) That this matter was declared *res judicata* by the lower court's ruling dated the 9th day of November 2021and any subsequent extension of warrants of execution in this matter is illegal *ab initio*.

iii) That the said orders of the lower court dated the 9th day of November 2021 have not been reviewed or appealed against by any of the parties herein hence the lower court has no authority to entertain or issue any orders hence the Appellant urges the honorable Court to stay and declare the warrants of attachment dated 5th day of January 2022 as illegal.

iv) That the said warrants of execution were extracted with the full knowledge of the lower court that the Appellant herein had presented records before the court exhibiting full payment of the decretal sum.

v) That the warrants of execution dated the 5th day of January 2022 were illegally extended and extracted with a view of enriching the 1st and 2nd Respondents to the detriment of the Appellant.

vi) That the extraction and issuance of the impugned warrants of attachment was a gross violation and an abuse of the court's process by the parties thereto.

vii) That the 1st and 2nd Respondents fraudulently moved the lower court on the 10th day of August 2021 and extracted warrants of attachment of Kshs. 1,682,638/= as the entire unpaid decretal amount owed by the Appellant with accrued interest. The Appellant contested the same by exhibiting to the trial court that the claim had been fully paid.

viii) That the learned magistrate in his ruling relating to the warrants issued on the 10th day of August 2021 pronounced the same as an abuse of the court process and administrative.

ix) That after the lower court issued warrants of execution dated the 10th day of August 2021 of Kshs. 1,682,638/= in favour of the 1st and 2nd Respondents and its subsequent declaration that the matter is *res judicata*, the Respondents without receiving any payment from the Appellant, the claim reduced to Kshs. 861,972/= an indication that the 1st and 2nd Respondents were out to enrich themselves unfairly with the aid of the lower court.

x) That the orders sought if granted will not prejudice the 1st and 2nd Respondents.

xi) That it is in the interests of justice that this honorable court grants the orders prayed herein.

4. The brief facts of this case were that on 20th October 2013, Enock Arani Mose, the 1st Respondents' son (deceased person) was involved in a fatal road traffic accident along Chebilat-Sotik road. The 1st Respondents herein then brought a suit through Sotik Civil Suit No. 214 of 2015 against the Applicant herein. By judgment delivered on 17th May 2018, the trial court awarded damages in favour of the 1st Respondent in the sum of Kshs. 1,035,250/= plus costs and interests. The 1st Respondents then moved the court on 10th August 2021 seeking to attach the Applicant's property in realization of the decretal sum. It was their case that the Applicant (defendants) failed to settle the decretal sum which now stood at Kshs. 1,682,638/= inclusive of interest.

5. It was the Applicant's case (Appellant) that they had already paid the full decretal amount in three installments of Kshs. 500,000/= paid on 22nd August 2019, Kshs. 500,000 paid on 22nd August 2019 and Kshs. 320,666/= paid on 26th September 2019. The 1st Respondents' advocate on the other hand claimed that the first amount of Kshs. 500,000 paid by the Applicants was in respect of another matter that they were handling, Nyamira PMCC 169 of 2015. The Applicant brought an Application dated 26th August 2021 seeking a declaration from the trial court that the decretal amount had been fully settled. The trial court in its ruling dated 9th November 2021 declared the matter *res judicata* since it had been heard and determined three years back and ordered the parties to handle the issue of payment amongst themselves and termed the issue as administrative.

6. After perusing their statement of accounts and realizing that there were monies received similar to the amounts quoted in cheques referred to by the Applicant as Nos. 005828 and 005843, the 1st Respondents' advocates confirmed that a total of Kshs. 860,666/= had been paid by Electronic Funds Transfer (EFT). Subsequently, they moved the trial court and extracted another warrant of attachment dated 5th January 2022 seeking the full payment of the balance of the decretal amount being Kshs. 861,972/=. It was the Applicant's contention that since the trial court had already declared the matter *res judicata*, the subsequent warrants that were issued on 5th January 2022 were therefore illegal. This is the basis of the appeal and the present Application.

7. By the Court's directions on 10th February 2022, the Application was urged through written submissions.

Submissions

Appellant's Submissions

8. The Appellant submitted on three issues. Firstly was whether there would be substantial loss and the Applicant submitted that the same was likely to occasion double jeopardy towards them by being dragged through illegal court processes. They submitted that it was the duty of the Respondent's advocates to follow up on the monies received from the insurance company in order to confirm that the said amounts had been settled in full. In addition, they submitted that the properties proclaimed were the only assets they owned for purposes of their business and to sustain daily needs. To this, they relied on ***Mukuma vs. Abuoga (1998) KLR 645, National Industrial Credit Bank Limited vs. Aquinas Francis Wasike Misc. Application 238 of 2005*** **and** ***Article 50 of the Constitution.***

9. On timely filing, they submitted that there was no delay occasioned in filing the present Application. Additionally, they submitted that they were apprehensive that they would not be able to recover their money in the event that the 1st Respondent proceeded to execute their decree since the Respondent did not demonstrate that they were persons of means.

10. Lastly, the Applicant submitted on the issue of depositing security and stated that the same was discretionary on the court in accordance with the provisions of Order 26 Rule 1 of the Civil Procedure Rules. That their appeal was based on non-compliance with the court orders of

9th November 2021 and that having paid the entire decretal amount, the circumstances of the case did not call for the lodging of security. On the contrary, they urged the Court to order the Respondents to deposit security for costs for the main appeal. To this end, they relied on ***Guff Engineering (East Africa) Limited vs. Amrik Singh Kalgi at page 281***.

Respondent's Submissions

11. The Respondent submitted that the Applicant did not provide copies of the cheques confirming payment and that their unwillingness to deposit or pay the remaining decretal sum as security for the performance of the judgment decree was a violation of their right to property. They also submitted that the power of the Court to grant stay of execution pending appeal, though discretionary, had to be exercised judiciously. That the Applicant had to satisfy the Court that they were willing to furnish security and that they would suffer substantial loss if the stay was not granted.

12. It was the submission of the Respondent that one of the cheques issued in settlement of the judgment decree was in respect of another matter and this remained uncontroverted when they produced BOM-3 as proof. They urged the Court to balance their interest to enjoy the fruits of the judgment alongside that of the Applicant's right to appeal and thus order that the balance of the decretal sum be deposited in a joint interest earning account so that if the Applicants could prove payment, the money would be released to them. They relied on the case of ***Kenya Tanzania Uganda Leasing Company Limited vs. Mukenya Ndunda (2013) eKLR*** **and** ***Machira T/S Machira & Co Advocates vs. East African Standard (No. 2) (2002) KLR, 63***.

13. Secondly, the 1st Respondent submitted that the Applicants herein failed to demonstrate the manner in which they would suffer substantial loss if they were allowed to execute the decree. They cited the case of ***Everlyn Jebitok Keter vs. Henry Kiplagat Muge & 2 Others (2011) eKLR*** **and** ***Rocky Driving School Limited vs. Cute Kitchen Limited (2015) KLR***.

14. Finally, they submitted that the Application lacked merit and ought to be dismissed as the Applicant failed to satisfy the conditions pre-requisite for granting an order for stay of execution pending appeal.

Issues

15. Having considered Application and the submissions of the two parties alongside the legal authorities they have relied upon, the main issue for determination is whether the Application has merit and should be allowed.

16. 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.*

17. The power of a court to grant stay of execution is discretionary as correctly submitted by the Respondents. This discretionary power must not be exercised capriciously or whimsically but must be exercised in a way that does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the appeal overturn the trial court's decision. (see **Butt vs. Rent Restriction Tribunal [1979]**).

18. The purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of the case. The Court of Appeal in **RWW vs. EKW (2019) eKLR** addressed itself on this 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.*
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> *9. 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."*

(See also Court of Appeal of Uganda in **Mugenyi & Co. Advocates vs. National Insurance Corporation [Civil Appeal No. 13 of 1984]**).

19. The Court of Appeal in **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nairobi 15 of 1990 [1990] KLR 365,** outlined the requirements for granting stay of execution pending appeal. It 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 (*as it then was*) 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.

20. The first requirement is that the intended appeal must be arguable. A cursory look at the Memorandum of Appeal shows that the grounds raised therein are triable. This first ground is therefore met. The essence of considering whether the appeal raises triable issues is to avoid the same being rendered nugatory should the decision of the appellate court overturn that of the trial court.

21. The second aspect is to consider whether the Application before court had been filed without undue delay. I noted that the order granting warrants of attachment was dated 5th January 2022 while the present application is dated 2nd February 2022. The Memorandum of Appeal is also dated 3rd February 2022. Thus, there is no undue delay.

22. Thirdly, this Court must determine whether not granting the order will occasion substantial loss to the Applicant. Substantial loss was explained in the case of **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR,** that:-

> *"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."*

23. I have perused the further Affidavit of the Applicant's director dated 28th February 2022 and noted that his main concern is that the motor vehicles are their only source of income for their daily livelihood and repays loans from various financial institutions. Thus, they would suffer irreparable loss where stay was not be granted. On the other hand, the Respondents have also waited for three years for their judgment debt to be paid and are yet to enjoy the fruits of their judgment. This Court while balancing these two interests, must satisfy itself that that no party would suffe4r undue prejudice.

24. This principle was enunciated in the decision of the Court of Appeal in **Absalom Dova vs. Tarbo Transporters [2013] eKLR**, where it stated: -

> *"The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation…"*

25. It is my considered view that if this Court were to deny the Applicants the order for stay of execution, it would place them at a more prejudicial position than the Respondents. While it is unfortunate that the Respondents have had to wait for long to enjoy the fruits of their judgment, the Applicants have adequately demonstrated that they are likely to suffer loss should their properties be attached and sold off. The Applicants did state that they were apprehensive that the Respondents may not be able to repay them should the Appeal go in their favour. That fear is not far-fetched as Respondents have neither rebutted nor demonstrated that they had the means and capacity to refund the Applicants. I am satisfied that the Applicants have adequately demonstrated that they would suffer substantial loss.

26. Lastly, the Applicant is required to furnish security to the Court as security for the performance of the judgment debt should the appeal fail. In the present case, the award from the trial court in favour of the Respondents was made on 17/5/2018 which is now four years back. Though the Respondents confirmed that some amounts had been remitted in settlement of the judgment decree, it is evident that a substantial part of the judgment debt had not been paid. The judgment debt was due for settlement and remained owing until payment in full as in the present case. The judgment debt stands unsettled to the extent of Kshs. 861,972/=. It is this amount that the Court thus considers as the outstanding judgment debt. This amount still emanates from a legal court order issued by the trial magistrate and where a party seeks stay, such an application must still be weighed against the parameters under Order 46 Rule (2).

27. The purpose of security was clearly enunciated in **Arun C. Sharma vs. Ashana Raikundalia t/a Rairundalia & 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."*

28. It behooved the Applicant herein to furnish security as stipulated by the law. This was not done. The Applicant was unwilling to pay any further monies towards this matter as their claim in the appeal was that they have already settled the entire decretal amount. It was their argument that since they were not challenging the decision of the trial court, there was no need to deposit security. They also contended that they were only challenging the legality of the warrants which in any case would absolve them from the parameters of order 42, rule 6 (2b). At this point, it appears as though the Applicants want to have their cake and still eat it. On the one hand they argue that where stay is not granted, they will suffer substantial loss. On the other hand they are unwilling to comply with the requirements under Order 42, rule 6.

29. Stay of execution is exactly what it states; it is an order of the court barring a decree holder from enjoying the fruits of his judgment pending the determination of some issue in contention. It matters not whether the issue in contention is the amount awarded in the judgment debt, or liability or legality of the extracted warrants as in this case. Where a party seeks to stay execution, the Court must be guided by the parameters set out in Order 42 Rule 6.

30. While this Court appreciates that the subject of the appeal is whether the decretal amount was paid or not and hence the unwillingness of the Applicant to deposit security for the outstanding judgment debt, at this interim stage, it will only limit itself to the preconditions for granting stay of execution where there exists a judgment legally entered in favour of one party against the other. Thus, it matters not at this stage whether they had paid the full amount or not, that is a matter for consideration at the appeal stage. It must satisfy the requirement for security.

31. The Court observed in **Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd [2019] eKLR**, thus:-

> **"…** *the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.*
>
> *Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal … Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.* (Underlining mine for emphasis)

32. As already demonstrated in **James Wangalwa & Another vs. Agnes Naliaka Cheseto (supra)** the three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive and not disjunctive. It is my finding that the Applicants herein, though they brought this Application without undue delay and adequately demonstrated the substantial loss that they would suffer and they failed to furnish security as stipulated by sub-rule 2b.

33. In the result, I grant the order for stay of execution on condition that the Applicants shall furnish security equivalent to the outstanding amounts in contention being Kshs. 861,972/=.

34. The Applicants shall provide a Bank guarantee of Kshs. 861,972/= from a reputable Bank within 15 days of today. The applicants shall take all necessary steps to ensure that the Appeal is properly filed and admitted within 45 days of today.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 28TH DAY OF APRIL 2022

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R. LAGAT-KORIR

JUDGE

Ruling delivered virtually in the presence of Ms. Kusa for the Respondent and N/A for the Applicant.