



Progressive Credit Limited v Seedtran Transporters Limited & another (Miscellaneous Application E140 of 2021) [2022] KEHC 12197 (KLR) (26 April 2022) (Ruling)

Neutral citation: [2022] KEHC 12197 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E140 OF 2021**

OA SEWE, J

APRIL 26, 2022

BETWEEN

PROGRESSIVE CREDIT LIMITED APPLICANT

AND

SEEDTRAN TRANSPORTERS LIMITED 1ST RESPONDENT

SWABRA MOHAMED ABDULAHIM 2ND RESPONDENT

RULING

1. Before court is a notice of motion application dated June 17, 2021 filed by the applicant under the provisions of article 50 (1) of the *Constitution* of Kenya, section 1A, 1B and 3A of the *Civil Procedure Act*, order 22 rule 22, order 42 rule 6 and order 50 rule 1, 3 and 4 of the *Civil Procedure Rules* and all other enabling provisions of the law. The application seeks orders, inter alia that, upon hearing the application inter partes, the court be pleased to order a stay of execution of the judgment in Mombasa CMCC No 1344 of 2019; Seedtran Transporters Limited & Swabra Mohamed Abdulahim v Progressive Credit Limited delivered by Hon. Muchoki (Mr) on the June 10, 2021, together with the resultant decree and all consequential orders flowing therefrom against the 1st and 2nd respondents either by themselves, their agents, servants or anyone acting through them, pending the hearing and final determination of the intended appeal.
2. The applicant also prayed for such further orders or directions that the court may deem fit to grant in the interest of justice, and that the costs of the application be in the cause. The application was premised on the grounds that the impugned judgment was delivered in the absence of the applicant; and therefore that the applicant's Advocate was not able to seek for an informal stay of execution of the judgment pending appeal. It was further averred that the respondents had already served a letter dated June 12, 2021 threatening to execute the said judgment. The applicant is therefore apprehensive that unless granted stay of execution the intended appeal stands the risk of being rendered nugatory.



3. The application was supported by the affidavit of Collins Muhia Mbatia annexed thereto in which the aforementioned grounds were expounded. The applicant also annexed to the supporting affidavit a copy of the letter dated June 12, 2021 indicating that the respondents were poised to enforce the impugned judgment. Also exhibited as annexure CMM-2 to the supporting affidavit was a letter to the lower court requesting for certified copies of judgment and proceedings for purposes of appeal. In addition, the applicant averred, at paragraph 14 of the supporting affidavit that it is ready, willing and able to deposit security or such sum as the court may order to be so deposited either into court or in a joint interest earning account to the order of both the applicant and the respondent's advocates pending the hearing and determination of the appeal.
4. The respondents opposed the application *vide* the replying affidavit sworn by Swabra Mohamed Abdulahi, the 2nd respondent. He averred that, as successful litigants they have a right to the fruits of their litigation; and that even though it is not necessary, they are willing to lodge the logbook of Motor Vehicle Registration Nos KBG 263M and Trailer Registration No ZC 2846 in court as security in the event of a successful appeal. He added that the two units have been valued at Kshs 2,100,000/= and therefore there is no reason why they should be kept from the decretal sums due to them.
5. A further affidavit was filed by Collins Muhia Mbatia on July 26, 2021 in response to the respondents' replying affidavit. He averred that an appeal has since been filed by the applicant; and that the appeal has high chances of success; given the orders of the lower court are at variance with the prayers in the plaint. In reply to paragraphs 5 and 6 of the respondent's replying affidavit, Mr Mbatia averred that the valuation reports relied on by the respondents were prepared on 17th and July 18, 2019 and therefore do not reflect an accurate value of either the motor vehicle or the trailer.
6. The application was canvassed by way of written submissions, pursuant to the directions given herein on July 1, 2021. Thus, learned counsel for the applicant filed his written submissions on July 26, 2021 and proposed the following issues for determination, from the backdrop of order 42 rule 6 of the [Civil Procedure Rules](#):
 - (a) Whether substantial loss may befall the applicant;
 - (b) Whether the application has been made without unreasonable delay; and,
 - (c) Whether the applicant can provide security for costs.
7. Counsel relied on [Butt v Rent Restriction Tribunal](#) [1979] eKLR, [James Wangalwa & Another v Agnes Naliaka Cheseto](#) [2012] eKLR and [Total \(Kenya\) Ltd v Janevams Limited](#) [2015] eKLR as to what amounts to substantial loss. He urged the court to find that the application was made without unreasonable delay. He also submitted that an offer for security has been made, as a show of good faith that the application is not just meant to deny the respondents the fruits of their judgment. Accordingly, it was the submission of the applicant that, since all the three conditions provided for in order 42 rule 6 of the [Civil Procedure Rules](#) have been satisfied by the applicant, it is only fair and just that the orders sought be granted.
8. Ms Kiptum for the respondent also made reference to order 42 rule 6 of the [Civil Procedure Rules](#); but urged the court to find that the conditions set forth in that provision of the law have not been satisfied by the applicant. On substantial loss, counsel submitted that the subject decree being a money decree, the appeal cannot be rendered nugatory. She relied on [Kenya Shell Limited v Benjamin Karuga Kibiru & Another](#) [1986] eKLR and [Kenya Hotel Properties Ltd v Willesden Properties Ltd](#), Civil Application No Nair 322 of 2006 in that regard. She conceded that the application was brought without undue



delay; and that an offer for the provision of security has been made; but nevertheless urged for the dismissal of the application.

9. Order 42 rule 6 (2) of the *Civil Procedure Rules*, 2010 prescribes the conditions for stay of execution of a decree or order pending appeal. Accordingly, an applicant must demonstrate that: -

- (a) Substantial loss may result to the applicant unless the order was made;
- (b) The application was made without unreasonable delay; and
- (c) Such security as the court may order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

10. The Court of Appeal in the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR held: -

Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.

11. Further, in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR, the court held 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.” (emphasis added)

12. In this case, the applicant indicated that if the respondent is allowed to execute the intended appeal will be rendered nugatory. The applicant in its memorandum of appeal has contended that its submissions were ignored and that the quantum of damages awarded by the lower court was excessive in the circumstances. They alleged that the case being appealed against is one of breach of contract and pitched the argument that it is a general rule that no damages can be awarded for breach of contract. All these are arguable points and therefore it cannot be said that the appeal is frivolous. Further, the applicant submitted that the respondents have failed to show that they will be able to refund the decretal sum in the event the appeal succeeds.

13. The Court of Appeal in the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR held:

“...This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge see for example section 112 of the *Evidence Act*, chapter 80 Laws of Kenya...”



14. I have, consequently, looked at the log books and valuation reports annexed to the respondents' replying affidavit and i find that there fall short of furnishing sufficient proof that if paid the decretal sum the respondents will be in a position to refund the same. What has been offered are log books and valuation reports which were prepared in July 2019; about three years ago. It is a well known fact that vehicles depreciate with time; and there is no guarantee that by the time the appeal will have been heard, the aforementioned units will fetch the same value as had been given them in 2019. The log books and valuation reports are therefore, not sufficient proof that the respondents are capable of refunding the decretal sum in the event of a successful appeal.
15. As for the second requiremenet, there is no doubt that the application herein was filed without unreasonable delay, a fact that has been conceded to by counsel for the respondent. The judgment of the trial court was delivered on the June 10, 2021 and the application herein was filed 8 days thereafter on the June 18, 2021.
16. The applicant has also, at paragraph (m) of its motion, indicated that it was ready and willing to provide security as may be ordered by the court. Indeed, the the respondent proposed that if the court is inclined to grant the applicant the stay of execution as sought for, the same be on the condition that applicant pays the fifty percent (50%) of the decretal sum within fourteen (14) days and the other fifty percent (50%) be deposited in joint interest earning account in th names of counsel for both parties.
17. In view of the above, it is my finding that the applicant has made out a good case and proved all the elements provided for under order 42 rule 6(2) the Civil Procedure Rules. Accordingly, his application dated June 17, 2021 is hereby allowed and orders granted as hereunder:
 - (a) That an order of stay of execution be and is hereby granted in respect of the judgment in Mombasa CMCC No 1344 of 2019; Seedtran Transporters Limited & Swabra Mohamed Abdulahim v Progressive Credit Limited and the resultant decree, together with all consequential orders flowing therefrom, pending the hearing and final determination of Mombasa High Court Civil Appeal No 99 of 2021 on condition that the applicant deposits the entire decretal sum in a joint interest earning account in the names of counsel for the parties within 45 days from the date hereof.
 - (b) Costs of the application be costs in the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 26TH DAY OF APRIL 2022.

OLGA SEWE

JUDGE

