



**Greatrift Express Shuttle v Avisia (Civil Appeal E25 of 2020)
[2022] KEHC 10260 (KLR) (28 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10260 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E25 OF 2020
EKO OGOLA, J
JUNE 28, 2022**

BETWEEN

GREATRIFT EXPRESS SHUTTLE APPELLANT

AND

CLAUDIA NAMGOSA AVISA RESPONDENT

RULING

1. Before for me for determination is the Appellant's/Applicant's Notice of Motion dated 22nd April, 2022 in which the Applicant's seeks that;
 1. Spent.
 2. Spent.
 3. This Honourable Court be pleased to grant stay of execution of the ex-parte orders issued on 22nd March, 2021 and all consequential orders thereto pending the hearing and determination of Eldoret High Court Civil Appeal No. 24 of 2020.
 4. The Honourable Court be pleased to set aside the ex-parte orders issued on March 2021 emanating from the Plaintiff's application dated 19th March, 2021 and all consequential orders thereto.
 5. The Honourable Cour be pleased to set aside the Certificate of assessed costs dated 13th November, 2020 which was taxed ex-parte to allow participation by both parties since the same is exaggerated and excessive.
 6. The Defendant/Respondent be granted leave to file submissions to the Plaintiff's Bill of costs dated 30th October 2021 in Eldoret CMCC No. 854 of 2017.
 7. Costs of this application be provided for.



2. The application is premised on the grounds on the face of it and it is further supported by the affidavit of Dorcus Cheruiyot sworn on 22nd April, 2021. The Applicant's case is that being aggrieved by judgment in Eldoret CMCC No. 854 of 2017 delivered on 30/10/2020 it preferred an appeal being Eldoret HCCA No. E24 of 2020.
3. The Applicant states that at the lower Court it had filed an application seeking stay of execution of the judgment that had been rendered on 30/10/2020 pending the hearing and determination of this instant appeal. The Applicant deposed that the same was determined and a ruling rendered on 5th March, 2021 requiring the Applicant to pay half of the decretal amount to the Respondent and deposit the other half in a joint interesting earning account within 30 days in compliance with the conditions for stay of execution of the judgment that had been rendered on 30/10/2020.
4. The Applicant averred that in compliance with the said conditions it has since paid half the decretal sum being Kshs. 375, 818/= vide cheque dated 8/4/2021 to the Respondent and has also deposited Kshs. 375, 819/= vide cheque dated 19/4/2021 in a joint interest earning account of the parties Advocates on record.
5. The Applicant averred that the delay in complying with the conditions for stay of execution issued on 5th March, 2021 was not deliberate and was as a result of administrative issued regarding the execution of the joint interest earning account forms. The applicant case is that the orders have now been fully complied with.
6. The Applicant averred that on 19th March, 2020 the Respondent proceeded to file a Notice of Motion in which she sought to review the orders that had been issued on 5th March, 2021 by the lower Court. Consequently, the Respondent obtained ex-parte orders dated 22nd March, 2021.
7. The Applicant contends that the application dated 19th March, 2020 by the Respondent was never served upon it, and that in light of the said application, it was further required to pay costs and interest for the suit from the date when the ex-parte orders were obtained which period is short and has since lapsed causing prejudicial to the Applicant.
8. The Applicant averred that the Respondent is threatening to carry out execution in compliance with ex-parte orders that were obtained on 22nd March, 2021, and it is apprehensive that execution is imminent and if the prayers herein are not granted it stands to suffer prejudice.
9. The Applicant contends that the Certificate of the assessed costs dated 13th November, 2021 emanating from the Respondent's bill of costs dated 30th October, 2020 is overly assessed and it is in the interest of justice that the Applicant be allowed to file submissions to the said bill of costs.
10. The Applicant urged Court to allow the application as prayed.

Response

11. In opposition to the application the respondent has filed a replying affidavit dated 7th June, 2021 and grounds of opposition dated the same date.
12. The Respondent's case is that the Applicant's application has not be brought to Court in good faith but rather with half- truth, malice, immaterial facts without any basis whatsoever. The Respondent's case is that the Applicant is concealing material facts and has never exhibited any good faith in this matter.
13. The Respondent deposed that she lodged this suit before the subordinate Court in the 2017 and that the same was never defended by the Applicant until when the Respondent had obtained ex-parte



- judgment. That the Applicant then moved Court to have the judgment set aside. This despite of the fact that the Applicant had been properly served with the Plaintiff and Summons to enter Appearance.
14. The Respondent averred that on 16th March, 2018 the subordinate Court having dismissed the Applicant's application, she took out Warrants of Attachment of moveable property against the Applicant. That the Applicant herein then filed an appeal and also filed an application for stay of execution in the said matter.
 15. The Respondent further averred that on 23rd April, 2018 the lower Court allowed the Applicant's application with conditions but the Applicant did not comply with the said orders forcing the Respondent to enter into a consent to allow the Applicant to defend the suit almost (4) months after the suit had been filed.
 16. The Respondent further averred that the Applicant would later on seek for leave to file a Third Party Notice but then abandoned the said application without any explanation.
 17. The Respondent deposed that pursuant to the consent dated 3rd August, 2018 judgment in the test suit was delivered on 7th December, 2018 finding the Appellant 100% liable for the occurrence of the accident. Subsequently, the Applicant on 25th September, 2019 requested the Respondent to concede 10% liability that notwithstanding the outcome of the test suit which the Respondent did and judgment was later delivered on 30th October, 2020 and the Appellant being aggrieved by the said judgment preferred an appeal being Eldoret HCCA No. E24 of 2020.
 18. The Respondent contends that before the aforementioned appeal was filed, the Respondent's Party to Party Bill of Costs has already been assessed and the decree and Certificate of Costs issued. The Respondent maintains that the Applicant herein had annexed in its application dated 18th November, 2020 seeking stay of execution the Warrant of Attachment of Moveable which clearly indicates the taxed costs and interest but did not raise any issues with costs and interest.
 19. The Respondent's case is that the subordinate Court was silent on the taxed costs and interest and the same was made clear vide the order that was issued on 22nd March, 2021 which appears to have resulted in the Appellant filing this instant appeal.
 20. The Respondent averred that the Appellant herein filed a similar application for stay in the lower Court and the same is pending directions on 23rd June, 2021. The Respondent contends that before the said directions were issued the Applicant filed this instant application. Further, the Respondent averred that when the application before the lower Court was mentioned on 19th May, 2021 the Appellant's Advocate requested the Court to allow parties to discuss and agree, but not communication has been made even since only for the Applicant to file this instant application.
 21. The Respondent urged Court to dismiss the Applicant's application with costs.

Determination

22. I have considered the application, the affidavits in support of and in opposition to the application, the submissions filed as well as the authorities relied upon. The only issue for determination is:
 - i. Whether the Applicant's application meets the threshold for grant of orders of stay under Order 42 rule 6(2) of the Civil Procedure Act.
23. Before I delve into the merits of the application is it noteworthy to mention that the Appellant/Applicant in its submissions dated 5/10/2021 abandoned prayers (4), (5) and (6) of the application dated 22/4/2021.



24. The Applicant herein seeks to stay the ex-parte orders that were issued on 22nd March, 2021 by Hon. L. Kassan (CM) in Eldoret CMCC No. 854 of 2017 reviewing the orders that the Court had earlier on issued on 5th March, 2021.
25. The Applicant's case is that the Respondent filed an application dated 19th March, 2020 and was issued with ex-parte orders on 22nd March, 2021 which were never served upon it. The Applicant further contends that as result of the said ex-parte orders, it is now further required to pay costs and interest of the suit in the lower Court within 14 days from the date when the ex-parte orders were issued.
26. It is not in dispute that that Applicant herein has since complied with the conditions of stay that were issued pursuant to the orders of 5th March, 2021. The Applicant has presented before Court copies of cheques to prove that it had complied with the said orders.
27. From my perusal of the record it is clear that the ex-parte orders that were issued by the lower Court on 22nd March, 2021 were made without notice to the Applicant. It is not disputed that the said ex-parte orders had in fact altered the conditions for stay that had been earlier on issued on 5th March, 2021 to now include the Respondent's costs and interest for filing the suit. The ex-parte orders had a direct interest on the issue before the court and it would therefore have been prudent for the trial Court to allow the Applicant to respond to Notice of Motion application dated 19th March, 2021 before issuing the said orders.
28. In view of the foregoing and in the interest of justice I hereby issue an order of stay, staying the execution of the ex-parte orders of the lower Court made by Hon. L. Kassan (CM) on 22nd March, 2021 in Eldoret CMCC No. 854 of 2017 pending the hearing and determination of this instant appeal.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH OF JUNE 2022.

E. K. OGOLA

JUDGE

