



Karanja v Kakai; Khushi Motors Ltd & 2 others (Judgment debtor) (Civil Appeal 137 of 2021) [2022] KEHC 12281 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEHC 12281 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 137 OF 2021**

**JM NGUGI, J
JULY 28, 2022**

BETWEEN

WINNIE NJERI KARANJA APPLICANT

AND

PETRONILAH KHATTI KAKAI RESPONDENT

AND

KHUSHI MOTORS LTD JUDGMENT DEBTOR

MARY WANGU NJAU JUDGMENT DEBTOR

MARGRET WANJIRU JUDGMENT DEBTOR

(Being an application for stay of execution of the decree dated February 5, 2020 in CMCC 45 of 2019 and that the order(s) herein issued do apply to CMCC 44/2019, CMCC 46B/2019 and CMCC 47/2019.)

RULING

1. The respondent herein filed a suit in the lower court against the three judgment debtors seeking damages for injuries she says were sustained in a road traffic accident. The respondent claimed that the accident occurred on May 10, 2018 and involved motor vehicle registration number KCL 937T (hereinafter “the subject motor vehicle”).
2. After instituting the suit, the respondent says that she served the judgment debtors who neither entered appearance nor filed a defence. The matter therefore proceeded as an undefended suit and judgment was entered in favour of the respondent.



3. There were also other judgments entered against the judgment debtors in CMCC 44 of 2019, CMCC 46'B' of 2019 and CMCC 47 of 2019, evidently, from other suits that arose out of the aforementioned accident.
4. After obtaining judgment *ex parte*, the respondent proceeded to attach the subject motor vehicle in execution of the decree. It was at this point that the applicant filed an application before the trial court seeking *inter alia* to be made a party to the suit, to have a stay of the decree and setting aside of the warrants of attachment issued to the respondent's appointed auctioneers, release of the subject motor vehicle by the said auctioneers pending the application and further orders of the court.
5. In its ruling of December 9, 2021, the trial court dismissed the applicant's application with costs, reasoning that the subject motor vehicle belonged to the 1st judgment debtor at the time of the accident and the applicant was not its owner as at the time of the accident.
6. The appellant was aggrieved by that ruling and timeously preferred an appeal to this court vide the memorandum of appeal dated December 14, 2021. In the interim, the applicant filed the application now before me seeking a stay of execution of the decree of the trial court pending her appeal to this court. The same is dated December 20, 2021 and seeks the following orders:
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 2. Spent
 3. The Hon court do issue orders of stay of execution of the decree dated February 5, 2020 in CMCC 45 of 2019 herein pending the hearing and determination of the appeal herein.
 4. That orders issued herein do apply to CMCC 44/2019, CMCC 46B/2019 and CMCC 47/2019.
 5. The court do make such further orders as may meet the ends of justice in this case.
 6. Costs of this application be borne by the respondent.
2. The application is supported by the grounds on the face of it and the supporting affidavit of Winnie Njeri Karanja, the Applicant, which was filed in court on December 16, 2021. The applicant depones that she is the registered owner of the subject motor vehicle, bought on hire purchase from the 1st judgment debtor herein.
3. She deposes that the said motor vehicle was transferred to her on May 17, 2017 after making full payment. To her knowledge, the subject motor vehicle has never been involved in an accident as alleged in the plaint before the trial court and that the police abstract attached therein does not indicate that it is that motor vehicle that was involved in the accident.
4. The applicant says the subject motor vehicle was attached and towed away on March 5, 2020 in execution of warrants issued in the lower court and that although she was issued with a temporary stay of execution before the lower court, the same was eventually dismissed and she has filed an appeal against the dismissal of her application.
5. The applicant contends that despite not being a party to the suit, it is her motor vehicle that was attached. This, she contends is an erroneous finding and the trial court ought to have set aside the Judgment and allowed her to come on record so that the ownership of the motor vehicle can be determined.



6. She is apprehensive that the subject motor vehicle is likely to be sold in execution and that she stands to suffer substantial loss and risks being condemned unheard.
7. The respondent opposed the application vide her affidavit dated January 24, 2022. She contends that the application does not meet the minimum threshold for grant of the prayers sought.
8. The respondent depones that she filed a suit against the judgment debtors herein after a road traffic accident involving the subject motor vehicle. The judgment debtors failed to enter appearance after being duly served and an interlocutory judgment entered against them on July 11, 2019. The matter then proceeded to formal proof and a judgment delivered in her favour.
8. She subsequently demanded for the decretal sum, but the judgment debtors failed to honour her demand. She says that it was only after she began the process of execution that the applicant made an application dated March 6, 2020 seeking to be enjoined in the suit as well as setting aside of the judgment on the grounds that she was the owner of the subject motor vehicle, which application was dismissed.
9. The respondent maintains that it is the judgment debtors who are the owners of the motor vehicle, having done an online search before filing the suit, which search revealed the 1st judgment debtor as the legal owner. She further points to an abstract dated June 23, 2018, which she says showed that 2nd judgment debtor was also an owner and had taken out an insurance cover on the subject motor vehicle.
10. The respondent contends that the applicant has not availed any documents to show that she was the owner of the motor vehicle at the time of the accident. She refers to a copy of a logbook produced by the applicant, which she says shows that the motor vehicle was registered in the applicant's name on November 7, 2018, after the accident had occurred.
11. The respondent believes that the application has been brought in bad faith and that if it is allowed, the applicant should deposit the full decretal sum in a joint interest earning account in their advocates' names.
12. The application was argued by way of written submissions. the applicants submissions are dated March 31, 2022. The Applicant relies on section 8 of the *Traffic Act* and the case of *Ignatius Makau Mutisya v Reuben Musyoki Muli* [2015] eKLR and contends that the best evidence to prove ownership of a motor vehicle is the logbook unless contrary evidence is tendered. The applicant's protest is that despite holding this view, the learned magistrate went ahead to state that the copy of records produced by the respondent proved that the motor vehicle was initially owned by the 1st judgment debtor. This position, she claims is wrong since the records indicate that she became the owner of the motor vehicle on May 17, 2017.
13. The applicant further denies that any evidence was adduced to show that the 2nd or 3rd judgment debtors were beneficial owners of the motor vehicle. She contends that the case herein, was filed in 2019, way after she had been registered as the owner of the motor vehicle and that the reason for her seeking to be enjoined in the lower court case was to prove her ownership of the motor vehicle.
14. The respondent's submissions are dated May 24, 2022. The respondent submits that the application herein does not meet the threshold under order 42 rule 6(2) of the *Civil Procedure Rules*. She contends that the applicant's appeal does not have any chances of success and if the instant application is not granted, the appeal will not be rendered nugatory.
15. The respondent maintains that it is the judgment debtors who are the owners of the motor vehicle and that she conducted a search before filing the suit. She reiterates the averments in her affidavit and



submits that the application is brought in bad faith with the purpose of denying her the fruits of her judgment.

16. The conditions for stay of execution pending appeal are set out principally by the provisions of order 42 rule 6 and case law as developed by the courts over time. These are:
 - a. The appeal must be arguable.
 - b. The applicant must demonstrate that she is likely to suffer substantial loss unless the order is made, or the appeal will be rendered nugatory if the stay is not granted;
 - c. The application was made without unreasonable delay; and
 - d. In appropriate cases, the applicant must demonstrate that she has given or is willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on him.
18. On the first condition, an arguable appeal need not be one that will necessarily succeed, but one that is not frivolous and/or idle. -See *Kenya Industrial Estate Limited & another v Matilda Tenge Mwachia* [2021] eKLR.
19. From the applicant's memorandum of appeal, the key issue raised by the applicant is the ownership of the subject motor vehicle that is both the subject of the proceedings before the lower court and the article attached in execution. This issue deserves consideration by this court: On the one hand, the applicant claims that the subject motor vehicle belonged to her as at the time of the accident; and further that it was never involved in any accident; on the other hand, the respondent claims that the subject motor vehicle belongs to the judgment debtors. The applicant produced the logbook of the subject motor vehicle; the respondent produced an online search results and the police abstract. Who should prevail? There is no question that the appeal herein is arguable; it is certainly not idle.
20. The timeousness of the applicant in filing the application is also not in question. While judgment in the matter was entered on February 5, 2020, it is not disputed that the applicant only became aware of the judgment on March 5, 2020. She immediately filed the application to set aside the judgment on March 6, 2020. The ruling on that application was delivered on December 9, 2021. The applicant then filed the present application on December 16, 2021, about 7 days after the ruling was delivered.
21. On substantial loss, there is *prima facie* evidence that despite not having been part of the proceedings before the trial court, the applicant was in possession of the subject motor vehicle. The applicant is also in possession of a logbook that will need to be re-evaluated by this court on appeal. The applicant's apprehension that the subject motor vehicle is likely to be sold in fulfilment of the decree is in my view, well founded.
22. On the final condition, the respondent proposes that the applicant should be ordered to pay security as condition for stay of execution. The purpose of furnishing security is to balance the interests of the successful litigant with a valid decree and the applicant's right to appeal and to not have her appeal be rendered nugatory. This was explained by the Court of Appeal in *Ndubiu Gitabi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 as follows:

The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants



or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it.

23. The applicant was neither invited to take part in the proceedings before the lower court nor is she the judgment debtor. In the circumstances of this case, it would be doubly unjust to demand that the applicant deposits security. In any event, the subject motor vehicle is sufficient security in this case. It would be sufficient security to place a condition that the applicant shall not sell, alienate, or use as collateral the subject motor vehicle.
24. The disposition, then, shall be as follows:
 - I. Pending the hearing and determination of the appeal herein, there will be a stay of execution of the judgment and decree of the lower court dated February 5, 2020.
 - II. The stay issued herein will also apply to the judgments and Decrees in CMCC 44/2019, CMCC 46B/2019 and CMCC 47/2019.
 - III. The applicant shall not sell, otherwise alienate, offer as a collateral for a loan, or substantially alter motor vehicle registration No KCL 937T during the pendency of the appeal herein.
 - IV. Costs to be in the appeal.
25. Orders Accordingly.

DATED AND DELIVERED AT NAKURU THIS 28TH DAY OF JULY, 2022

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JOEL NGUGI

JUDGE

