



**NCBA Bank Kenya PLC v Musya & another (Civil Appeal  
E062 of 2022) [2022] KEHC 11835 (KLR) (12 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 11835 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E062 OF 2022**

**OA SEWE, J**

**AUGUST 12, 2022**

**BETWEEN**

**NCBA BANK KENYA PLC ..... APPLICANT**

**AND**

**JOEL TITUS MUSYA ..... 1<sup>ST</sup> RESPONDENT**

**STEPHEN KIMANI MUTURI ..... 2<sup>ND</sup> RESPONDENT**

*(Appeal against the Ruling made by Hon. Kalo, C.M. on the 14th day of April 2022)*

**RULING**

1. The Notice of Motion dated April 28, 2022 was filed by the applicant, NCBA Bank Kenya PLC pursuant to sections 3A, 75, 78 and 79G of the [Civil Procedure Act](#), chapter 21 of the Laws of Kenya and order 42 rule 4 of the [Civil Procedure Rules](#), 2010, for the following orders:
  - (a) Spent
  - (b) Spent
  - (c) That the court be pleased to grant a stay of execution of the order dated April 14, 2022 issued in Mombasa CMCC no 418 of 2021 pending hearing and determination of the appeal against the ruling made by Hon Kalo, C M on April 14, 2022.
  - (d) That the costs of the application be provided for.
2. The application was premised on the grounds that by the impugned ruling, the learned magistrate, Hon J B Kalo, CM, reviewed and set aside his own ruling delivered on December 2, 2021 in Mombasa CMCC miscellaneous application no 418 of 2021. The applicant further complained that the ruling had the ultimate effect of denying it the enjoyment of its rights over the subject matter in Mombasa CMCC no 418 of 2021, being motor vehicle registration no KCJ 970G, Mercedes Benz, which is a



- collateral over an ongoing facility issued by the applicant to its customer. The applicant is therefore apprehensive that the 2<sup>nd</sup> respondent is likely to execute the order at any time; in which event it will not only suffer substantial loss but its appeal will also be rendered nugatory.
3. The application was premised on the affidavit of Jackson Nyaga, in which he deposed that the ruling of April 14, 2022 is littered with irregularities and has therefore been appealed; and that in the meantime, the 2<sup>nd</sup> respondent has embarked on extracting an order from the said ruling and will proceed to execute unless stay is granted. Mr Nyaga annexed to his affidavit a copy of the impugned ruling, as well as a copy of the records of motor vehicles issued by the National Transport and Safety Authority, confirming that the subject motor vehicle is registered in the name of the applicant and one Jurgen Fuks.
  4. In response to the application, the 2<sup>nd</sup> respondent, Stephen Kimani Muturi, filed a Replying Affidavit sworn on May 15, 2022 in which he averred that he purchased the subject motor vehicle at a public auction, and therefore is the bona fide owner of the motor vehicle. He exhibited a copy of his Certificate of Registration at page 6 of the respondent's exhibits, and added that ownership of a motor vehicle is proved through Certificate of Registration and not searches as the applicant purported to do. He consequently prayed that the motor vehicle be released to him forthwith as its continued detention by the applicant is extremely prejudicial to his interest.
  5. The application was urged by way of written submissions pursuant to the directions issued herein on May 30, 2022. Accordingly, Mr Ng'ang'a, learned counsel for the applicant relied on his written submissions dated June 6, 2022. He submitted that, whereas proof of ownership of a motor vehicle as envisioned by section 8 of the *Traffic Act*, chapter 403 of the Laws of Kenya is through the Certificate of Registration, otherwise known as the log book, section 109 of the *Traffic Act* also recognizes that such ownership can also be proved through a certified copy of the motor vehicle records.
  6. As to whether the applicant is entitled to stay of execution pending appeal, Mr Ng'ang'a referred the court to order 42 rule 6 of the *Civil Procedure Rules* and the cases of *Hamisi Juma Mbaya v Amakecho Mbaya* [2018] eKLR, *Endoros Enterprises Limited v Wild Living Business Hub Co. Ltd* [2021] eKLR, and *Michael Ntouthi Mitheu v Abraham Kivondo Musau* [2021] eKLR, among other decisions, to support his assertion that all the conditions for grant of stay have been met by the applicant, namely:
    - (a) That substantial loss may result to the applicant unless the order of stay is made;
    - (b) That the application has been made without unreasonable delay; and,
    - (c) That such security as the court may order for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.
  7. On his part, Mr Kirui, counsel for the 2<sup>nd</sup> respondent relied on his written submissions filed on June 21, 2022. In addition to reiterating the averments of the 2<sup>nd</sup> respondent as set out in his Replying Affidavit, counsel submitted that the application is incompetent for the reason that there was no suit in the first place to warrant the grant of the orders sought by the applicant. He pointed out that the miscellaneous application which the applicant purported to have relied on lapsed upon the auctioneer being issued with vesting orders in favour of the 2<sup>nd</sup> respondent. He was of the view that the applicant's reliance on rule 17(6) of the Auctioneers Rules to justify the application is misguided as the same only guides the mode of approach to the Court by an auctioneer for purposes of a vesting order.
  8. On the merits of the application, Mr Kirui submitted that substantial loss cuts both ways; and therefore that, while the applicant claims the subject motor vehicle was offered to it as collateral for an ongoing facility, the 2<sup>nd</sup> respondent is likewise entitled to possession of the motor vehicle as a bona fide purchaser for value, who, after the purchase expended substantial sums of money in repairing the motor vehicle to



its current state. He consequently urged the Court to find that substantial loss is in favour of releasing the motor vehicle to the 2<sup>nd</sup> respondent.

9. In the same vein, Mr Kirui submitted that in so far as no offer for security was made by the applicant in its application dated April 28, 2022, it is not entitled to the orders sought. He was of the view that it was pointless for the applicant to make a proposal for security in its submissions as submissions are not evidence. He relied on *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR and *Charles N Ngugi v ASL Credit Limited* [2022] eKLR to support his assertions, and consequently prayed that the application be dismissed with costs.
10. I have given careful thought to the application, the grounds set out on the face thereof as explicated in the Supporting Affidavit as well as the response given thereto by the respondent in his Replying Affidavit. I have likewise taken into account the written submissions filed by counsel for the respondent. The single issue for determination is whether the applicant has satisfied the conditions for grant of an order of stay of execution pending appeal as prescribed by order 42 rule 6(2) of the *Civil Procedure Rules*.
11. The brief background to the application, as can be gleaned from the rulings annexed to the applicant's Supporting Affidavit, is that, pursuant to proceedings in distress for rent against one Jurgen Fuks, Joel Titus Musya who is the 1<sup>st</sup> respondent, caused the attachment and sale of the subject motor way of public auction. It was purchased by the 2<sup>nd</sup> respondent on August 31, 2021. The applicant, NCBA Bank Kenya PLC thereafter proceeded to file an objection to the sale, contending that, as a financier, its right as co-owner of the motor vehicle with Jurgen Fuks was not taken into consideration. Hence, two of its prayers were that the purported sale by public auction of the subject motor vehicle be declared null and void; and that the respondents be ordered to immediately return the motor vehicle into the custody of Matriz Motors and be restrained from interfering with the possession.
12. Upon considering the application, the learned magistrate, in a ruling dated December 2, 2021, came to the conclusion that:

“The objector has demonstrated its interest in the motor vehicle. It has also demonstrated that the purported auction did not take into consideration that interest. Consequently, the court finds that the objector has made out a case for the grant of the orders sought. The following orders are hereby issued:

- a) The order granted on September 6, 2021 in favour of the 1<sup>st</sup> respondent in respect of motor vehicle registration number KCJ 970G (“the motor vehicle”) issued by this honourable court is hereby lifted and/or vacated.
- b) That the purported sale by public auction of the motor vehicle that occurred on August 31, 2021 is hereby declared null and void.
- c) The respondents by themselves, officers, employees, agents, servants and/or any other person whatsoever are hereby restrained from effecting any change of ownership over the motor vehicle within the records of NTSA.
- d) That the respondents by themselves, officers, employees, agents, servants and/or any other person whatsoever are hereby ordered and directed to immediately return the motor vehicle into the custody of Matriz Motors and be restrained from interfering with the possession.
- e) There shall be no order as to costs.”



13. Being aggrieved by that decision, the 2<sup>nd</sup> respondent filed an application for review contending, *inter alia*, that, by the time the application dated September 24, 2022 was filed, ownership of the subject motor vehicle had already vested in the 2<sup>nd</sup> respondent and a log book issued in his name. The 2<sup>nd</sup> respondent also took issue with the fact that the applicant had sought substantive orders through a miscellaneous application instead of filing a suit. Hence, the learned magistrate allowed the application for review upon being convinced that there were errors apparent on the face of the record, including the fact of non-disclosure by the applicant that the subject motor vehicle had been registered in its name jointly with its customer, Jurgen Fuks. Thus, the lower court ordered that:

“As it must be clear now, there is ample material on record to form a basis for the court to review its ruling delivered on December 2, 2021. Consequently, the ruling delivered on December 2, 2021 is hereby reviewed and set aside. The objector shall serve its application dated September 24, 2022 upon the 1<sup>st</sup> respondent within 14 days from the date hereof. The 1<sup>st</sup> respondent shall file a response within 14 days from the date of service. The matter shall be mentioned on May 17, 2022 for directions on the hearing of the application. The objector shall serve a mention notice upon the 1<sup>st</sup> respondent. The orders granting the objector possession of the vehicle having been set aside, the status of the vehicle shall revert to what it was before the orders were issued...”

14. That is the decision that precipitated the instant appeal, vide the Memorandum of Appeal dated April 28, 2022. The applicant’s main ground of appeal is that the learned magistrate misdirected himself in reviewing the ruling dated December 2, 2021. It therefore prayed that, pending the hearing and determination of its appeal, the court be pleased to issue an order staying the orders issued by the lower court on April 14, 2022 in Mombasa Miscellaneous Application no 418 of 2021.

15. Order 42 rule 6 of the [Civil Procedure Rules](#) provides that:

“No appeal or second appeal shall operate as a stay of execution or proceedings 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...”

16. Needless to say that the 2<sup>nd</sup> respondent, having been successful in his litigation, is entitled to the fruits of the orders thus far made in his favour. Hence, in handling applications of this nature, it is useful to bear in mind the apt expressions made in [Machira t/a Machira & Co Advocates vs East African Standard](#) (no 2) [2002] KLR 63, that:

“The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling



civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

17. In the premises, the applicant was under obligation to satisfy the conditions set out in rule 6(2) of order 42 aforementioned, namely:
- (a) that substantial loss may result unless the order is made;
  - (b) that the application has been made without unreasonable delay.
  - (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

18. There is no dispute that the instant application was brought without unreasonable delay, considering that the impugned ruling was made on April 14, 2022. Indeed, counsel for the 2<sup>nd</sup> respondent had no quarrel with this aspect of the applicant's case. Accordingly, what remains for determination are the twin questions of substantial loss and security. Substantial loss has been said to be the cornerstone of the jurisdiction for granting stay (see *Kenya Shell Limited v Kibiru* [1986] KLR 410 and *Endoros Enterprises Limited v Wild Living Business Hub Co Ltd, supra*); and, as pointed out in *Samvir Trustees Limited v Guardian Bank Limited*:

"...It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of litigation...the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court..."

19. The same considerations were suggested in *Hammond Suddard Solicitors v Agrichem International Holdings Limited* [2001] EWCA Civ 2065 thus at paragraph 22:

"...Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"

20. With the foregoing in mind, I have given consideration to the competing interests of the applicant and the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent relied on a registration Certificate no K4641608L to demonstrate that, as of October 15, 2021, he was the registered owner of the suit motor vehicle. On the other hand, the applicant relied on a copy of the motor vehicle records issued by NTSA to prove that as at September 24, 2021, the subject motor vehicle was jointly owned by it and Jurgen Fuks. This was the situation obtaining about 24 days after the purported auction of August 31, 2021; and therefore the applicant has a genuine grievance to ventilate in this appeal. I am further satisfied that, unless stay



order is granted as sought, the motor vehicle may be easily disposed of, thereby rendering the appeal nugatory.

21. As for security, I note that the impugned order is not for the payment of money. Thus, preservation of the subject matter would simply require the storage of the subject vehicle in safe custody pending the hearing and determination of the appeal. It is therefore of little significance that the applicant did not offer security. It suffices that it is ready and willing to abide by such conditions as the Court may impose; which is what was deposed to at paragraph 8 of the grounds set out on the face of the application dated April 28, 2022. Hence, in *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others* [2015] eKLR it was held that:

“...the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here...”

22. In the result, I find merit in the application dated April 28, 2022. The same is hereby allowed and orders granted as hereunder:
- (a) That stay of execution of the order dated April 14, 2022 issued in Mombasa CMCC no 418 of 2021 be and is hereby granted on condition that the subject motor vehicle, registration no KCJ 970G, Mercedes Benz, be kept in the safe custody of Matriz Motors pending the hearing and determination of this appeal.
- (d) That the costs of the application be costs in the appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 12<sup>TH</sup> DAY OF AUGUST 2022.**

---

**OLGA SEWE**

**JUDGE**

