



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

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**Guardian Coach Limited v Matunda Bus Services Limited (Civil Appeal
242 of 2020) [2022] KEHC 12554 (KLR) (Civ) (4 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12554 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 242 OF 2020

JK SERGON, J

AUGUST 4, 2022

BETWEEN

GUARDIAN COACH LIMITED APPLICANT

AND

MATUNDA BUS SERVICES LIMITED RESPONDENT

RULING

1. The appellant/applicant took out the Notice of Motion dated June 10, 2022 and supported by the grounds set out on its body and the facts stated in the affidavit of David Henry Ong'era. The following are the orders being sought therein:
 - (i) Spent.
 - (ii) Spent.
 - (iii) That there be a stay of execution of the judgment and decree herein and stay all consequential orders emanating therefrom pending the hearing and determination of the appeal.
 - (iv) That this honourable court be pleased to order staying sale of the motor vehicles registration no KDH 084H, KDH 103H, KCV 071R, KCV 072R, KCV 073R, KCW 072X, KCW 073X, KCV 493A, KCP 628X, KCU 387A, KCQ 785W and KCG 780W proclaimed on the June 5, 2022 by Anfield Auctioneers.
 - (v) That the costs of the application be provided for.
2. The respondent opposed the motion by putting in Grounds of Opposition dated July 22, 2022 raising the following grounds:



- (a) That the application has not met the legal criteria for the granting of the reliefs sought in the application.
 - (b) That the application is an abuse of the court process and has been made to delay or frustrate the respondent's right to execute the lawful decree in its favour.
 - (c) That the appellant is guilty of bringing the application and is therefore not entitled to the reliefs sought.
 - (d) That the appellant has not demonstrated compliance with the conditions on the deposit of the decretal sums in court as ordered on June 12, 2022 and being a party in contempt of the order is not entitled to the reliefs sought.
 - (e) That the appellant has not proved or demonstrated that she will suffer irreparable loss if the execution of the decree proceeds.
 - (e) That the application filed in support of the application is fatally defective for want of the appellant's authority under seal thereby rendering the entire application incompetent.
3. At the hearing of the motion, the parties agreed to rely on the averments made in their respective documents.
 4. I have considered the grounds laid out on the body of the Motion; the facts deponed in the supporting affidavit; and the Grounds of Opposition.
 5. Before I consider the merits of the instant motion, I will make a determination on two (2) preliminary issues raised in the respondent's Grounds of Opposition.
 6. The first preliminary issue has to do with competency of the motion on the premise of the affidavit in support thereof.
 7. As earlier noted, the respondent argues that the motion ought to be struck out for being supported by an affidavit in the absence of the applicant's authority under seal for the deponent to swear the said affidavit.
 8. Upon my perusal of the supporting affidavit in question, I note that the same is sworn by David Henry Ong'era, indicated as being the fleet manager of the applicant.
 9. Upon my further perusal of the supporting affidavit, I note that the same is signed by the deponent and bears the Commissioner of Oaths stamp and signature.
 10. I have not come across anything to indicate that the applicant was mandatorily required to file a written authority under seal, in the absence of which the supporting affidavit would be rendered fatally defective.
 11. In view of all the foregoing circumstances, I see no reason to declare the instant motion incompetent on that basis.
 12. The second preliminary issue touches on compliance with the order made by the court on June 12, 2022.
 13. Upon my study of the record, I observed that when the instant motion was placed before the court on June 12, 2022 *ex parte*, the court granted a temporary order for a stay of execution on the condition that the applicant deposits the decretal sums indicated in the warrants of attachment by July 4, 2022, pending interparties hearing on July 25, 2022.



14. From my study of the record, there is nothing to indicate that the applicant complied with the abovementioned orders. Suffice it to say that, it is apparent that the temporary stay orders have since lapsed. That being the case, I will consider the merits of the instant Motion.
15. As earlier noted, the order being sought herein is that of a stay of execution of the decree pending appeal.
16. The guiding provision is order 42, rule 6(2) of the [Civil Procedure Rules](#) which sets out the following conditions in determining an application for stay.
17. The first condition provides that the application must have been made without unreasonable delay. On the one part, the applicant is of the view that the instant motion has been brought within reasonable timelines, while the respondent on the other part states that there is no proper basis for granting the orders sought in the motion.
18. From my perusal of the record, it is apparent that the impugned judgment was delivered on May 29, 2020 while the instant Motion was filed close to two (2) years later. It is also apparent that the applicant filed its memorandum of appeal on 24th June, 2020.
19. In my view, while there has been a prolonged delay in bringing the motion, I am not convinced that the same is entirely inordinate in the circumstances.
20. The second condition touches on the subject of substantial loss to be suffered by an applicant.
21. On the part of the applicant, it is stated that unless an order for a stay of execution is granted, the respondent will proceed to execute the decree, thereby rendering the appeal nugatory.
22. The applicant also states that if the respondent proceeds with execution, the applicant's business stands to suffer immensely.
23. The respondent retorts by stating that no substantial loss has been demonstrated by the applicant.
24. The legal position is that execution is a lawful process and hence a party cannot simply argue that a stay of execution is necessary in order to halt or prevent execution. It is on this basis that the court in the case of [James Wangalwa & Another v Agnes Naliaka Cheseto](#) [2012] eKLR rendered itself thus:

“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. This is what substantial loss would entail...”
25. Upon my perusal of the record, I note that the decretal sum is fairly colossal in nature and has continued to accrue interest over time.
26. Upon my further perusal of the record, it is apparent that the respondent only recently commenced the execution process and this likely prompted the applicant to file the instant motion.
27. Be that as it may and in view of all the foregoing circumstances, I am satisfied on the likelihood of substantial loss resulting to the applicant if the order for a stay of execution be denied, thereby rendering the appeal nugatory.
28. The final condition which is the provision of security for the due performance of a decree or order was not addressed by any of the parties before me.
29. Upon considering the decretal amount in question, I am of the view that an order for deposit of the same in a joint interest earning account would constitute the most suitable security.



30. Consequently, I will allow the motion dated June 10, 2022 as prayed, giving rise to the following orders:
- a. An order for stay of execution of the judgment delivered on May 29, 2020 and the sale of the attached goods proclaimed on the 5th of June, 2022, pending appeal is granted on the condition that the applicant deposits the entire decretal sum in an interest earning account to be held in the joint names of the advocates and or firms of advocates within 30 days from today, failing which the order for stay shall automatically lapse.
 - b. Costs of the application to abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
4TH DAY OF AUGUST, 2022.**

.....

J K SERGON

JUDGE

In the presence of:

..... for the appellant/applicant

..... for the respondent

