



**Guardian Bus Services Limited v Njwe (Civil Appeal E112 of 2021)
[2022] KEHC 14492 (KLR) (25 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14492 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E112 OF 2021
JN KAMAU, J
OCTOBER 25, 2022**

BETWEEN

GUARDIAN BUS SERVICES LIMITED APPELLANT

AND

RISPER AGUTU NJWE RESPONDENT

RULING

1. In its Notice of Motion application dated May 28, 2021 and filed on May 31, 2021, the Appellant sought an order for stay of execution of the Ruling and order of Hon MI Shimenga (SRM) that was delivered at Kisumu in Chief Magistrate's Court Civil Case No 282 of 2018 on September 9, 2021.
2. The said application was supported by an Affidavit of the Appellant's Assistant Legal Officer, Kelvin Ngure, that was sworn on April 22, 2022. The Appellant averred that it was aggrieved by the Learned Trial Magistrate's judgment in which she awarded the Respondent Kshs 2,000,000/= together with costs and interest.
3. It contended that unless an order for stay of execution was granted, it would suffer substantial and irreparable loss, that its Appeal would be rendered nugatory and that if it succeeded on appeal, it would not be able to retrieve the decretal sum from the Respondent as she had not revealed her financial status.
4. It further averred that it was ready and willing to provide a bank guarantee from Family Bank as security pending the hearing and determination of the Appeal herein.
5. In opposition thereto, on May 25, 2022 Silvester O Madialo, advocate, swore a Replying Affidavit on behalf of the Respondent herein.
6. Through the said Advocate, the Respondent pointed out that she would not be opposing the present application on condition that the Applicant deposited into an interest earning account at Housing Finance Bank Kisumu in their advocates name and in the name of the Appellant's counsel within ten



(10) days of the date of the Replying Affidavit and that the costs of the Auctioneers in the lower court be agreed upon and/or taxed and that the Appellant pay the same within thirty (30) days from the date of agreement and/or taxation.

7. The Appellant's Written Submissions were dated and filed on June 13, 2022 while those of the Respondent were dated June 6, 2022 and filed on June 9, 2022. The Ruling herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

8. The Appellant submitted that its insurer, M/S Directline Assurance Company Limited, did not have any Memorandum of Understanding with Housing Finance Bank and asserted that a bank guarantee was an acceptable way of furnishing security as was held in the case of *Justin Mutunga David vs China Road & Bridge Corporation (K) Limited* [2019] eKLR that it relied upon.
9. It was its contention that the issue of the costs did not arise in the present application as the warrants were executed when the orders for stay of execution were already in force and hence the proclamation was premature. It pointed out that it had already filed an application seeking to set aside the said proclamation.
10. It was categorical that it had met all the conditions that were set out in Order 42 Rule 6 of the *Civil Procedure Rules* and urged this court to grant the orders it had sought herein.
11. The Respondent asserted that she was not opposed to the present application on condition that the Appellant released half the decretal sum to her and deposited the other half of the decretal sum in a joint interest earning account in the names of the advocates on record within fourteen (14) days from the date of her Written Submissions.
12. Before an order for stay pending appeal under Order 42, Rule 6(2) of the *Civil Procedure Rules*, 2010 can be granted, an applicant has to demonstrate the following:-
 1. That substantial loss may result unless the order is made.
 2. That the application has been made without unreasonable delay.
 3. Such security as the court orders for the due performance of the decree has been given by the applicant.
13. The three (3) conditions for the grant of an order for stay of execution must be met simultaneously as they are conjunctive and not disjunctive.
14. Notably, the decretal sum was colossal. The Respondent did not file an Affidavit of Means to demonstrate that she would be able to refund the Appellant any amount of the decretal sum if the same was released to her and the Appellant succeeded on appeal.
15. Even so, the Respondent may very well be able to refund it if the Appellant was successful on appeal. However, the rigours of recovering the said amount could amount to substantial loss. This very court made a similar finding in the case of *Dr G N Muema t/a Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another* (2018) eKLR. It was for that reason that this court came to the conclusion that the Appellant had satisfied the first condition of being granted an order for stay of execution pending appeal.
16. The order the Appellant wished to appeal against was made on September 9, 2021. The present application was filed on September 23, 2021. There was no delay in filing the said application. The



court found and held that the Appellant had satisfied the second condition for being granted an order of stay of execution pending appeal.

17. The Appellant was ready and willing to furnish security. This court was satisfied that it had demonstrated that it had met the third condition for the granting of an order of stay of execution pending appeal. Having said so, this court took the view that a bank guarantee was not a suitable form of security considering that there was a possibility of the bank not honouring the bank guarantee as the bank issuing the same would not be a party to the suit therein making it difficult for a successful appellant to enforce any orders he or she would get regarding the said bank guarantee, if at all. This court therefore determined that the security to be furnished herein would be in form of money.
18. This court took the view that the Respondent could not dictate the financial institution the decretal monies were to be deposited and the time lines for depositing the same. This was a discretion of the court.
19. Notably, the Memorandum of Appeal showed that the Appellant had appealed against both the apportionment of liability against it and the quantum the Respondent herein was awarded. The court was not therefore persuaded that it should order release of half of the decretal sum to the Respondent with the other half being deposited into a joint interest earning account in the names of the parties' advocates.
20. Going further, it was the considered view of this court that the issue of auctioneers costs was not part of the conditions the court was required to deal with when granting an order for stay of execution. This court steered away from delving into this issue because it appeared that the Appellant had since filed an application seeking to set aside the proclamation.

Disposition

21. The upshot of this court's decision was that the Appellant's Notice of Motion application dated April 22, 2022 and filed on April 25, 2022 was merited and the same be and is hereby allowed in the following terms:-
 1. That an order for stay of execution of the Ruling and order of Hon M I Shimenga (SRM) that was delivered at Kisumu in Chief Magistrate's Court Civil Case No 282 of 2018 on September 9, 2021 be and is hereby granted pending the hearing and determination of the appeal on condition the Appellant shall deposit the sum of Kshs 2,000,000/= into an interest earning account in the joint names of the advocates for the parties herein within thirty (30) days from the date of this Ruling.
 2. For the avoidance of doubt, in the event the Appellant shall default on Paragraph 21(1) hereinabove, the conditional stay of execution shall automatically lapse.
 3. The Appellant be and is hereby directed to file and serve its Record of Appeal within one hundred and twenty (120) days from the date of this Ruling.
 4. This matter will be mentioned on February 7, 2023 to confirm compliance and/or for further orders and/or directions.
 5. Costs of the application herein shall be in the cause.
 6. Either party is at liberty to apply.
22. It is so ordered.

DATED and DELIVERED at KISUMU this 25th day of October 2022



J. KAMAU
JUDGE

