



**Swiftway Auctioneers v New Buxton Inn Limited (Miscellaneous Civil Application 80 of 2021) [2022] KEHC 16863 (KLR) (18 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16863 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS CIVIL APPLICATION 80 OF 2021**

**OA SEWE, J**

**NOVEMBER 18, 2022**

**BETWEEN**

**SWIFTWAY AUCTIONEERS ..... APPLICANT**

**AND**

**NEW BUXTON INN LIMITED ..... RESPONDENT**

**RULING**

1. Before the court for determination are two applications; the 1<sup>st</sup> application being the Notice of Motion dated August 23, 2021. It was filed by Swiftway Auctioneers under article 43 of the Constitution of Kenya; sections 1, 1A, 3, 3A & 63(e) and 71(1) and 95 of the Civil Procedure Act, chapter 21 of the Laws of Kenya; section 30(f) of the Auctioneers Act; as well as order 22 rule 25, order 43 rule 2 and order 51 rule 1 of the Civil Procedure Rules, 2010 for the following orders:
  - (a) Spent
  - (b) Spent
  - (c) That the court be pleased to order stay of further proceedings in MCCC No 1135 of 2020 pending the hearing and determination of the intended appeal;
  - (d) Spent
  - (e) Spent
  - (f) That the court be pleased to extend time to file an appeal to this court against the ruling and orders by Hon Lesootia Saitabu, PM, issued on April 9, 2021 in MCCC no 1135 of 2020 and all the consequential orders thereof directing the applicant to release the proclaimed and removed goods to the respondent;



- (g) That the court be pleased to extend time to file an appeal to this court against the ruling and orders by Hon Lesootia Saitabu, PM, issued on July 14, 2021 in MCCC no 1135 of 2020 and all the consequential orders thereof directing the Mwara Investments to surrender the respondent's good;
  - (h) That the court be pleased to grant leave to the applicant to appeal against the ruling and orders by Hon Lesootial Saitabu, PM, issued on April 9, 2021 and all the consequential orders thereof directing the applicant to release the proclaimed and removed goods to the respondent;
  - (i) That the court be pleased to grant leave to the applicant to appeal against the ruling and orders by Hon Lesootia Saitabu, PM, issued on July 14, 2021 and all the consequential orders thereof directing Mwara Investments to release the respondent's goods;
  - (j) That the court be pleased to order stay of execution of the orders by Hon Lesootia Saitabu, PM, issued on April 9, 2021 and all the consequential orders thereof directing the applicant to release the proclaimed and removed goods to the respondent, pending the hearing and determination of the applicant's intended appeal against the said orders;
  - (k) That the court be pleased to order stay of execution of the orders by Hon Lesootia Saitabu, PM, issued on July 14, 2021 in MCCC no 1135 of 2020 and all the consequential orders thereof directing Mwara Investments to surrender the proclaimed and removed goods to the respondent, pending the hearing and determination of the applicant's intended appeal against the said orders;
  - (l) That the court be pleased to make such further orders that may be appropriate in the interest of justice;
  - (m) That the costs of the application be provided for.
2. The application was premised on the grounds that, on April 9, 2021, the lower court delivered its ruling in respect of the respondent's applications dated December 15, 2020 and January 19, 2021, thereby making various orders; including an order for the payment by the respondent of conceded rent arrears of kshs 681,805/= in monthly instalments of kshs 100,000/= from May 9, 2021 and thereafter on the 9<sup>th</sup> day of the succeeding months until payment in full, pending determination of the sum due in the main suit. The applicant was likewise ordered to release the respondent's proclaimed goods. The applicant averred that, although he was willing and ready to comply with the said order, it was not clear who was to pay the auctioneer's fees and storage charges.
  3. It was further the contention of the applicant that, on July 14, 2021, the lower court delivered its ruling in respect of the respondent's application dated June 9, 2021 and ordered that the respondent's goods be surrendered by Mwara Investments, on the ground that the applicant herein and the 1<sup>st</sup> defendant in CMCC No 1135 of 2020 caused the goods to be stored by Mwara Investments and thus they could not look to the respondent to pay storage charges in the event the applicant failed to pay. The applicant added that he is aggrieved by the orders aforementioned and wishes to file an appeal, but requires leave for purposes of section 75(1) of the *Civil Procedure Act* and order 43 rule 2 of the Civil Procedure Rules.
  4. The application was supported by the affidavit of Anthony Michael Mwanza Mulwa, sworn on August 23, 2021, to which he annexed several documents in proof of his averments. At paragraph 15 thereof, the applicant explained that the delay in seeking leave to file an appeal against the rulings and orders issued on April 9, 2021 and July 14, 2021, respectively, was due to the fact that the parties were engaged in negotiations for the payment of his fees as well as the storage charges. The applicant added that the



trial court failed to consider that he is entitled to his fees for the work done; and therefore that, unless the orders sought herein are granted, the intended appeal shall be rendered nugatory.

5. The application was opposed by the respondent. An affidavit to that effect, sworn by Michael Okach Omondi, was filed on September 6, 2021. He confirmed the averments of the applicants that the respondent obtained orders from the lower court for the release of the respondent's goods upon the respondent being granted time to pay the accrued rent by instalments. Copies of the impugned orders were annexed to the Replying Affidavit, along with other pertinent documents. The respondent further confirmed that although the applicant asked to be paid their charges vide a letter dated April 14, 2021, marked Annexure "MOO8" to the Replying Affidavit, the same could not be paid upfront because it was not part of the subject court orders.
6. It was further averred by Mr Omondi that, since no appeal has so far been filed, there is no justification for stay; and that in any event, the applicant, having contemptuously disobeyed the orders of the lower court, is not entitled to the discretion of the Court. He added that, instead of releasing the respondent's property as ordered by the lower court, the applicant approached this court and obtained *ex parte* stay orders without disclosing that he was in contempt of two court orders.
7. On a without prejudice basis, Mr Omondi averred that the auctioneers' charges are not payable till the conclusion of the suit; that all the items in the auctioneer's fee note were not receipted and therefore not payable; and that the issue of fees and storage charges was already canvassed in the lower court and an order for unconditional release of the goods made by the lower court. He concluded his affidavit by stating that in is in the interest of justice that the applicant's application be dismissed with costs.
8. In response to the averments set out in the respondent's Replying Affidavit, the applicant filed a Further Affidavit on October 14, 2021. He averred that his advocates, M/s Odindiko & Company Advocates were not served with the application dated June 9, 2021. He added that failure to comply with the orders of July 14, 2021 was because he had filed an application on June 17, 2021 seeking to have the respondent pay the auctioneers charges and storage fees; which application was still pending and would have been rendered nugatory had he released the respondent's goods without payment. He consequently denied the contention by the respondent that he is in contempt of court.
9. At paragraph 14 of his Further Affidavit, the applicant deposed that he has a right to equal protection and equal benefit of the law in terms of article 27 of the Constitution; and as such his rights can only be realized if the orders sought by him are granted. He blamed the delay on the trial court and urged the Court to find that his appeal is arguable.
10. The application dated August 23, 2021 was canvassed by way of written submissions, pursuant to the directions of September 16, 2021. Thus, the applicant's written submissions were filed on October 14, 2021 by Mr Iddi, advocate, duly instructed by M/s Odindiko & Co Advocates. He proposed the following two issues for determination:
  - (a) Whether the applicant's Notice of Motion ought to be allowed?
  - (b) Who is to bear the costs of the application.
11. Mr Iddi submitted that the applicant has raised arguable grounds of appeal with high chances of success. He pointed out that the respondent has conceded to rent arrears of kshs 681,805/=; and therefore urged the court to find that it is only fair that the applicant be paid his fees together with the storage charges. He explained that the reasons for the delay in filing the appeal and the instant application have been given by the applicant been explained and added that the applicant stands to suffer irreparable loss if the orders sought are not granted. He relied on Kenya Wildlife Service v James



- Mutembei* [2019] eKLR and *Julius Kimeli Ngetich v Christopher Kuto* [2020] eKLR to support the submissions that the applicant has fully satisfied the conditions for grant of stay of proceedings.
12. Mr Iddi also made reference to the cases of *HGE v SM* [2020] eKLR and *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR to demonstrate that the applicant stands to suffer substantial loss; and therefore that there is need to preserve the substance of the intended appeal. He also prayed that the respondent be ordered to bear the costs of the application.
  13. A perusal of the court record reveals that the applicant was granted interim orders on August 25, 2021, effectively staying proceedings in MCCC No 1135 of 2020 as well as execution of the orders of the trial court issued on April 9, 2021 and July 14, 2021 pending the hearing and determination of the applicant's application dated August 23, 2021. The record further shows that, before the applicant's application was determined, the respondent filed an application dated December 6, 2021. The application was brought under sections 1A, 1B, 3, 3A, 63(e) and 95 of the *Civil Procedure Act*; and order 51 rule 1 of the Civil Procedure Rules for the following orders: -
    - (a) Spent;
    - (b) That the honourable court be pleased to vacate, vary, discharge and/or set aside the orders of stay granted to the applicant *ex parte* on August 23, 2021;
    - (c) That the honourable court be pleased to order the applicant to release the respondent's goods/ items and tools of trade held by them since January 9, 2021;
    - (d) That the honourable court be pleased to issue such other orders it deems fit and just to grant; and
    - (e) That the costs of this application be provided for.
  14. The respondent's application was premised on the grounds that it continues to pay the rent arrears as ordered by the lower court in spite of the fact that the applicant seized their tools of trade. The respondent further averred that the applicant is in contempt of court and ought not be given a hearing by the Court until he purges his contempt. The application was supported by the affidavit of Michael Okach Omondi in which he detailed instances to demonstrate that the applicant has treated the lower court with contempt and failed to give an explanation for his failure to comply with the orders of the lower court.
  15. At paragraph 8 of the Supporting Affidavit, the respondent gave an undertaking to pay the applicant's charges/costs so long as the same is approved by the lower court. Mr Omondi also explained the challenges the respondent has been facing upon the attachment by the applicant of the respondent's tools of trade and prayed that the same be released to the respondent.
  16. In response to the respondent's application dated December 6, 2021, the applicant filed a Replying Affidavit sworn by him on February 18, 2022. He reiterated his stance that he is not in contempt of the orders of the lower court; adding that the respondent's goods were proclaimed and removed from the suit premises pursuant to a lawful distress for rent process. He added that his failure to release the distrained goods was only due to the fact that he had filed an application before the lower court for the payment of his fees and storage charges; which application was yet to be determined. The applicant generally reiterated his averments in support of his application dated August 23, 2021 and urged for the dismissal of the respondent's Notice of Motion dated December 6, 2021.
  17. Directions were thereafter given on December 8, 2021 that the second application be canvassed by way of written submissions; which submissions were to be filed and exchanged before February 23, 2022. On behalf of the respondent, Mr Omondi filed written submissions on May 9, 2022. He simply



restated the substance of the respondent's application and urged the court to grant the orders prayed for therein.

18. Mr Iddi filed his written submissions in respect of the respondent's application on September 22, 2022. He was of the view that the respondent's application is an abuse of the court process because the issues raised therein are the very issues in the applicant's application dated August 23, 2021. Mr Iddi posited that to allow the respondent's application would be to, in effect, dismiss the applicant's application dated August 23, 2021 and to forestall the intended appeal; thereby completely locking the applicant from the seat of justice in contravention of article 159(2)(d) of the *Constitution* and sections 1A and 1B of the *Civil Procedure Act*. Counsel relied on *Ochola Kamili Holdings Ltd v Guardian Bank Ltd* [2018] eKLR and *Mbaki & Others v Macharia & Another* [2005] 2 EA 206 to justify the interim orders issued on August 24, 2021 and submitted that those orders were intended to preserve the subject matter of the intended appeal; and therefore to allow the respondent's application would render the intended appeal nugatory.
19. I have carefully considered the two applications in the light of the parties' affidavits and written submissions. Since the applications raise cross-cutting issues, I will consider them under the following themes:
- (a) Whether the applicant's application dated August 23, 2021 has merit;
  - (b) Whether the respondent's application dated December 6, 2021 is merited; and
  - (c) What orders ought to issue in respect of costs.
- (a) On whether the applicant's application dated August 23, 2021 has merit:
20. The applicant's application seeks two main prayers; stay of proceedings and execution of the trial court's orders on April 9, 2021 and July 14, 2021 and leave to appeal out of time. Stay of proceedings is provided for order 42 rule 6 of the *Civil Procedure Rules*. Sub-rule 1 thereof 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."
21. Accordingly, although the court has the discretion to grant stay orders on terms, the interests of justice require that the discretion be exercised judiciously and within the laid down parameters. The rationale for this has been aptly captured in *Halsbury's Laws of England*, 4<sup>th</sup> Edition, Vol. 37 at pages 330 and 332 thus:
- "Stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation toward the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.
- This is a power which, it has been emphasized ought to be exercised very sparingly, and only in exceptional cases.



It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for stay on this ground must show no merely that the plaintiff might not, or probably would not succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

22. That being the case, in determining what the interests of justice require in the instant application, it is imperative to balance the competing interests of the parties; and in this respect, I find instructive the expressions of Ringera, J in *Global Tours & Travels Limited* WC No 43 of 2000, that:

“...whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but on whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

23. The requirements for granting an order of stay of execution pending appeal are provided for in order 42 rule 6(2) of the Civil Procedure Rules: -

- (2) No order for stay of execution shall be made under subrule (1) unless—
- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

24. Thus, on both scores, the applicant had to satisfy the court that, he stands to suffer substantial loss unless the order for stay of proceedings and stay of execution is made; that he made the application without unreasonable delay; and finally, that he has provided security for the due performance of the order as may be made by court. Accordingly, in *Rhoda Mukuma v John Abuoga* [1988] eKLR the Court of Appeal stated thus: -

“..... substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory. Therefore, it is necessary to preserve the status quo.”

25. There appears to be no dispute that the applicant was instructed by Nairobi Homes (Mombasa) Limited to levy distress on the respondent for rent arrears; or that, pursuant to those instructions he carried out his professional services for which ought to be paid together with storage charges. He annexed a copy of his fee note to the Supporting Affidavit as Annexure AMMM-4. Nevertheless, the ruling of the lower court was explicit; namely that the order for the release of the respondent’s goods was conditional on payment of rental arrears and not pegged on payment of the applicant’s fees and/or storage costs. The impugned ruling further shows that this was an interim measure pending hearing



and determination of the dispute and was intended to meet the ends of justice in the matter, for the lower court observed that:

“...alive to the fact that indeed many businesses have been affected by the effects of Covid-19 Pandemic as the plaintiff strives to catch up with his accrued arrears he ought to have made a better offer that would see rent arrears settled in at least 6-months time. Noting that the plaintiff disputes the rent due and as claimed by the defendant, pending the determination of the sum due in the main suit the Plaintiff is directed to settle the conceded rent arrears of kshs 681,805 in monthly instalments of kshs 100,000 with effect from the May 9, 2021 and thereafter on the 9<sup>th</sup> day of succeeding months until payment in full.”

26. The lower court was therefore explicit as to the release of the distrained goods and the continuation of the tenancy uninterrupted so as to enable payment of the instalments due pending hearing and determination of the dispute. In those circumstances, it cannot be said that the applicant stood to suffer substantial loss if he released the goods without payment of his fees and storage charges. Indeed, as was aptly stated in *James Wangalwa & Another v Agnes Naliaka Cheseto (supra)* the burden was on the applicant to show that the loss contemplated was such as would irreparably affect him if he succeeded on appeal. It was held that: -

“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...”

27. In my considered view, the pursuit of the auctioneer’s fees and storage costs will not be impeded in any way. Indeed, the respondent gave an undertaking to pay such fees and charges once approved by the lower court. It is also noteworthy that the applicant was instructed by a third party to levy distress for rent arrears against the respondent. Therefore, the applicant ought to look to the third party for payment in the first instance. I therefore entirely agree with the position taken in *Kingsway Tyres and Automart Ltd v Richard Muchai t/a Richard Muchai Auctioneers & Another* [2005] eKLR, by Hon Waweru, J that: -

“The distraint agent must demand his remuneration from the distrainor. So, the auctioneer under this regulation must demand his charges from the 2nd respondent’s authorized officer (distrainor) who instructed him to assist in levying distress against the applicant or from the principal. He cannot look to the applicant for payment of these charges.”

28. It is therefore my finding that the applicant has failed to prove substantial loss as a requirement for stay. On whether the application was brought without unreasonable delay, I note that the trial court orders were granted on April 9, 2021 and July 14, 2021, and therefore that the application was filed after a period of 5 months between the first order. There being no plausible explanation for the delay, it is my view that it is unreasonable; granted the unique circumstances of the case. And, granted my conclusions in respect of the first two requirements, I need not consider the issue of security.

29. In the light of the forgoing, it is my finding that the applicant has failed to meet the threshold for stay of proceedings and execution stipulate in order 42 rule 6 of the Civil Procedure Rules and the principles set out in *Tabro Transporters Limited v Absalom Dova Lumbasi* [2012] eKLR where the court stated: -

“These conditions are the essence of order 42 rule 6 CPR. They however share an inextricable bond such that, if one is absent, it will affect the exercise of the discretion of the court in granting stay of execution.”



30. On the issue of leave to appeal out of time, section 79G of the *Civil Procedure Act* provides that: -

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order. Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.”

31. The Court of Appeal case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR quoted with approval the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported) where the court set out guidelines on applications for extension of time to file appeals: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted”.

32. It is clear from the application and submissions thereafter that the applicant admits to delay in filing the intended appeal. His explanation for the delay was that the parties were engaged in negotiations for the payment of his fees and storage charges. Needless to mention that the power of the court to grant leave to file an appeal out of time as stipulated in section 79G of the *Civil Procedure Act* is discretionary; and that the discretion must be exercised judiciously and on a sound basis, as leave by itself is not a matter of right. I am not satisfied with the explanation offered by the applicant on the delay to file the appeal and further find that the applicant has failed to demonstrate that the intended appeal raises arguable issues that would warrant this court to exercise its discretion in his favour, as per the annexed copy of Memorandum of Appeal on the Further Affidavit sworn on October 14, 2021.

33. In the light of the forgoing analysis, it is my finding that the applicant has failed to meet the threshold for granting leave to file an appeal out of time.

35.

(b) On whether the respondent’s application dated December 6, 2021 is merited:

34. There main prayers in the respondent’s application are setting aside of this court’s interim orders on August 23, 2021 and for the applicant to return the respondent’s goods/items and tools of trade. The first prayer is now spent as the court rendering final orders on the applicant’s application, therefore I rest the issue there and move on to the second.

35. My view on the second prayer is that the respondent is seeking enforcement of the trial court’s orders and I need only emphasize that the trial court has the requisite jurisdiction to enforce its own orders without the intervention of this Court. The respondent’s application is therefore entirely misconceived and untenable.

36. In view of the forgoing, and upon consideration of both the applicant’s application dated August 23, 2021 and respondent’s application dated December 6, 2021, the orders that commend themselves to me, and which I hereby grant are as follows:

(a) The applicant’s Notice of Motion dated August 23, 2021 is hereby dismissed;



- (b) The respondent's application dated December 6, 2021 is struck out;
- (c) The interim orders issued by this court are hereby vacated and parties are at liberty to approach the lower court for further directions; and
- (d) Parties to bear their own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 18TH DAY OF NOVEMBER 2022.**

**OLGA SEWE**

**JUDGE**

