



**Bashy African Credit Limited & another v Mutemi (Civil Appeal
E751 of 2022) [2022] KEHC 16338 (KLR) (Civ) (16 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16338 (KLR)

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

CIVIL

CIVIL APPEAL E751 OF 2022

JK SERGON, J

DECEMBER 16, 2022

BETWEEN

BASHY AFRICAN CREDIT LIMITED 1ST APPELLANT

LAAR AUCTIONEERS 2ND APPELLANT

AND

PAUL MUTEMI RESPONDENT

RULING

1. The 1st and 2nd appellants brought the Notice of Motion dated 26th September, 2022 supported by the grounds presented on its face and the facts stated in the affidavit of director of the 1st appellant company Bashri Kipimo Mrima. The appellants sought for a stay of all proceedings in Milimani Chief Magistrate Court COMMSU No. E1085 of 2021 pending the hearing and determination of this appeal.
2. The respondent put in a replying affidavit sworn on 11th November, 2022, to oppose the Motion.
3. When the parties came for interparties hearing, they chose to rely on the averments made in their respective affidavits.
4. The applicants stated that respondent had applied two loans with the 1st appellant on 26th November 2020 & 18th March 2021 of Kshs.803,000/= and Kshs.2,012,500/= respectively and pledged his motor vehicle registration KCZ 917T and KCZ 936P which was jointly registered in the names of the 1st appellant and respondent as security for the loan.
5. The applicants aver that respondent defaulted on both loans and filed an application in 2021 under a certificate of urgency seeking injunctive orders which was dismissed on merit on 1st November 2021, however, the respondent on 21st June, 2022 filed a similar application seeking injunctive orders which application was ideally res judicata.



6. The applicants further aver that the court issued injunctive orders without taking into account that a similar application had previously been dismissed and during the interparties for the said application, the court confirmed the interim orders.
7. The applicants stated that they have already filed documents showing that the subject motor vehicle was sold by way of public auction on 17th June, 2022 and is in the hands of a third party known as Joseph Chege Muchiri who is yet to be enjoined as 2nd interested party.
8. The applicants deponed that the trial court may now commence contempt proceedings on orders which essentially are res judicata and were issued when the court was already functus officio.
9. In retort, the respondent avers that the 1st appellant is fully aware that the respondent has fully paid the loan advance and put up the motor vehicle with the license plate KCQ 514 Q as collateral, but despite this, they kept pointing out how illegal it was while drifting the outstanding and claiming that the court had ordered the parties to meet and reconcile their accounts for interest payable before the matter was set for hearing.
10. The respondent further avers that the 1st appellant instead of meeting, it instructed the 2nd appellant to repossess and sell the respondent's motor vehicle by way of public auction to allegedly recover amounts that are not owed.
11. The respondent depones that the said motor vehicle is being hidden in an unknown and secretive location only known by the appellants and that they disobeying court orders, using all means not to hand over the said vehicle including frustrating the police officers to track down the motor vehicle.
12. Be that as it may, the provisions of Order 42, Rule 6(2) of the *Civil Procedure Rules*, 2010 express that even where an application for a stay of execution or proceedings is denied or granted by the trial court, the court sitting on appeal is at liberty to consider a similar application and to make such orders as it deems just.
13. The granting of a stay of proceedings is purely a matter of judicial discretion. The principles surrounding the granting of an order for stay of proceedings were aptly discussed by the court in the case of *William Kamunge & 2 others v Muriuki Mbithi* [2016] eKLR:

“...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 whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”
14. The prayer for stay of proceedings is an equitable relief. An applicant must have come to court with clean hands. It is therefore important for the court to consider whether or not the application for stay of proceedings has been filed expeditiously.
15. The first principle concerns itself with whether there was delay in filing of the application. The court noted that the Order the applicants intended to appeal was delivered on 21st September, 2022. The Memorandum of Appeal was filed on 26th September, 2022 while the present application was filed on 26th September, 2022 five (5) days could not be said to have been inordinate. This court was thus satisfied that the present application was filed without any delay.
16. The second principle concerns itself with whether the applicant has an arguable appeal with reasonable chances of success. The applicants are of the view that their appeal raises arguable grounds and has high



chances of success, and that if the order sought herein is denied, the respondent will continue abusing the doctrine of res judicata hence rendering the appeal an academic exercise.

17. I did not come across any specific arguments by the respondent on this subject.
18. From my study of the grounds featured in the memorandum of appeal, it is apparent that the appeal seeks to challenge the orders issued on 21st September, 2022 by the trial court where the court failed to appreciate that the interlocutory orders of mandatory injunction ought to be determined on substantial justice to all parties and that the third party the purchaser of the vehicle was never enjoined as a party in the proceedings so no orders can be issued against him.
19. In my view, I am satisfied that the applicants have demonstrated that the appeal raises prima facie arguable points of law and fact and that if an order for a stay of proceedings is denied and the suit proceeds for hearing, there is a likelihood that the appeal will be rendered nugatory.
20. Going further, this court was cognizant of the fact that an arguable appeal only needed to raise a single bona fide point worthy of consideration and need not be one that must necessarily succeed as was held in the case of *Co-operative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya)* [2015]eKLR.
21. The Court of Appeal also held in the case of *UAP Insurance Company Ltd vs Michael John Beckett* [2004] eKLR, all an applicant is required to show is that he has arguable appeal which is not frivolous and that the appeal will be rendered nugatory if the stay of proceedings are not granted.
22. The third principle touches on the interest of justice vis-à-vis the subject of prejudice, the applicants stated that no prejudice shall be occasioned to the respondent should the orders be granted.
23. Upon the foregoing circumstances hand in hand, I am satisfied that the applicants have reasonably shown that unless there is a stay of proceedings during the pendency of the appeal, there is a likelihood that prejudice and hardship will result to them.
24. Concerning the fourth principle on the expeditious disposal of cases vis-à-vis proper use of judicial time, upon considering the foregoing circumstances, I find that it would only be a practical and proper use of judicial time for the parties to first pursue the appeal before undertaking any further proceedings in the present suit.
25. As was held in the case of *Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others* [2009]eKLR, the Court of Appeal rendered itself as follows:-

“Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.”
26. In the end therefore, the Motion dated 26th September, 2022 is hereby allowed on merit in terms of prayers 6 and 7). Consequently:
 - i. There shall be a stay of all further proceedings in Milimani Chief Magistrate Court COMMSU No. E1085 of 2021 until such time as the present appeal is heard and determined.
 - ii. That there shall be stay of the orders issued on 21st September 2021 in Milimani Chief Magistrate Court COMMSU No. E1085 of 2021 until such time as the present appeal is heard and determined.
 - iii. Costs of the Motion shall abide the outcome of the appeal.



**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
16TH DAY OF DECEMBER, 2022.**

J. K. SERGON

JUDGE

In the presence of:

..... for the 1st Appellant

..... for the 2nd Appellant

..... for the Respondent

