



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MERU

MISC CIVIL APPL. NO.62 OF 2020

PLATINUM CREDIT LIMITED.....APPLICANT

VERSUS

SAMUEL MWENDA MBOGORI.....RESPONDENT

RULING

1. For determination by the court is a Notice of Motion under certificate of urgency dated 24th July 2020 by the applicant, Platinum Credit Limited, and expressed to be brought under *Order 42 Rule 1,2,4 & 6 of the Civil Procedure Rules, Section 1A, 1B, 3A, 63(e) of the Civil Procedure Act and Article 159 of the Constitution*. In it the applicant seeks:

i) Spent

ii) Spent

iii) spent

iv) This honourable court be pleased to grant the applicant leave to lodge an appeal out of time against the ruling/decision delivered on 19.02.2020 by the Resident Magistrates Court in Githongo in RMCC No .114 of 2017.

v) That upon grant of leave to appeal out of time, the memorandum of appeal be deemed as duly filed.

vi) That this honourable court be pleased to stay the execution of the judgment given on 21.08.2019 and the ruling of 19.02.2020 together with all consequential execution proceedings pending the hearing and determination of the appeal

vii) That this honourable court be pleased to issue any other or further orders it deems mete and just in the circumstances of this case.

viii) That costs be in the cause.

2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Richard Simbala, the applicant's legal officer, sworn on 24.07.2020 to be that: -

a) The respondent, who continues to owe the applicant money, obtained ex-parte permanent injunction restraining the applicant from repossessing or selling the motor vehicle given security for the loan and declined to set aside the ex-parte proceedings and order.

b) The applicant was aggrieved by the ex-parte judgment and the ruling of the court on its application to set aside the ex-parte judgment intends to appeal against it.

c) That the applicant has a good case and should not be condemned unheard as the respondent will be unjustly enriching himself yet he still owes the applicant money.

d) That the applicant is ready to abide by the court's directions on security as a condition for stay pending appeal and that a mistake on the part of counsel should not be visited upon the applicant.

e) That It stands to be greatly prejudiced if leave and stay are refused and execution is allowed to proceed.

3. The respondent, Samuel Mwenda Mbogori, opposed the application through his replying affidavit sworn on 07.08.2020. He avers that he lodged a suit on 11.12.2017 at Githongo Law Courts against the applicant after the applicant maliciously impounded the respondent's motor

vehicle KBH 557S for alleged loan arrears. After several adjournments by the applicant, the matter was finally slated for hearing by consent on 03.07.2019 on which date the applicant never showed up and the matter then proceeded for hearing, the absence of the applicant notwithstanding and the case was closed. Subsequently the applicant was served with a mention for 24.07.2019 but it did not attend court or file its submissions. That judgment was delivered on 21.08.2019 ordering the applicant to release the respondent's motor vehicle as well as pay costs of the suit. That the applicant filed an application to set aside the judgment of the court which was dismissed vide a ruling delivered on 19.02.2020. That the applicant has had sufficient time to file his intended appeal or seek extension of time to file the same but it has been lethargic. He added that the applicant has only awoken from slumber in July 2020 when the respondent sought payment of his costs as awarded by the court. The respondent contends that the applicant has not met the threshold for grant of stay and as such its application should be dismissed with costs.

4. The applicant filed two further affidavits on 24.08.2020 one sworn by the counsel herself and another by the assistant legal officer. Under the rules these Affidavits ought to have been properly identified as supplementary affidavit for it is the respondent to an application who file further affidavit while the applicant file supplementary affidavit. The two affidavits reiterated the averments in its affidavit in support of its application and responding to the averments in the Replying Affidavit while stressing that on the day the suit proceeded in her absence, she had actually instructed one Otieno Advocate to hold her brief but the said advocate could not attend, delegated to a counsel he cannot remember and therefore did not report back what transpired in court. On failure to attend for the mention when duly served, the counsel conceded having been served but contended that the mention notice had no reason disclosed and that thereafter she kept calling and texting the respondents counsel for an update on several occasions without much feedback and that promises to call back added to nothing till execution issued.

5. On accusations that she took so long to bring the application, she asserted that she needed to get instructions from the applicant which was aggravated by the onset of Covid19 lockdown measures. A case was then made that costs were assessed and a decree drawn without her participation and the client obligated to pay a sum of 117,145 on costs. On security for the due performance of the decree, counsel offered that the applicant is prepared to deposit the sum of Kshs 52,103, being difference between the adjudged costs and the sum admitted to be owing from the respondent to the applicant.

6. The further Affidavit by the legal officer underscore that the fact of indebtedness by the respondent was admitted by himself in the pleading and captured in the judgment but not given effect hence the court chose the path of rewriting the contract between the parties. On the whereabouts of the motor vehicle the deponent asserted that the vehicle remained with the auctioneer after the respondent failed to agree with the auctioneer on his costs after the applicant was restrained by the court order from selling the same and that negotiations failed when the respondent failed to honour the promise to pay the admitted sum. On prejudice, it was deposed that the applicant stands to suffer greatly in that the debt stood at 304,961 and that costs were taxed without recourse to them which portend to taint its standing as a credit institution then he made an offer any security the court may offer.

7. The respondent also filed a supplementary affidavit on 04.09.2020 and reiterated his replying affidavit and in response to the applicant's further affidavits. The gist of the affidavit was to reiterate the substratum of the suit before the trial court said to have been unlawful repossession when there was no chattels mortgage executed and registered a position the applicant had always skirted around while behaving like a shylock. On the sum due to the applicant as admitted in the plaint, it was asserted that after the suit was filed he made two payments thus liquidating the debt hence the trial court was entitled to decide as it did. The applicant was faulted for failure to exhibit the affidavit allegedly instructed to attend court and failure to peruse the court file.

8. The application was directed to be canvassed by way of written submissions. For the applicant, submissions were made to the effect that the applicant will suffer substantially as it will be paying a party who currently owes it Kshs 304,961 without prospects and opportunity to recover the debt and be portrayed negatively if execution is allowed to proceed. A case was then advanced that the applicant has an arguable appeal with high chances of success which intended appeal will be rendered nugatory if stay is not granted. It is submitted that the applicant was condemned unheard in both the hearing of the case and the assessment of costs and further that the applicant is willing to deposit security for costs as may be directed by this court. It is concluded that the application has been made without undue delay and that no prejudice shall be suffered by the respondent if the orders sought herein are granted. The applicant relied **ASW (minor) v Jiangxi Zhongmei Engineering Ltd (2019)eklr** for the position of the law that assessment of costs by magistrates is not guided divinely, **Barclays Bank of Kenya v Evans Ondusa Onzere (2008)eklr** on when an appeal may be rendered nugatory, **Shadrack Mueni Ngugu v Moses Wangai (2020)eklr** citing with approval Phillip Chemwolo vs Augustine Kubende (1982-1988) klr 103, for the proposition of the law that blunder should not be the only reason to shut a party from the seat of justice and lastly, **Mwangi v Kenya Airways Ltd (2003) KLR** on the considerations to be taken into account in an application to extend time.

9. The respondent, on his part, submitted that the applicant has not met the three conditions for grant of stay of execution pending appeal as set out under Order 42 Rule 6 of the Civil Procedure Rules. That the three conditions cannot be severed and must be met simultaneously. It is submitted that the applicant has not met any of these conditions and as such its application should be dismissed. That the applicant has failed to demonstrate how payment of costs and the release of the motor vehicle to the respondent will cripple its operations. It is contended that the application has been made with unreasonable delay and that the explanation that the delay was caused by COVID 19 is neither here nor there and that the respondent should not be punished for the applicant's delay to appeal within time. According to the respondent, the applicant is not acting in good faith as it is yet to release his motor vehicle. It is concluded that the applicant has not established any reasonable basis for grant of the orders sought. The respondent then identified three issues for determination, answer all in his favour and relied on the decisions in **Robert Mutuku Musyoki v China Road & Bridge Corporation (2018)eKLR** on how to challenge taxation of costs, **Alice Mumbi Nganga v Danson Chege Nganga & anor(2006) eKLR**, for the proposition of the law that cases belong to parties and not counsel and **Peter Kinyari v Gladys Wanjiru Migwi & anor** quoted in **Thomas K. Sambu v Paul Chepkwony Koskei(2014)eKLR** to support his submissions that where a litigant and counsel a casual attitude towards a case, they have selves to blame and they cannot extend further indulgence to them.

10. Having reviewed the materials availed and despite the structure of arguments adopted by the parties placing the application for stay ahead of that for extension of time, I will reverse that structure and consider enlargement of time with precedence and only consider the request for stay if the time be extended. This decision is informed by the appreciation that stay only comes to be available when there is an appeal pending and not before.

11. The principles for consideration on an application for enlargement or extension of time to take legal proceedings are established that the power is discretionary, and unfettered but the applicant must prove to the satisfaction of the court that the delay is not inordinate, reasons for delay must be plausible, that the appeal is arguable and not flippant or frivolous and that the respondent is not unduly prejudiced by the order being made.^[1]

12. I have given due regard to the explanation for delay and the length of delay spanning between February and July, a period of some five months and fully appreciated the unusual conditions of living the human kind have been exposed to owing to the covid19 pandemic and the fact that the assertion by counsel that she severally sought to be updated by his colleague on the status of the matter without a response and I am inclined to accept the explanation for the delay as plausible and the period itself as not inordinate.

13. On the arguability of the intended appeal, I do not consider the grounds raised in the draft memorandum as frivolous but I consider the some to raise critical questions and point that seek to ask whether due process was followed in issuing and serving efficacious notices when the matter was to be mentioned for filling of submission. I am of the learning that every notice requiring court attendance ought to sufficiently inform the addressee of the purpose of attendance. In my view that is part of right to fair hearing so that a party attends court when informed of what is expected of him so that one is not ambushed so as to be prejudice and further to facilitate the efficient disposal of court business. I am equally concerned with the practice that seems to gain ground, without legal underpinning and or justification by which costs are assessed by the executive and the judicial officer without proof that the judgment debtor has been served. To my mind such practice violates every notion of fair hearing and the right to be heard and can easily qualify as an arbitrary deprivation of property. That has been the understanding and philosophy of this court and I therefore can only agree with Chitembwe, J when he underscores the need for the obligated party to be afforded a hearing before costs are assessed by the trial court or at the registry by the executive office. It is however worth reiterating that the practice of plaintiff in the lower court simply filling what may appear as a bill of costs, many times, contrary to the Advocates Remuneration Rules, and seeking to have same assessed and the court proceeding with such assessment oblivious of the right of the judgment debtor to participate in such proceedings flies in the face of due process, right fair hearing and right to be heard. The practice which I now fear is embraced in most of our court stations is wholly unjust, if not unconstitutional, and must be discouraged and ultimately arrested and forbidden.

14. I consider those two issues to merit consideration by the court on appeal and that on that basis alone I ought to give leave to appeal out of time for which reason I do hereby enlarge time. Having done so and there being a draft memorandum of appeal exhibited, I deem the appeal duly filed save that court fees be paid within 7 days from the day the operations of the registry shall resume and an appeal file be appropriately opened.

15. Now that I have enlarged time and deemed the appeal filed conditionally, the stage is now set for me to consider the prayer for stay pending appeal. That prayer also invokes the discretionary powers of the court which of course must be exercised judiciously and upon set thresholds and principle. Order 42 Rule 6 of the Civil Procedure Rules, 2010, sets the thresholds and empowers a court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. The prerequisite conditions to be met before stay is granted are provided by the Rule 6 (2) to be that; the application be made with promptitude, the applicant satisfies the court that it stand to suffer substantial loss unless stay be granted and that security for the due performance of the decree as may be binding upon the applicant at the conclusion of the matter be provided or offered.

16. In that statutory set up, substantial loss become the pillar upon which the decision rotates. The Court of Appeal calls it the cornerstone of jurisdiction to grant stay which is unfettered and stands at large^[2]. The jurisdiction ought to be exercised in a way that preserves and does not discourage or prevent an appellant from meaningful pursuing the cause and that at the conclusion when the appeal succeeds the result is not rendered academic or nugatory.^[3]

17. **The issues for determination here like in every such application must therefore remain; whether** the prerequisite conditions for grant of stay have been met and whether the other orders sought should be granted.

18. Substantial loss as a legal principal is a relative term and more often than not must be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum. When put in the context of this matter where the sum in dispute may not qualify as colossal and the suit motor vehicle has been at the yard of an auctioneer, exposed to all the vagaries of weather in Meru, since the contested repossession, one must decide what is the best balance to be struck so as to serve the competing interests of the parties in an even and just manner. That balancing act however must remain in consonance with the dictate that substantial loss be avoided with its attendant follower called nugatory nature of the appeal at conclusion.

19. I do consider that in a society declared to be governed by the rule of law, any process that negates on the known and basic norms of administration of justice ought never to be treated and viewed mundanely. I have found in this matter that the process by which costs were assessed deserves interrogation by this court by way of an appeal as a recourse of supervision of the trial court. My take is that every time a Kenyan leaves the court with that feeling that he has not got his basic entitlement of the law in the nature of the right to be heard, it is the cause of justice and its institutions that suffer. For such a litigant, that he has been obligated to pay sum without being heard cannot pass as any other indiscretion. I consider it a serious violation and thus a loss not so insubstantial. That however does not apply to the release of the car which I consider to dilapidate and deteriorate every day it remains parked at the auctioneers' yard, idle, without care or useful engagement. I have taken note that the applicant has, in the three affidavits filed, offered to avail security as directed by the court. On the foregoing circumstance, I find that the applicant has satisfactorily demonstrated that it is merited to get stay pending appeal. I do grant stay but on conditions that:

(i) The security of kshs 100,000 be deposited into an escrow account in the joint names of the advocates for the parties within 21 days from today.

(ii) The suit motor vehicle be release to the respondent upon payment of reasonable agreed fees to the auctioneer and in default to agree on such fees, the same be released on a running attachment pending the assessment of the auctioneer's fees with the participation of the respondent.

(iii) Pending the determination of the appeal, the motor vehicle shall not be alienated, sold or possession parted with.

(iv) The applicant shall within 60 days from today file and serve a record of appeal together with written submissions to enable the respondent also file and serve own submission within 14 days thereafter.

(v) Time shall be of essence and if there shall be default by the applicant in compliance on due dates, the stay hereby granted shall stand discharged on the day of such default.

20. On costs, the application was necessitated and occasioned by default on the part of the applicant and it shall be unjust to award to it the costs thereby occasioned. On that basis the costs are to the respondent in all events and such costs shall be costs in the appeal.

Dated, signed and delivered at Meru, online, this 19th day of March, 2021

Patrick J O Otieno

Judge

[1] [Nicholas Kiptoo Arap Korir Salat vs IEBC \(2013\)eklr](#)

[2] [Kenya Shell Limited v Benjamin Karuga Kibiru & another \[1986\] eKLR](#)

[3] [Butt v Rent Restriction Tribunal \[1982\] KLR 417](#)