



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. E009 OF 2021**

**HEALTHSPAN MEDICAL CENTRE LIMITED.....APPELLANT/APPLICANT**

**-VERSUS -**

**PRISCILLA MAKOKHA (Suing as the personal representative and**

**administrator to the Estate of ELIZABETH ALIVITSA MBAO..... 1ST RESPONDENT**

**FRATON GLOBAL LIMITED..... 2ND RESPONDENT**

**RULING**

This ruling is in regards to two applications before the court by the Appellant and the 1st Respondent dated 18th January, 2021 and 25th January 2021 respectively. The Appellant's application is brought under the provisions of Sections 1A, 1B, 79G and 95 of the Civil Procedure Act, Cap 21 and all other enabling provisions of the law and is premised on the grounds on the face of the application and the supporting affidavit of OMAR MAHMOOD, a director in the Appellant/Applicant Company, sworn on 18th January, 2021. The 1st Respondent opposed the application through her Replying Affidavit sworn on 5th March, 2021. The Appellant/Applicant is seeking the following orders:

***i. Spent***

***ii. Spent***

***iii. Spent***

***iv. Spent***

***v. THAT pending the hearing and determination of the appeal, this Honourable Court be pleased to grant an Injunction restraining the 1st Respondent herein, its servants and agents or otherwise from selling, either by way of auction or in any way purporting to exercise her power of sale in as far as it relates to the Applicant's movable and immovable property.***

***vi. THAT pending the hearing and determination of the appeal, this Honourable Court be pleased to set aside the Warrant of Attachment of Movable property in execution of decree of money and the Warrant of Sale of property in Execution of decree of money both dated 12th January, 2021.***

***vii. THAT the Honourable Court be pleased to stay the consequential order in the judgement dated 28th May, 2020, pending the hearing and determination of the appeal from the judgement of the Honourable Court delivered on the 28th May, 2020.***

***viii. THAT costs be in the cause.***

The 1<sup>st</sup> Respondent application on the other hand is brought under the provisions of Order 40 Rule 7, Order 42 Rule 7(2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling provisions of the law. The application is premised on the grounds on the face of the application and the supporting affidavit of **PRISCILLA MAKOKHA**, the administrator of the deceased estate, sworn on 25th January, 2021. The Appellant opposed the application through the Replying Affidavit of OMAR MAHMOOD, a director of the Appellant's company, sworn on 5th March, 2021. The 1st Respondent is seeking the following orders:

***i. Spent***

***ii. THAT this Honourable court be pleased to exercise its inherent jurisdiction to vary and or set aside its ex-parte orders of 19th***

January, 2021.

iii. **THAT this Honourable court in the alternative be pleased to order that the Appellant deposits the sum of Six Million and Ninety Five Thousand, Eight Hundred and Ninety Nine (Kshs. 6,095,899/=) being the decretal sums into a joint interest earning account in the names of the Appellant and 1st Respondents counsels on record pending the hearing of the appeal as filed.**

iv. **THAT this Honourable court grants an early hearing date for the Appellants application dated the 18th day of January 2021 and the instant application by the Decree-Holder.**

v. **THAT costs of this Application be provided for.**

The court gave directions on 2nd March, 2021 to have both applications heard orally and that the parties file list of authorities. The hearing proceeded on 8th March, 2021 and the Appellant and the 1st Respondent both filed their list of authorities dated 5th March, 2021 and 8th March 2021 respectively. The Appellant's/Applicants case is that on 14<sup>th</sup> January, 2021 it was served with Warrants of Attachment and Warrant of Sale of Property dated 12th January, 2021 by the 1st Respondent following a judgment delivered by Hon. P. Gesora on 28th May, 2020 in CMCC No. 1853 of 2016. The Appellant/Applicant avers that the judgement was delivered in the absence of the parties and confirms that they were not served with a notice of the judgement date, Decree, Certificate of Costs or the Notice of intention to execute. The Appellant/Applicant further stated that on 7th January, 2021, via an application in Misc. Application No. E465 of 2020, Justice Serгон allowed an application to file an Appeal out of time after which a Memorandum of Appeal was filed on 13th January, 2021.

It is the Appellant's/Applicant's contention that the appeal which was brought without delay, has a reasonable chance of success and if the execution is not stayed, it will be rendered nugatory and become a pure academic exercise with resultant substantial loss to the Appellant/Applicant. The Appellant/Applicant is apprehensive that the 1st Respondent through her agent, MORAN AUCTIONEERS, who have already proclaimed against its trade tools used in the administration of health services to the public may sell/auction the same. The Appellant/Applicant is willing to abide by any conditions and terms imposed by the court for due performance of the decree.

In her Replying Affidavit sworn on 5<sup>th</sup> March, 2021, the 1<sup>st</sup> Respondent while relying on her Supporting Affidavit to the application dated 25<sup>th</sup> January, 2021 avers that since the judgment of the lower court is yet to be overturned, the court should order the Appellant/Applicant to deposit the entire decretal sums of Kshs. 6, 127,210.13 in a joint interest earning account of the parties' advocates. The 1st Respondent avers that it is apprehensive that the judgment debtor is a flight risk since they have already closed its business.

The 1<sup>st</sup> Respondent's application dated 25th January 2021 is premised on the grounds that there was material non-disclosure and misrepresentation of facts and law by the Appellants at the time the orders of 19th January, 2021 were granted since there was an earlier order issued by Justice Sergon touching on the issue of stay. The 1st Respondent argues that the orders of 15th January, 2021 by Justice Sergon declined to issue orders of stay of execution pending appeal and therefore the Appellant should have moved the court for review. It is the 1st Respondent's case that the orders for stay as granted are in violation of the rules of practice in particular that an *ex parte interim* orders should only be granted once and not for more than fourteen (14) days unless consented by the parties or allowed by the court for a period less than fourteen (14) days. The 1st Respondent further urges the court to balance the interest of the parties before it and exercise its discretion under Order 42 Rule 7 of the Civil Procedure Rules, 2010 and order the Appellant to deposit the decretal sums in a joint interest earning account in the names of counsels for the parties herein as a condition for the stay pending hearing of its appeal.

In opposition to the 1st Respondent's application dated 25th January, 2021, the Appellant filed a Replying Affidavit dated 5<sup>th</sup> March, 2021 sworn by OMAR MAHMOOD refuting the assertions that the current application is res judicata as the same was filed on 18<sup>th</sup> January, 2021 after it had filed its appeal on 12th January, 2021. The Appellant contends that the 1st Respondent was aware of the current application as the same is acknowledged in Paragraph 3 of her Supporting Affidavit and that she was served with the Court Order and an Affidavit of Service is on record. Further, the Appellant although willing to abide by the conditions of the Court in granting stay pending appeal states that due to the effects of COVID-19 Pandemic, the business is operating on a losses and if the court grants the prayers sought it would suffer financial embarrassment and consequently irreparable harm.

During the oral submissions in court, it was argued for the Appellant/Applicant by Miss Athman that since its goods and tools of trade had been attached, it would therefore suffer irreparable damage if execution is allowed to continue. The Appellant/Applicant through counsel urged the court to expunge the Replying Affidavit by the 1st Respondent as it was filed out of the court's stipulated timeline and it raises serious allegations that was not responded to. Miss. Athman for the Appellant/Applicant, while acknowledging that the only issue raised in the 1st Respondent application is a request for the deposit of the decretal sum in a joint interest earning account, submits that the Appellant/Applicant is willing and able to only deposit half of the decretal amount arguing that judgment was entered as against the two defendants jointly and severally and there was no proof that the 1st Respondent has executed against the other defendant.

Miss Lingunya appearing for the 1st Respondent and in opposition to the Appellant's/Applicant's application of 18<sup>th</sup> January, 2021 stated that her client was not served with the application before court and that the email indicated in the affidavit of service does not belong to her. It is Miss Lingunya further contention on behalf of the 1st Respondent that the Appellant's/Applicant's application is res judicata as the same had been dealt with by Justice Sergon in an early application. The 1st Respondent further argues that the right of an appeal by the Appellant/Applicant is not an automatic stay of execution and that the court ought to weigh the claim of both parties. Reference was made to the case of **Pauline Nderitu Mwangi & Another V Jacinter Mbet Mutisya & Another (Suing as the Legal Representatives of the Estate of William Mbithi Musonzo(Deceased))[2018]eKLR** where the court of appeal set out the condition for granting stay of execution by the High Court.

Miss Lingunya refuted the assertion that the Appellant/Applicant only work is to test travellers and stated that it's a health institution offering various services. Counsel further pointed out that the bank statements annexed have not been certified by the issuing bank. Miss Lingunya further acknowledged that judgment was indeed entered against the defendants jointly and severally, however, she argues that it is not for the 1st Respondent to go looking for the other judgment debtor. She reiterated that the 1st Respondent is agreeable to stay of execution subject to

the deposit of the whole decretal sum in a joint interest earning account of both advocates.

**Analysis/Determination:**

The only issue raised by the two applications for determination by this court is whether the 1st Respondent is entitled to stay of execution pending appeal and if so, what conditions should this court set. The conditions to be met before stay is granted are provided for under Rule 6(2) of Order 42 and states as follows:

***“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.”***

Further, the Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

***“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.***

***2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.***

***3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.***

***4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.***

***5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”***

The Memorandum of Appeal was filed on 12th January, 2021 and the Appellant/Applicant application for stay was filed on 18th January, 2021 this was three (3) days after the 1st Respondent through her agent Moran Auctioneers had proclaimed the Appellants/Applicants movable assets. I therefore find that there was no inordinate delay in making the present application.

The Appellant/Applicant operates a medical facility which offers test for travellers and other health care services. It is evident that the 1st Respondent through its agent Moran Auctioneers have already proclaimed the Appellants/Applicants movables which include its tools of trade in execution of the court decree in Cmcc No. 1853 of 2016 and intend to have the same sold off. This will completely alienate the Appellant/Applicant from its movables which are its tools of trade hence occasion a substantial loss and will also render the appeal nugatory. In the case of **Kenya Shell Limited v Kibiru[1986] eKLR**, Platt Ag JA.(as he then was) held that “Substantial loss in its various forms, is the corner stone of both jurisdictions for granting of stay”. As to whether the appeal has high chances of success, the Appellant/Applicant alleges that the magistrate erred in shifting and lowering the burden of proof in deciding liability of the defendants. Further, the Appellant/Applicant allege that the learned magistrate based his decision on a document that was never produced in evidence and that there was no proper notice on delivery of judgment. These issues would best be determined in the appeal and I am of the view that in the event the appeal succeeds, without an order of stay of execution, there is high likelihood that the Appellant/Applicants will suffer substantial loss.

It is the duty of the court to ensure that the interests of the parties are balanced. In the case of **Machira T/A Machira & Co. Advocates V East Africa Standard (No. 2) [2002]KLR 63**, the court reiterated on the principle that a successful party is entitled to the fruits of his judgment and in applications for stay, the courts should strive to do justice according to the law and prevent the abuse of the court process. While in the case of **Samvir Trustee Limited v Guardian Bank Limited Nairobi (Milimani HCCC 795 of 1997)** Warsame J. stated that the court is empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court by ensuring that orders of stay are granted conditionally. The Appellants/Applicants have indicated readiness to furnish security for the due performance of the decree by depositing half the decretal sum in a joint interest earning account in both parties’ advocates’ names. However, the 1st Respondent has insisted that the Appellant/Applicant deposits the whole decretal sum. I have taken into account the effects of Covid-19 Pandemic on the economy and I agree with the Appellant/Applicant that deposit of half of the decretal amount in an interest joint account of the parties’ advocate would be sufficient security.

Accordingly, and in consideration of the two applications before this court, I make the following orders:

***a) There shall be a stay of execution of the Judgment entered on 28th May, 2020 made on in Milimani Commercial Court Case No. 1853 of 2016 ; Priscillah Makokha (Suing as the personal Representative and administrator to the Estate of Elizabeth Alivitsa Mbao vs Fraton Global Limited & Healthspan Medical Centre Limited pending the hearing and determination of the Appellant’s/Applicant’s appeal.***

*b) The Appellant/Applicant to deposit half the decretal sum totaling Kshs.3,100,000/- in a joint interest earning account in the names of the advocates for the appellant and 1<sup>st</sup> respondent within 30 days hereof.*

*c) The Appellant/Applicant shall meet the Auctioneers Costs.*

*d) In default of the applicant complying with order (b) above, the stay of execution orders shall stand vacated and the 1<sup>st</sup> respondent shall be at liberty to execute.*

*e) The costs of the application shall abide the outcome of the appeal and shall follow the cause.*

**DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF MAY, 2021.**

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**S. CHITEMBWE**

**JUDGE**