



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. E080 OF 2021**

**CATHERINE MWENWA MWIRIGI.....APPELLANT/APPLICANT**

**VERSUS**

**PROGRESSIVE CREDIT LIMITED..... RESPONDENT**

**RULING**

***Application***

1. The court has considered the application for stay of execution pending appeal by Notice of Motion dated 22<sup>nd</sup> June 2021. The application is made necessary following the refusal of the trial court by a ruling of 16<sup>th</sup> June 2021 to set aside its judgment of 10<sup>th</sup> December 2020 in which it decreed in favour of the respondent a sum of Ksh.537,500 being the outstanding loan balance, inclusive of interest and penalties as at 25<sup>th</sup> September 2019 to be paid within 60 days and in default the 1<sup>st</sup> defendant in the suit (respondent herein) “shall be at liberty to realize the security being motor vehicle registration number KCM845V as per the loan agreement.” The memorandum of Appeal dated 22<sup>nd</sup> June 2021 was filed on the same date as from the trial court’s ruling declining to review and set aside its said judgment of 10<sup>th</sup> December 2020.
2. Despite opportunity granted to the Respondent to file a Replying Affidavit by the adjournment for that purpose granted at the request of Mr. Nyenyire who held brief Mr. Juma on 29<sup>th</sup> June 2021 no replying affidavit was filed. Consequently, when the application came for hearing on 15<sup>th</sup> July 2021, counsel for the applicant, Mr. F. Mugambi, urged that the application was unopposed and asked the court to grant a stay of execution as prayed in prayer (c) of the Motion, and ruling was reserved for the 29<sup>th</sup> July 2021.
3. By prayer (c) of the Notice of Motion the applicant sought the substantive prayer for the stay of execution pending appeal in terms that “(c) pending the hearing and determination of the intended appeal this Honourable Court be pleased to stay execution of the judgment delivered on 10<sup>th</sup> December 2020.”

***Sufficient cause and substantial loss***

4. While the applicant claims that the sum of 180,000/- was paid to the respondent in two tranches of 130,000/- by account to account transfer and Ksh.50,000/- Mpesa deposit, it would appear the payments went to payment of principal, interest and penalties. On a balance of probabilities, there being no response to the applicant’s case, the court finds sufficient cause in terms of Order 42 Rule of the Civil Procedure Rules to grant a stay pending appeal. The court would consider that the applicant would suffer loss sufficient for the court to grant a stay if her motor vehicle KCM845V which is the security for the loan is sold in execution of the decree to recover the sum which includes a disputed amount. The claims of wrongful imposition of penalty and interest pleaded in paragraphs 5 - 8 of the supporting affidavit sworn on 22<sup>nd</sup> June 2021 for alleged late payments are contentions by the applicant which can only be settled at the hearing of the appeal and cannot therefore be taken to be established at this stage.

***Security***

5. The Court would require as a condition of the stay that the appellant pays the undisputed amount to the Respondent. Since the judgment in December 2020, the applicant has not paid or tendered the amount she claims to be undisputed. Consistently with the overriding objectives of the civil process under section 1A and B of the Civil Procedure Act, the court must warn itself of the danger of abuse of its process to delay the fair determination of the matter, even as regards the undisputed amount.
6. The applicant had by this application sought to pay the said amount within 30 days of filing of the application. At paragraphs 13-16 of the Supporting Affidavit of 22<sup>nd</sup> June 2021, the applicant sets out her grievance as follows:

***“13. That the Respondent is adamant that I should pay the entire amount of Ksh.537,000/- that the court directed despite me having paid Ksh.180,000/- which has not been factored anywhere.*”**

***14. That the Magistrate in his ruling has stated that the loan statement was not available for the court to take into account at the time of trial which is not true as clearly demonstrated hereinabove.***

***15. That it is in the interest of justice that this honorable court do issue orders of stay of execution pending hearing and determination of the intended appeal.***

**16. That further to the foregoing the appellant is ready and willing to settle the outstanding balance that she acknowledges within 30 days of filing this application.”**

7. There is no evidence that any amounts have been paid despite the matter coming up for hearing on 15<sup>th</sup> July 2021, over 21 days after the filing of the application on the 22<sup>nd</sup> June 2021. And interest and penalties continues to accrue on the loan account.

#### **ORDERS**

8. Accordingly, for the reasons set out above, the Court makes the following orders:

1. The applicant is granted an order for stay of execution of the decree of the trial court by its Judgment delivered on 10<sup>th</sup> December 2020 pending hearing and determination of the appeal on condition that the applicant pays to the Respondent within **fourteen (14) days the sum of Ksh.357,500/-** (being the decretal sum of Ksh.537,000/- net of the disputed sum of Ksh.180,000/-).

2. In default of the payment in Order (1) above, the order for stay shall lapse and execution to issue.

*Order accordingly.*

**DATED AND DELIVERED ON THIS 29<sup>TH</sup> DAY OF JULY, 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES:**

M/S DAVID JOHN MBAYA & CO. ADVOCATES for the Appellant.

M/S CHEGE KIBATHI & CO. ADVOCATES for the Respondent.