# Car & General (Trading) Limited & another v Mose (Miscellaneous Case E114 of 2023) [2024] KEHC 1125 (KLR) (5 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1125 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**MISCELLANEOUS CASE E114 OF 2023**

**MW MUIGAI, J**

**FEBRUARY 5, 2024**

**BETWEEN**

**CAR & GENERAL (TRADING) LIMITED .................................... 1ST APPLICANT**

**JACKLINE MUTHOKI MWANIA .................................................. 2ND APPLICANT**

**AND**

**PATRICK MAKORI MOSE ................................................................ RESPONDENT**

## RULING

1. Vide a Notice of Motion under Certificate of Urgency dated 13th June,2023 and filed in court on 14th June,2023, brought under Order 42 Rule 6, Order 50 Rule 6 of the *Civil Procedure Rules 2010*, Sections 1A (2) 3A, and 63 (e), 79G and 95 of the *Civil Procedure Act*.
2. The Applicants seeks the following orders that:
    1. Spent.
    2. Spent.
    3. Spent.
    4. There be a stay of execution of the aforementioned judgment and decree of the subordinate court Machakos Small Claims Case Number SCCC No 589 of 2022 pending the hearing and determination of the Appeal.
    5. ThisCourt be pleased to deem the draft Memorandum of Appeal herein annexed and Marked HO-1 duly filed.
    6. The costs of this application be provided for.
3. The ground upon which this Application is based are on the body of the said Application.

**Supporting Affidavit**

4. The Application was supported by an affidavit dated 13th June,2023 and filed in court on 14th June,2023 Sworn by Sharon Mokena, the Legal Office of GA Insurance Company Ltd, wherein she deposed that she is informed by her advocate on record that stay of the execution of thirty (30) days from 27th April,2023 granted lapsed on 27th May,2023.

5. Lamenting that she is further advised by her Advocate on record that a Memorandum of Appeal was to be filed on/before the 27th May,2023 but the Appeal was not filed in time. (Annexed and marked copy of the Memorandum of Appeal).

6. She deposed that the reason for delay in filing the Memorandum of Appeal was due the temporary closure of the Machakos Court registry as the staff were engaged in a team building activity on the 26th May,2023 when their Advocates on record were to file the Memorandum of Appeal as we had just given them instructions in regard to the filing of the appeal. (Annexed and marked copy of the Notice from Machakos Chief Magistrate).

7. Deposing that as the insurer who shall pay on behalf of the Defendant/Applicant, has a reasonable and justifiable apprehension that it will be unable to recover the decretal amount from the Respondent in the event a stay pending the intended appeal is not granted and the Defendant/Applicant is successful in the intended appeal as the insurer has no details of the assets and/or income of the Plaintiff/ Respondent.

8. Further she deposed that in the absence of the orders sought for herein being granted, the Respondent will proceed to execute the subordinate court judgment and decree, causing the insurer to suffer substantial loss.

9. She lamented that in the interest of justice that the Application herein be allowed by granting the Applicant leave to file Memorandum of Appeal out of time and stay of execution of the subordinate court judgment and decree, as the Applicant stand to suffer grave prejudice if the orders sought herein are not allowed as prayed.

10. She deponed that the insurer on behalf of the Defendant/Applicant is ready to provide such security as this Court may deem fit.

**Replying Affidavit**

11. The Application was opposed by the Replying Affidavit dated and filed in court on 23rd June,2023, Sworn by Patrick Makori Mose, the Respondent herein, wherein he deposed inter alia that the grounds upon which the Application is based are neither accurate nor factually/legally sound and the Application for stay is meant to delay the ends of justice. Further that the small claims court matter the subject the subject of the instant Application was fully heard to its logical conclusion and a judgment was delivered by the Court on 27th April,2023.

12. Deposing that contrary to the assertion by the 2nd Applicant herein that no party will suffer prejudice; he stands prejudiced as he cannot enjoy the fruits of his judgment. Lamenting that the draft Memorandum of Appeal consists of general facts and not points of law as expected of an appeal from the Small Claims Court to this Court.

13. It was his position that the Applicant has neither demonstrated that she has an arguable Appeal not how that Appeal will be rendered nugatory should the instant Application be dismissed as is expected of an Applicant in an application similar to the instant one.

14. Deposing that should the Court be inclined to allow the instant Application, he does pray that the same should, in the interests of justice, be conditional on the deposit of the decretal sum in an interest earning account or 50% payment thereof or to his Advocates on record.

15. The matter was canvassed by written submissions.

**Submissions**

**Applicant's Submissions**

16. The Applicant in its submissions dated 4th August,2023 and filed in court on 7th August,2023, wherein the counsel for Applicant submitted on the following issues sequentially.

17. On the issue of without unreasonable delay, counsel submitted that judgment herein was delivered on 27th April,2023 wherein the court awarded the Respondents Kshs 761,088.00 as damages together with costs of the suit. Contending that the Applicants aggrieved and dissatisfied with the Trial Court's Judgment were required to file the Memorandum of Appeal on or before the 27th May,2023. However, On the 26 May,2023 when the Applicants' Memorandum of Appeal was to be filed, there was a temporary closure of the Machakos Registry as the staff were engaged in a team building activity on the said date. According to the counsel, this necessitated the filing of the present Application herein on the 14th June,2023.

18. As to substantial loss, counsel submitted that substantial loss occurring to the Applicants is the cornerstone of the jurisdiction of the court in granting stay of execution. To cement this position, credence was placed on the case of *Kenya Shell Limited v Benjamin Karuga Kibiru and Ruth Wairimu Karuga* (1986) eKLR.

19. Submitting that the Applicant's stand to suffer substantial loss should this Honorable Court fail to grant the orders sought for herein thereby granting the Respondent the liberty to commence execution proceedings. It was the Applicant's contention that the Applicants have reasonable and justifiable apprehension that they will be unable to recover the decretal amount from the Respondent if stay pending appeal is not granted and the Applicants are successful in the appeal filed as the Respondent has no known assets.

20. Further reliance was placed on the cases of *Tropical Commodities Suppliers Ltd & others v International Credit Bank Ltd (In Liquidation)* [2004] EA 331 *James Wangalwa & another v Agnes Naliaka Cheseto* Bungoma Hc Misc Application No 42 of 2011, *Antoine Ndiaye v African Virtual University*, to buttress the position on substantial loss.

21. Contending that the Applicants have no details of any assets owned by the Respondent which would perhaps be disposed of so as to repay the decretal sum hence it was incumbent upon the Respondent to avail before this Honorable Court any Proof of ownership of any meaningful assets as information is exclusively known only to the Respondent. Reliance was placed on Section 112 of the *Evidence Act* and the cases of *APA Insurance Limited v Micahel Kinyanjui Muturi* HCCA of 2015, Nairobi Civil Application No 238 of 2005 *National Industrial Credit Bank Limited v Aquinas Francis Wasike & another* [2006] eKLR and *Rosemary Kimingi v Wachira Waruru & another* [2019], to substantiate the position of burden of proof.

22. As to security, counsel averred that applicants herein are willing to abide by the conditions imposed on them by this Court in relation to granting Security herein. He relied on Order 42 Rule 6 (2) (b) to substantiate the limb on security and opined that applicants have expressed their willingness to provide such security as this honorable court deem fit.

**Respondent's Submissions**

23. The respondent in his submissions dated 16th August,2023 and filed in court on 31st August,2023, wherein counsel for the Respondent submitted that whereas the Court has requisite jurisdiction under Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules, 2010* to grant the Orders sought, the said discretion should be exercised judiciously and in a manner that promotes the overriding objectives Under Section 1A and 1B of the *Civil Procedure Act*.

24. It argued that the Court has to balance the interests of both parties. Reliance was placed on the case of *RWW v EKW* [2019] and *Michael Ntouthi Mitheu v Abraham Kivindo Musau* [2021] eKLR on the need to balance the interests of both parties.

25. Submitting that whereas the Applicant is entitled to exercise her right to Appeal, the Respondent has a valid Decree issued by a court of competent jurisdiction and without going into the merits of the Appeal, there is no guarantee that the Appeal would be successful. contending that to ensure proportionate and balance scales of justice the Respondent submitted the decretal sum should be deposited in the interest earning account.

26. It was averred that the Respondent stands to suffer greater prejudice and injustice should the Appeal fail and he finds it impossible to realize the fruits of his judgment. Further that Order 42 Rule 6 (2) makes security a critical consideration in the Application for stay of execution pending appeal. It was urged that adequate security in the nature of deposit of the decretal sum in the interest earning account be provided for should the court be inclined to allow the prayer sought in the instant application. To cement the position on the requirement of security, counsel relied on the cases of *RWW v EKW* [2019] eKLR and *Michael Ntouthi Mitheu v Abraham Kivindo Musau* [2021] eKLR adopted the reasoning in *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR.

27. It was prayed that should the court be inclined to allow the application; the same should be conditional upon depositing of the decretal sum in the interest earning account as adequate security for the satisfaction of the decree herein.

**Determination/analysis**

28. I have considered the Application, the Supporting Affidavit, the Replying Affidavit and the submissions filed as well as the authorities relied upon by the counsels for their respective clients.

29. The issue that commends itself for determination is whether the Applicant has demonstrated that the orders for stay of execution pending appeal are merited.

30. The guiding principles for grant of execution pending appeal are well established. These principles are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which is to the effect that:

    " No order for stay of execution shall be made under subrule (1) unless—

    (a) 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." (Emphasis added).

31. Further to the forgoing, Court in determining on whether to grant a stay or not is enjoined to have regard to the sufficient cause. The overriding objective espoused under Section 1A and 1B of the Civil

Procedure Rules exercise are applicable in *Civil Procedure Act* or in the interpretation of any of its Provisions.

32. According to Section 1A(2) of the *Civil Procedure Act*, "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B, some of the aims of the said objectives are; "the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties." (Emphasis added)

33. In *Stephen Boro Gitiha v Family Finance Building Society & 3 others* Civil Application No Nai. 263 of 2009, Nyamu, JA on 20/11/09 held inter alia that:

> the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. (Emphasis added)

34. In *Kenya Commercial Bank Limited v Kenya Planters Co-Operative Union* Civil Application No Nai. 85 of 2010 held that:

> " where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case." (Emphasis added)

35. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. The Court should weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. The Court when confronted with such circumstances will consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, should therefore always opt for the lower rather than the higher risk of injustice. See *Suleiman v Amboseli Resort Limited* [2004] 2 KLR 589.

36. It is worth noting that an Applicant for stay of execution of Decree or any consequential orders thereto pending Appeal must demonstrate and/or satisfy the conditions set out under Order 42 Rule 6(2) of the *Civil Procedure Rules* namely:

    a. that substantial loss may result to the applicant unless the order is made;

    b. that the application has been made without unreasonable delay; and

    c. that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. (Emphasis added)

37. As to what substantial loss is, in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, where it was observed that:

> " No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution

has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. 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 … the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory." (Emphasis added)

38. In the instant case, the Applicants submitted that they stand suffer substantial loss should this Honorable Court fail to grant the orders sought for herein thereby granting the Respondent the liberty to commence execution proceedings, further, the Applicants have a reasonable and justifiable apprehension that they will be unable to recover the decretal amount from the Respondent if stay pending appeal is not granted and the Applicants are successful in the appeal filed as the Respondent has no known assets. Respondent on the other hand opined that he has a valid Judgment whose fruits he is entitled to enjoy and any lawful execution cannot be seen as amounting to substantial loss. Averring that the possibility that the Applicant can trigger the execution process is by no means substantial loss to the Applicant herein.

39. Platt, Ag. JA (as he then was) in case of *Kenya Shell Limited v Kibiru* [1986] KLR 410, at page 416 expressed himself as follows:

> "It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money". (Emphasis added)

40. Similarly, on the part of Gachuhi, Ag. JA (as he then was) at 417 held thus:

> "It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be" In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted? By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding" On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement." (Emphasis added)

41. Regarding the contention that there was no evidence that the 1st Respondent would be able to refund the decretal sum if paid over to the Respondent, Hancox, JA (as he then was) in the above cited case expressed himself as follows:

> "I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to

be so, in particular that the first respondent will not remain in his job until pensionable age." (Emphasis added)

42. From the forgoing case, the three Judges of Court of Appeal (as they then were) carefully, ably and respectfully distilled the import of substantial loss noting that it is not sufficient to state the sum is a lot of money and the Applicant will suffer loss if the money is paid. The Applicant must establish what loss it would be. Therefore, an allegation that a decree holder is a person of unknown means does not rob and/or deny the said decree holder from the enjoyment of the fruits of a judgement. The doctrine is and has been that courts are enjoined not to deny a successful litigant of the fruits of his judgment save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court.

43. More importantly, in *Stephen Wanjohi v Central Glass Industries Ltd.* Nairobi HCCC No 6726 of 1991, that it was held:

> "Financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonorable miscreant without any form of income" (Emphasis added)

44. Applicant's apprehension that the Respondent will be unable to refund the decretal sum in the event the appeal herein filed succeeds is premised in the basis that the Applicants have no details of any assets owned by the Respondent which would perhaps be disposed of so as to repay the decretal sum. The Respondent on the other hand submits that to ensure proportionate and balanced scales of justice the Respondent urged that decretal sum should be deposited in an interest earning account as the Respondent stands to suffer grater prejudice and injustice should the Appeal fail. In regard to the forgoing circumstances bearing in mind that Court must balance the interests of both parties, this court has considered the decretal amount is Kshs 761,088.00.

45. On the issue of security, it is a requirement under Order 42 rule 6 aforesaid, that the applicant is to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder.

46. In the case of *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others* [2015] eKLR, it was held that:

> "… the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ''ultimately be binding' are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the *Civil Procedure Rules* includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick." (Emphasis added)

47. Further, I associate myself with the holding in *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR, where the court stated that:

> "… the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the

opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... This the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine." (emphasis added)

48. The Court of Appeal in *Nduhiu Gitahi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100, expressed itself as follows:

> " The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it" (Emphasis added).

49. In the instant case, it is submitted that the Applicants herein are willing to abide by the conditions imposed on them by this Court in relation to granting security herein. It is clear in my view from the forgoing that the Applicant did not furnish the court with any form of Security they would want to be used for the due performance of the decree. As it may, Court has unfettered discretion to issue an order with regards to security as required by law.

50. As to appeal being brought without unreasonable delay, the Applicant herein submitted that Judgment was delivered on the 27th April, 2023 wherein the Court awarded the Respondent Kshs 761,088.00 as damages together with costs of the suit. The Applicants being aggrieved by the Trial Court's Judgment were required to file the Memorandum of Appeal on or before the 27thMay,2023 however on 26th May,2023 when the Memorandum of Appeal was to be filed there was a temporary

closure of the Machakos registry as the staff were engaged in a team building activity on the said date. I find the reasons advanced for the delay in filing the Memorandum of Appeal justifiable hence they should not be denied leave to file their Appeal out of time.

**Disposition**

1. Taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful plaintiff I grant a stay of execution of the decree herein in the following terms:

    a. The Applicant pay to the Respondent through the Advocate of record half of the decretal sum and the remaining half obtain a valid Bankers guarantee.

    b. The said conditions (a) to be met within 90 days from the date of this ruling and in default the application shall be deemed to have been dismissed with costs and the Respondent will be at liberty to execute.

    c. The appeal is deemed as filed. Further mention for directions and compliance on 4/03/2024.

    d. The Applicant is granted leave to file and serve the Memorandum of Appeal with 30 days from the date of this ruling.

    e. Costs of this Application to abide the outcome of the Appeal.

It is so ordered.

**RULING DELIVERED, SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 5TH FEBRUARY, 2024 (VIRTUAL/ PHYSICAL CONFERENCE).**

**M.W. MUIGAI**

**JUDGE**