



Okerio (Suing as personal representative in the Estate of Kelvin Nyangau Onduko (Deceased) v Kassam Hauliers Limited (Civil Appeal E162 of 2023) [2024] KEHC 2729 (KLR) (13 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2729 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E162 OF 2023
FR OLEL, J
MARCH 13, 2024**

BETWEEN

KENNEDY ONDUKO OKERIO (SUING AS PERSONAL REPRESENTATIVE IN THE ESTATE OF KELVIN NYANGAU ONDUKO (DECEASED) APPLICANT

AND

KASSAM HAULIERS LIMITED RESPONDENT

(Being an Appeal from the ruling and/or the order of the chief Magistrates court at Machakos, Hon C.N Ondieki, PM, dated, delivered and issued on 6th day of July 2023 in Machakos CMCC NO. 298 of 2020)

RULING

A. Introduction

1. The application before this court for determination is the Notice of Motion application dated 10th July 2023 brought pursuant to provisions of Section 1A , 1B, 3, & 3A of the *Civil Procedure Act*, Order 42 Rule 6(1),(2) and 7 of the *Civil Procedure Rules*. Article 50(1) and 159(2),(d) of the *Constitution* of Kenya and all other enabling provision of law. The applicant seeks for prayers that;
 - a. Spent.
 - b. Spent.
 - c. That this Honourable court be pleased to order the Respondent to provide adequate and/or sufficient security for the due performance and satisfaction of the decree and certificate of costs issued in Machakos Chief Magistrate court civil suit No 298 of 2020 as a condition precedent for the release of the attached Motor vehicle Registration Number KCF 259N pending hearing and determination of the lodged Appeal herein.



- d. That save for prayer number (3) above, this Honorable court be pleased to issue an order staying the execution of the ruling and/or the order of the Honourable C.N Ondieki PM, dated, delivered and issued on 6th day of July 2023 in Machakos chief Magistrate court civil suit No 298 of 2020 pending the hearing and determination of the lodged Appeal herein.
 - e. That this Honourable court do grant any other and further order as maybe just and expedient and for the interest of justice.
 - f. That costs of this Application be provided for.
2. The application is supported by the grounds on the face of the said application and the supporting affidavit of the appellant Kennedy Onduko Okerio dated 10th July 2023, and his further Affidavit also dated 31st July 2023. While it has been opposed by the Respondent, who filed a replying affidavit dated 21st July 2023 sworn by one Kassim Mohammed and a preliminary objection on a point of law also dated 21st July 2023.

B. Pleadings

3. The applicant averred that the trial Magistrate did deliver a ruling dated 6th July 2023 directing the appellant/applicant to release within 5 days, the attached motor vehicle registration Number KCF 259N, which they had attached in execution of the decree and certificate of costs in excess of Kshs 6,300,000/= earlier issued in Machakos chief Magistrate Court Civil suit No 298 of 2020, to which the respondent has never paid a cent toward its satisfaction and therefore releasing the subject motor vehicle would prejudice the applicant and defeat the cause of justice.
4. The trial Magistrate had without basis and/or justification held that the proclamation levied and subsequent attachment of Motor Vehicle KCF 259N was unlawful, null and void. It was the applicant's contention that the trial magistrate had misapprehended the salient provisions of Sections 22, 23, & 24 of the *Civil Procedure Act* and Order 22 Rule 18 and 35 of the *Civil Procedure Rules*, thereby arrived at an erroneous finding and conclusion. The appeal as filed therefore raised serious triable issues and there was need to grant the orders sought so as not to render this appeal nugatory.
5. Further the applicant averred that it would be unjust to derail the process of execution of a valid judgment and decree passed over three years ago in December 2019 given that the said decree remained unsettled. The attached motor vehicle was the only known asset of the respondent and therefore its release would be detrimental to the Applicant, who would suffer substantial loss and damage if the orders sought were not granted
6. The respondent was hell bent on delaying, frustrating and curtailing altogether the appellant from enjoying the fruits of his judgement and it was therefore in the interest of justice to balance the interest of both parties and allow the orders sought for as prayed.
7. This application was opposed by the Respondent through his brief replying affidavit and notice of preliminary of preliminary objection (both) dated 21st July 2023. They raised the issue that the notice of motion and supporting affidavit were undated and unsigned thus filed contrary to provisions of Order 16, Rule 6 and 7 of the *Civil Procedure Rules* and statutory Declaration Act therefore failed the authentication test. The court therefore was asked to find that the said application was misconceived and fit for dismissal.



C. Analysis & Determination

8. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit, Notice of preliminary objection and the Appellants written submissions and discern that the issue which arise for determination is; whether the applicant has satisfied the conditions set under Order 42 Rule 6 of the [Civil Procedure Rules](#) to allow the court exercise discretion in his favour to grant an order of stay of execution of the ruling/Order issued by Hon C.N Ondieki (PM), dated 6th July 2023 In Machakos chief Magistrate Court Civil suit No 298 of 2020 and/or whether to direct the respondent to provide adequate security for due performance and satisfaction of the decree and certificate of costs issued in the above mention case before the attached motor vehicle can be released.
9. First and foremost, the preliminary objection raised by the respondent is devoid of merit as the pleadings filed by the Appellant/Applicant are all signed and there is no basis to make any further determination on the issues raised therein.
10. Stay of execution pending appeal is governed by Order 42 Rule 6 of the [Civil Procedure Rules](#). It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant.(see [Butt v Rent Restriction Tribunal](#) (1982) KLR 417 and [James Wangalwa & another v Agnes Nalika Chereto](#) (2012) eKLR).
11. In the case of [Masis Mwita v Damris Wanjiku Njeri](#) (2016) eKLR the court provided the guiding principles which it should consider while determining an application of this nature. These were;
 - a. The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - b. 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 to be rendered nugatory should that appeal court reverse the judge's discretion.
 - c. A judge should not refuse 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.
 - d. The court in exercising the discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the cases and unique requirements.
12. Further in considering an application for stay of execution, the court in deciding whether or not to grant stay should also consider the provisions of Section 1A and 1B of the [Civil Procedure Act](#), which enjoins the court to give effect to the overriding objective in exercise of its powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions. See [Micheal Ntouthi Mitheu v Abraham Kivondo Musau](#) (2021) eKLR, where Justice G.V Odunga quoted the case of [Visbham Ravji Halai v Thornton Turpin](#) Civil Application No Nai 15 of 1990 (1990) KLR 365
13. The ruling/order appealed against was delivered on 6th July 2023. The Appeal herein and this application were simultaneously filed on 11th July, 2023 Thus, it can be said that this appeal and application for stay of execution have been file timeously.
14. On the likelihood of suffering substantial loss, it was sufficient if an applicant seeking a stay of execution demonstrated that he/she would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. The



- applicant has exhaustively pleaded the long process undertaken to arrive at the execution stage and the difficulties he has encountered in tracing the respondent assets. These averments are not traversed and/or denied by the respondent. If the suit lorry is released and this appeal is successful, the appellant will have to undergo through a wild goose chase to get the decree settled. Failure to recover such decretal sum from the attached suit lorry would render his appeal nugatory if he was successful. See *G. N. Muema P/A (516) Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & another* (2010) eKLR, *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* (2006) eKLR.
15. Guided by the above authorities and also considering the fact that the respondent owes the applicant part of the decretal sum of Ksh.3, 000,000/= plus accruing interest, I do find and hold that to release the attached suit motor vehicle would be prejudicial to the appellant, unless the respondent can offer a security of similar value to be placed under courts custody. I find that the Appellant have satisfied this court that he would suffer substantial loss if the motor vehicle is released before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.
 16. As regards the issue of security, the court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of his judgment. In other words, the court should not only consider the interest of the respondent but also consider, in all fairness, the interest of the applicant who in this appeal is been denied the fruit of his judgment. See *Attorney General v Halal Meat Produces Limited* Civil Application No Nairobi 270 of 2008; *Kenya Shell Ltd v Kibiru & another* (Supreme); *Mukuma v Abuoga* (1988) KLR 645.
 17. This issue of adequacy of security was dealt with in the Court of Appeal in *Ndubiu Gitabi v Warugongo* (1988) KLR 621; IKAR 100;(1988-92) 2 KAR 100 where the Court of Appeal 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 guarantees 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 judgment has been given. It is subject to 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 issues pending in the appeal. For that purpose, it matters not whether the plaintiff are secured in one way rather than the other, it would be easier for the defendants or if for any reasons they would prefer to provide security by a bank guarantee rather than cash. There are absolutely no principles why they should not do so... The aim of the court in this case was to make sure, in an even-handed manner, that there 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 or will any 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.”
 18. The obtaining position herein, creates a unique scenario, the order appealed against is not a money decree, and to the contrary it is the appellant who holds a valid decree as against the respondent. The court therefore has to balance the interest of the appellant who would wish to be allowed to proceed with execution and the respondent who also has a chattel held by Auctioneers and runs the risk of it



being devalued at the Auctioneers yard and also suffer financial loss for not being able to use his motor vehicle, should the appeal not succeed.

D. Disposition

19. Taking all relevant factors into consideration and in order not to render the intended appeal illusory, I do grant the following orders that;
 - a. The Respondent herein is directed to deposit the sum of Kshs 3,000,000/= in court within the next 30 days for the Motor vehicle Registration Number KCF 259N to be released to them,
 - b. The applicant will further pay the auctioneers costs before motor vehicle registration Number KCF 259N can be released to them.
 - c. During the period given for compliance as directed above an order of stay of release of the said motor vehicle registration Number KCF 259N will still be in force
20. Further and in the alternative if the respondent is unable to comply with prayer (a) & (b) above within the timelines issued, I do grant an order of stay of execution of the ruling/order dated 6th July 2023, issued by C.N. Ondieki (PM) in Machakos CMCC No 298 of 2020 pending the hearing and determination of this appeal.
21. The Appellant/Applicant advocate will also give his written irrevocable undertaking – filed in court, that should they lose this Appeal, the costs due to the respondent arising from this Appeal, the Auctioneers costs incurred and/or any sum due under loss of user for the period of attachment will be set off from the portion of the decree due from the Appellant.
22. The costs of this Application will be in the cause.
23. It is so ordered.

RULING WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 13TH DAY OF MARCH, 2024

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 13TH DAY OF MARCH, 2024

In the presence of: -

Mr. Maranga for Appellant

Mr. Ombura for Respondent

Sam Court Assistant

