



**Muriuki v Munene Storage Limited & 2 others (Civil Appeal
296 of 2023) [2024] KEHC 4706 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4706 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 296 OF 2023
FN MUCHEMI, J
APRIL 18, 2024**

BETWEEN

JOEL MUTURI MURIUKI APPELLANT

AND

MUNENE STORAGE LIMITED 1ST RESPONDENT

JFC MUNENE COLLEGE OF HEALTH SCIENCES 2ND RESPONDENT

HON ATTORNEY GENERAL 3RD RESPONDENT

RULING

Brief Facts

1. The application dated 5th May 2023 seeks for orders for stay of execution in respect of the judgment delivered on 5th April 2023 in Thika Small Claims Court Case No.E015 of 2023 pending the hearing and determination of the appeal.
2. In opposition to the application, the 1st and 2nd respondents filed Replying Affidavits sworn on 14th August 2023.

Applicant's Case

3. The applicant states that judgment in Thika Small Claims Court Case No. E015 of 2023 was delivered on 5th April 2023 in favour of the respondents for a sum of Kshs. 3,600,000/-. Being aggrieved by the decision, the appellant lodged the instant appeal (formerly Kiambu HCCA No. E112 of 2023) and filed his memorandum of appeal on 25th April 2023.
4. The applicant contends that stay of execution has lapsed and he is apprehensive that the respondents shall commence execution despite the pendency of the appeal. The applicant further states that he will suffer irreparable damage should the orders of stay not issue as there is no guarantee that the



respondents will be able to return motor vehicle registration number KBX 411Z in the event the appeal succeeds.

5. The applicant states that he is ready, willing and able to furnish a bank guarantee of the entire decretal amount as security for the performance of the decree. Further, the applicant states that the respondents will not suffer any prejudice or any damage that is not capable of being compensated by way of costs.

The 1st Respondent's Case

6. The 1st respondent opposes the application on the premise that it is frivolous, vexatious, a total abuse of the court process, incompetent and lacks merit.
7. The 1st respondent states that the applicant has not met the legal threshold for the grant of stay pending as he has not demonstrated any substantial loss he stands to suffer. The 1st respondent states that the applicant is neither the owner nor does he have any beneficial interest in the subject motor vehicle. Further, the 1st respondent argues that the applicant has several options to recover his decretal sum including filing a declaratory suit and/or executing against the personal belongings and household goods of the owners and as such, the applicant cannot purport to suffer any substantial loss.
8. The 1st respondent further states that the applicant has not offered any security for the due performance of the decree. Furthermore, the appellant was ordered to pay Kshs. 706,208/- as storage charges which he has not paid. The applicant has not offered any security for costs in his application as required.
9. The 1st respondent contends that the applicant's financial status is unknown and thus he should be ordered to deposit the entire decretal sum as security for the due performance of the decree in court or an interest earning joint account as a condition of granting stay. Moreover, the 1st respondent states that it is a stable corporate and can comfortably refund the decretal sum in the event the appeal succeeds.
10. The 1st respondent contends that the subject matter which is a motor vehicle is currently grounded due to a court order and it is depreciating at a fast rate. The 1st respondent is apprehensive that it will not be able to recover its storage charges as per the court judgment if the stay orders are granted.

The 2nd Respondent's Case

11. The 2nd respondent states that the application is a delaying tactic, made in bad faith and which is misconceived, incompetent, lacks merit, and an abuse of the court process. It's the conviction of the respondent that this application ought to be dismissed with costs.
12. The 2nd respondent states that the application does not meet the legal threshold for the grant of orders for stay pending appeal for the reason that no substantial loss has been demonstrated by the applicant. The 2nd respondent further states that it has repainted the subject matter as ordered by the court and therefore has no further obligation to the applicant. Further, the 2nd respondent contends that there is no mention of the 2nd respondent anywhere in the judgment and therefore the application against it ought to be withdrawn.
13. The 2nd respondent states that he is not a man of straw and he will be able to refund the decretal sum in the event the appeal succeeds. In the event the court is inclined to grant stay of the execution, the 2nd respondent contends that the applicant ought to deposit the full decretal sum in court in fourteen days as security.
14. The applicant filed a further affidavit dated 29th September 2023 and states that security for the due performance of the decree is not applicable as the subject matter of the instant appeal is the motor vehicle registration KBX 411Z, which is in the possession of the 1st respondent. As such, the 1st



respondent cannot continue holding the subject motor vehicle on one part and ask for security of costs as the subject motor vehicle is sufficient security for the due performance of the decree.

The Applicant's Submissions

15. The applicant submits that he filed a suit for compensation against the owner of the motor vehicle registration number KBX 411Z following a road traffic accident on 23rd January 2016. The applicant further submits that judgment was delivered in his favour and in execution of the decree the subject motor vehicle was attached and stored in the yard of Munene Storage Limited, the 1st respondent, pending the determination of the appeal filed by the owner of the said motor vehicle.
16. The applicant states that the appeal was ruled in his favour and upon its completion, he proceeded to the yard of the 1st respondent whereby he established that the 1st respondent had released and sold the subject motor vehicle to the 2nd respondent without his knowledge or consent. This prompted the applicant to file a suit before the Small Claims Court in Thika for the release of the motor vehicle. The applicant contends that the small claims court ruled in the respondents' favour.
17. The applicant submits that the 1st respondent sold the motor vehicle to the 2nd respondent without his consent whereas the same was being held pending the hearing and determination of the appeal that was filed by the owner of the said motor vehicle. The applicant further submits that the appeal shall be rendered nugatory in the event the 2nd respondent sells the subject motor vehicle to a third party. The applicant is apprehensive that if stay of execution is not allowed, he will suffer great prejudice as his claim is specifically for motor vehicle registration number KBX 411Z and not any other asset or property.
18. The applicant further submits that the subject motor vehicle should be held as security for costs in the instant suit as the same is currently in the possession of the respondents and thus they should not ask for deposit of any other security. Even in a very unlikely event that the respondents succeed in the appeal, the applicant contends that the respondents can dispose the said motor vehicle to recover their costs.

The 1st Respondent's Submissions

19. The 1st respondent submits that the lower court claim arose from a road traffic accident in which the applicant was knocked down by motor vehicle registration number KBX 411Z. Judgment was delivered in the applicant's favour for a sum of Kshs. 1,349,498.98/- and a decree issued and allocated to Expeditious Auctioneers to execute the same. The 1st respondent contends that the subject motor vehicle was stored in its premises for a period of over 4 years from 30th October 2018 until 9th November 2022 when the said motor vehicle was taken to Thika Police Station.
20. The 1st respondent submits that despite the applicant agreeing to pay Kshs. 400/- per day towards storage costs, he never paid a single cent and neither did his advocates or auctioneers. On 1st April 2022, the 1st respondent's director requested Chador Auctioneers to commence disposal of asset as the storage charges were excessive and Expeditious Auctioneers were non-responsive when contacted to pay the hefty outstanding charges amounting to Kshs. 706,208/- as at 1st November 2022. The small claims court delivered a judgment in favour of the 1st respondent ordering the applicant to pay the accrued storage charges.
21. The 1st respondent submits that the applicant does not meet the threshold for the grant of stay pending appeal as he has not demonstrated any substantial loss. The applicant is neither the owner nor does he have any beneficial interest in the subject motor vehicle. Further, the 1st respondent contends that the applicant's claim arises from a road traffic accident and thus he has several options to recover his



decretal sum including filing a declaratory suit against the insurance company and/or executing against the owners personal belongings and household goods.

22. The 1st respondent submits that the applicant has not offered any security for the due performance of the decree. The applicant was ordered to pay a sum of Kshs. 706,208/- as storage charges to the 1st respondent but has not offered any security making the application fatally defective. The 1st respondent states that the applicant ought to be ordered to pay the entire decretal sum as security for the due performance of the decree in court or an interest earning joint account as is required by law.

The Law

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

23. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) *Civil Procedure Rules*. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:-

1. “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.
2. No order for stay of execution shall be made under sub rule 1 unless:-
 - a. The Court is satisfied that substantial loss may result to the 1st 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.

24. Thus under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:

1. Substantial loss may result to him/her unless the order is made;
2. That the application has been made without unreasonable delay; and
3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

25. Substantial loss was clearly explained in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR:-

“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.

26. The applicant contends that he stands to suffer substantial loss as the 1st respondent will levy execution against him by selling motor vehicle registration number KBX 411Z which shall render the appeal nugatory. The 1st respondent argues that the applicant has not demonstrated the substantial loss he stands to suffer as he is neither the owner of the suit motor vehicle nor is he a beneficial owner. The 1st respondent further argues that the applicant in execution of his judgment can file a declaratory suit or attach the household goods of the judgment debtor.
27. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show how execution shall irreparably affect him or will alter the status quo to his detriment therefore rendering the appeal nugatory. In the instant case, the subject of the appeal is motor vehicle registration number KBX 411Z which was stored by the 1st respondent from 30th October 2018 until 9th November 2022 following instructions by the applicant and Expeditious Auctioneers. Although the claim by the applicant is the suit motor vehicle, it is not in dispute that the applicant has never paid any storage charges which as at 1st November 2022 were at a sum of Kshs. 706,208/-. Thus, the subject motor vehicle is currently at Thika Police Station and is grounded and is depreciating putting the 1st respondent at risk for not being able to recover its storage charges as per the trial court judgment. Moreover, the 1st respondent has averred in its affidavit that it is a stable corporation and has the financial muscle to refund the decretal sum in the event the appeal succeeds. It is therefore my considered view that the applicant has not demonstrated that he stands to suffer substantial loss when he himself is at fault for not paying the agreed accrued storage charges for a period of over 4 years.

Has the application has been made without unreasonable delay.

28. Judgment was delivered on 5th April 2023 and the applicant filed the instant application on 5th May 2023. It has taken the applicant one month between the date of judgment delivered in the trial court and the time when he filed the instant application. It is therefore my considered view that a delay of one month is not inordinate. As such, the application was filed timeously.

Security of costs.

29. The purpose of security was explained in the case of *Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure



Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

30. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicant has offered to provide security by furnishing a bank guarantee for the entire decretal amount as a condition for the grant of orders for stay of execution.
31. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited vs Guardian Bank Limited* [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”
32. The court in granting stay has to carry out a balancing act between the rights of the two parties. The issue that arises is whether there is just cause for depriving the respondents their right of enjoying their judgment. Looking at the grounds of appeal and without going into the merits of the appeal, I have noted that they do not raise any arguable points of law.
33. Consequently, it is my considered view that the applicant has not met the threshold of granting stay of execution pending appeal. Accordingly, the application dated 5th May 2023 lacks merit and is hereby dismissed with costs to the respondents. The costs shall abide in the appeal.
34. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 18TH DAY OF APRIL 2024.

F. MUCHEMI

JUDGE

