



**Star Bus (K) Limited & another v Mwaura (Civil Appeal
E212 of 2023) [2024] KEHC 7705 (KLR) (7 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7705 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E212 OF 2023**

H NAMISI, J

JUNE 7, 2024

BETWEEN

STAR BUS (K) LIMITED 1ST APPELLANT

ROBERT MACHARIA KANG'ETHE 2ND APPELLANT

AND

STEPHEN KIMANI MWAURA RESPONDENT

RULING

1. The Appellant/Applicant filed a Notice of Motion dated 20th July 2023 seeking the following orders:
 - i. (spent)
 - ii. That, pending the hearing and determination of the Application herein, the Honourable Court do grant a stay of execution of the judgment and orders made on 6th July 2022 in SPMCC No. 173 of 2020 (Kikuyu);
 - iii. That pending the hearing and determination of the Appeal filed herein the Honourable Court do grant a stay of execution of the judgement and orders made on 6th July 2022 in SPMCC No. 173 of 2020 (Kikuyu);
 - iv. That the cost of the Application be provided for;
2. On 3rd June 2024, Counsel for the Appellant made an oral application in Court to amend the Notice of Motion to include a fifth prayer; That this Honourable Court be pleased to enlarge time for filing an appeal.
3. The Notice of Motion is based on the grounds on the face of the Application and supported by the Affidavit of Stephen Mutungi sworn on 20th July 2023. As at the time of writing this Ruling,



the Applicant's written submissions were not on record. The Respondent filed undated written submissions on 4th June 2024.

4. In response thereto, the Respondent filed a Replying Affidavit dated 4th December 2023. The Respondent did not file any written submissions.
5. In the Supporting Affidavit sworn by Stephen Mutungu on behalf of the 1st Appellant, he deposes that although judgement was entered in SPMCC No. 173 of 2020 on 6th July 2022, he only came to learn of it on 15th June 2023 when Dikemwa Auctioneers proclaimed his motor vehicle registration number KCH 698Z Isuzu Bus. Judgement was entered against the Appellants in the sum of Kshs 171,070 plus interest and costs. The 1st Appellant argues that the company risks execution as the Respondent has instructed the Auctioneers who have since proclaimed the motor vehicle. The 1st Appellant further states that the Applicants are ready to offer security as will be determined by the Honourable Court.
6. On his part, the Respondent argues that the Applicants/Appellants were fully aware of the suit filed at Kikuyu Law Courts, having been duly served with the Summons to Enter Appearance, as evidenced by the Affidavit of Service annexed to the Replying Affidavit. The Respondent has also attached evidence of correspondence from Invesco Assurance Company Limited to the Applicants/Appellants dated 14th August 2020 bringing the Summons to Enter Appearance to their attention.

Analysis

7. I have considered the application, the Affidavit in support thereof, the Replying Affidavit as well as the Respondent's written submissions.
8. The principles upon which the court may grant stay of execution pending appeal are well settled. Order 42 rule 6 of the *Civil Procedure Rules* requires that an applicant seeking a stay of execution pending appeal must demonstrate that:
 - a. Substantial loss may result to the application unless the order is made;
 - b. The application was made without unreasonable delay; and
 - c. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as given by the applicant
9. In *Antoine Ndiaye -vs- African Virtual University* (2015) eKLR, Gikonyo,J opined thus:

“...stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under order 42 rule 6 of the *Civil Procedure Rules*...”
10. From the foregoing, it is evident that the power to grant stay of execution pending appeal is an exercise of the discretion of the court on the Applicant meeting the conditions set out therein. It is noteworthy that the 3 conditions must be met simultaneously as they are conjunctive and not disjunctive.
11. In the time acclaimed case of *Butt-vs- Rent Restriction Tribunal* (1982) KLR, the Court gave guidance on the exercise of discretion in granting of stay of execution pending appeal. It was 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.”
12. The first consideration is whether the application was filed timeously. Judgement of the lower court was entered on 6th July 2022. The Applicants/Appellant claim to have become aware of the same on 15th June 2023 when the proclamation was done. The Application herein was filed on 20th July 2023. Though there was delay in filing the application and the Memorandum of Appeal, the delay was, in my view, not inordinate.
13. The Applicants/Appellants contend that they will suffer substantial loss if the orders sought are not granted. The Respondent, on the other hand, contends that the Applicants have only made mention of substantial loss, but not elaborated on the same. It is the duty of the applicant in an application for stay of execution to establish that they will suffer substantial loss if the orders sought are not granted. In *Machira t/a Machira & Company Advocates -vs- East African Standard* [2002] KLR 63, the Court of Appeal, in considering what amounts to substantial loss, held as follows:
- 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.”
14. In responding to the issue of substantial loss and security, the Applicants have not raised any reasonable grounds that the Respondent will not be able to refund the sum of Kshs 226,400/-, owing to them as at 31st May 2023. On his part, the Respondent has stated that his insurers, Saham Assurance Company Ltd, a renown insurance company, would be able to refund the Appellants if the appeal is successful. A successful party should not be denied the fruits of his/her judgment. However, it is incumbent that the party rebuts the assertion that it would not be in a position to repay the sums paid in the event that the appeal is successful. Other than the assertion that the Respondent's insurers would be able to pay, there is no evidence of the Respondent's ability to refund any sums that may be paid to him in case the appeal succeeds.



15. The considerations to be made in a request for leave to file an appeal out of time are found in several decisions. The same were suggested in the case of *Mwangi -vs- Kenya Airways Ltd* [2003] eKLR. They include the following:
- (a) The period of delay.
 - (b) The reason for the delay.
 - (c) The arguability of the appeal.
 - (d) The degree of prejudice which could be suffered by the respondent if the extension is granted.
 - (e) The importance of compliance with time limits to the particular litigant or issue; and
 - (f) The effect if any on the administration of justice or public interest if any is involved.
16. On the third consideration, the Applicants depone that they are ready to meet any conditions on security as directed by the Court.

Disposition

17. The upshot is that the Appellants' Notice of Motion dated 20th July 2023 is merited. There shall be a stay of execution of the judgement and decree of Hon. C.Mburu (Mr.) delivered on 6th July 2022 in Kikuyu SPMCC No. 173 of 2020 pending the hearing and determination of the appeal on the following conditions:
- i. Leave to appeal out of time is granted;
 - ii. The Memorandum of Appeal dated 29th June 2023 is hereby admitted and deemed as duly and properly filed within time;
 - iii. The Appellants shall deposit the decretal sum in court as security within 30 days of this Ruling;
 - iv. In the event of failure to comply with order (iii) above, the stay of execution orders shall automatically be vacated and the Respondent shall be at liberty to proceed with execution of the decree;
 - v. The costs of this application are awarded to the Respondent;

DATED AND DELIVERED AT KIAMBU THIS 7TH DAY OF JUNE 2024.

HELENE R. NAMISI

JUDGE

In the presence of Mr. Isolio h/b for Mrs. Tindi for the Respondent

No appearance by Counsel for the Applicant

