



**Mwananchi Credit Limited v Migwi (Civil Appeal E187 of 2024)  
[2024] KEHC 9058 (KLR) (15 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9058 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL APPEAL E187 OF 2024**

**CW MEOLI, J  
JULY 15, 2024**

**BETWEEN**

**MWANANCHI CREDIT LIMITED ..... APPLICANT**

**AND**

**MOSES MBUTHIA MIGWI ..... RESPONDENT**

**RULING**

1. Before the Court for determination are two (2) motions. The first is dated 09.02.2024 and was filed by Mwananchi Credit Limited (hereinafter the Applicant). The second motion is dated 13.02.2024 and was filed by Moses Mbuthia Migwi (hereinafter the Respondent). For purposes of this ruling, the Court will hereafter refer to them as the first motion and the second motion, respectively.
2. The first motion seeks *inter alia* that pending the hearing and determination of the appeal herein, the Court be pleased to stay execution of the ruling delivered on 09.02.2024 in Nairobi Milimani CMCC No. E5147 of 2023 (hereinafter lower court suit). The motion is expressed to be brought pursuant to Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules (CPR). On grounds on the face of the motion as amplified in the supporting affidavit sworn by Sylvia Wanjiru Njoroge, the Legal Officer with the Appellant.
3. To the effect that both the Appellant and the Respondent filed motions before the lower Court of which were contemporaneously heard, and a ruling delivered on 09.02.2024 which dismissed the Appellant's motion. That being aggrieved with the said ruling the Appellant has lodged an appeal and that the Respondent has taken steps to execute the order of the lower Court his counsel has threatened to commence contempt proceedings. She goes on to depose that on or about August 2023, the Respondent successfully applied for a loan of Kshs. 10,000,000/- in respect of which the motor vehicle KDD 842N (subject motor vehicle) was offered as collateral; that the parties executed a loan agreement dated 18.08.2023 which provided for the terms and conditions governing the facility, Clause 6 being the arbitration clause; and that following breach of the terms, the Appellant notified the



- Respondent of his breach and demanded regularization of the loan via a letter delivered on 27.10.2023, but the Respondent has refused and or failed to make any payments in settlement of arrears.
4. She states that the orders granted by the lower court prevent the Appellant from recovering of outstanding sums now standing at Kshs. 14,097,879.39 as at 09.02.2024. She states that the present motion has been brought without inordinate delay whereas the Appellant will suffer irreparable loss unless the orders sought are granted, and that the Appellant is ready and willing to provide security as directed by the court.
  5. The Respondent failed and or opted not to file a response to the Appellant's motion.
  6. However, the second motion on its part seeks inter alia that the Court be pleased to set aside the order staying execution pending hearing and determination of the appeal. The motion is expressed to be brought pursuant to Section 1A, 1B & 3A of the CPA and Order 42 & 51 of the CPR. On grounds on the face of the motion as amplified in the supporting affidavit sworn by Respondent. He confirms that the parties herein filed respective interlocutory applications before the lower Court which were determined vide a ruling delivered on 09.02.2024.
  7. He proceeds to state that during the pendency of the said applications the Appellant mischievously proceeded to place the subject motor vehicle on sale; that the Appellant deliberately misled this Court and is guilty of material non-disclosure and if this Court does not intervene, the Respondent shall be greatly prejudiced; that the subject motor vehicle will be sold in the absence of a stay order barring the Appellant from selling and disposing of the subject motor vehicle, thereby rendering the appeal nugatory; and that had the Appellant disclosed in its application that the subject motor vehicle had been advertised for sale, the Court would have declined to grant interim orders. He concludes by deposing that if the orders sought are not granted by this honorable Court the Respondent shall be greatly prejudiced and subjected to great hardship since the subject motor vehicle will be sold having already been advertised on 14.02.2024.
  8. The Appellant opposes the Respondent's motion by way of a replying affidavit dated 26.04.2024 sworn by Saleh Jackline, the Legal Administrator and Analyst of the Appellant. Adopting the deposition in the supporting affidavit to the first motion, she disputes the Respondent's allegations of material non-disclosure and asserts that the subject motor vehicle was advertised for sale before delivery of the lower Court ruling on 09.02.2024, which information at the material times was in the knowledge of Respondent's counsel. Adding that the Respondent has refused to pay the outstanding loan and the Appellant is unable to exercise its powers under the loan agreement to realize the security because of the order restraining the Appellant from selling the subject motor vehicle.
  9. Directions were taken on filing of submissions. Only the Appellant complied.
  10. Counsel for the Appellant opened his submissions by submitting on the first motion as anchored on the provisions of Order 42 Rule 6(2) of the CPR. He cited the Supreme Court decisions in Gatirau Peter Munya v Dickson Mwenda Kithinji, & 2 Others, Application No. 5 of 2014. On the arguability of the appeal, counsel asserted that the ingredient was not expressly provided for in Order 42 Rule 6 of the CPR, he reiterated the circumstances leading to the dispute as deposed in the supporting affidavit and cited the decision in Industrial Hardware Ltd v Standard Chartered Bank Ltd (1999) KLR 25.
  11. Concerning substantial loss, counsel relied on the decision in Tropical Commodities Suppliers Ltd & Others v International Credit Bank Ltd (in liquidation) (2004) 2 EA to submit that the Appellant continues to be in arrears and that the Appellant is unlikely to recoup the monies advanced in the event the subject motor vehicle disposed of. Pointing out that the Appellant's motion was filed on the same day the lower Court rendered its decision. Submitting on the Respondent's motion, counsel



summarily dismissed it as a response to the Appellant's motion and asserted that the said motion has been overtaken by events given Mulwa, J.'s *ex parte* orders with respect to the Respondent's motion.

12. The Court has considered the pleadings, evidence as well as the submissions on record. There are two motions for consideration. Upon the Appellant filing the first motion on 09.02.2024, it was placed before Mulwa, J. who issued *ex parte* orders on 13.02.2024 to the following effect;-

“I have considered the motion dated 09.02.2024. Serve and return for inter partes hearing on 22.04.2024. In the meantime, a temporary stay of execution of the trial Court's ruling dated 09.02.2024 is stayed pending inter partes hearing of the application.”

13. Subsequently, the Respondent by the second motion dated 13.02.2024 moved the Court seeking that; -

- “1. That the honorable Court be pleased to certify the application herein as urgent and the same be heard *ex-parte* and service of the application be dispensed with in the first instance.
2. That the honorable Court be pleased to discharge stay of execution order granted on 13<sup>th</sup> February 2024 on account of non-disclosure of material facts and fraud committed before the honorable Court pending interpartes hearing and determination of the application.
3. That upon inter partes hearing of the application the honorable Court be pleased to set aside stay of execution of its order pending hearing and determination of the appeal.
4. ....”

14. Similarly, the Respondent's motion was place before Mulwa, J. proceeded to issue *ex parte* orders on 14.02.2024 to the following effect;

“This matter coming up on the Application dated 13.02.2024 has been considered. It is certified as urgent.

Prayer number 2 therein is granted, with a rider that the advertised sale of motor vehicle Reg. No. KDD 842N is halted forthwith.

The Application shall be served and return for hearing inter partes on 23.04.2024.” The Appellant's counsel has correctly described the Respondent's motion as merely a response to the Appellant's motion having been overtaken by events given Mulwa, J. *ex parte* orders on 14.02.2024. The Respondent eschewed filing any further affidavit material or submissions in response to the Appellant's contestation. Therefore, it is undisputed that the Appellant filed the motion dated 09.02.2024 and obtained *exparte* order by way of a temporary stay of execution of the ruling of the trial Court. Subsequently, the Respondent moved this Court equally seeking inter alia to discharge of the order of this Court granted 13.02.2024 pending hearing and determination of its application and setting aside of stay of execution order pending hearing and determination of the instant appeal.

15. As of writing this ruling, the Appellant's motion is yet to be determined by way of issuance of substantive order to the effect that “pending the hearing and final determination of the appeal herein, the honorable Court be pleased to order a stay of execution of the ruling delivered on 09.02.2024 before the Nairobi Milimani CMCC No. E5147 of 2023”. Mulwa, J. on 13.02.2024 only granted temporary stay orders of the lower Court decision pending hearing and determination of the Appellant's motion.



Later on 14.02.2024 upon being presented with the Respondent's motion, the Judge granted prayer (2) of the latter, which in effect discharged her earlier orders of 13.02.2024, in terms that the advertisement of sale in respect of the subject motor vehicle KDD 842N be halted, clearly intending to preserve the subject matter of the appeal.

16. Thus, the only live prayer in the Respondent's motion that upon interpartes hearing of the application the honorable Court be pleased to set aside stay of execution of its order pending hearing and determination of the appeal is moot, in light of Mulwa, J.'s orders issued on 14.02.2024. There are no stay orders in respect of the Appellant's motion subsisting and capable of being set aside, pending hearing and determination of the appeal. The second motion is essentially spent but material therein may be relevant to the determination of the first motion.

17. Regarding the first motion the power of the court to stay execution of a decree and or order of the Court pending appeal is discretionary. However, the discretion should be exercised judicially. See *Butt v Rent Restriction Tribunal* [1982] KLR 417. The Appellant's prayer for stay of execution pending appeal, is brought pursuant to Order 42 Rule 6 of the *Civil Procedure Rules* which provides that: -

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 order set aside.

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

(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”.

18. The cornerstone consideration in a motion to stay execution is whether the Appellant has demonstrated the likelihood of suffering substantial loss if stay is denied. One of the most enduring legal authorities on the issue of substantial loss is the case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the *Shell Case* are especially pertinent: -

“1. ....

2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.



3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
  4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”
19. The decision of Platt Ag JA, in the Shell case, in my humble view sets out two different circumstances when substantial loss could arise, and therefore giving context to the 4<sup>th</sup> holding above. The Platt Ag JA (as he then was) stated inter alia that:
- “The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the *Civil Procedure Rules* was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts... (emphasis added)”
20. The learned Judge continued to observe that: -
- “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 cornerstone of both jurisdictions for granting 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)
21. Earlier on, Hancox JA in his ruling observed that: -
- “It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would, ...render the appeal nugatory. This is shown by the following passage of Cotton L J in *Wilson -v- Church* (No 2) (1879) 12ChD 454 at page 458 where he said: -
- “I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.”
- As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”
22. In an application of this nature, the successful applicant ought to depose expressly, how substantial loss will arise, whether due the hardship resulting from making payments towards the decree, or the impossibility or difficulty in recovery of sums paid out, in the event the appeal succeeds. This case does not involve an adjudged sum or money decree. Although the Respondent eschewed filing a response



to the Appellant's motion, the court must satisfy itself that the conditions in Order 42 Rule 6 of the [CPR](#) have been satisfied.

23. The Appellant has alluded to likelihood of substantial loss and or irreparable harm through contempt proceedings in view of the lower Court ruling (annexure marked SWN12) which directed the unconditional release of the vehicle to the Respondent, and thereby prevented the Appellant from recovering monies owed by the Respondent allegedly standing at Kshs. 14,097,879.39 as of 09.02.2024. As stated in the Shell case, without a demonstration of substantial loss, it would be rare that any other event would render the appeal nugatory.
24. The parties' respective affidavit material before the court in part corroborates the Appellant's averments. The lower Court proceedings were initiated by the Respondent who was seeking inter alia a permanent injunction compelling the Appellant to unconditionally release the subject motor vehicle and general damages. The suit was accompanied by an urgent motion dated 27.11.2023 which was allowed by the lower Court on 09.02.2024, granting orders restraining the Appellant from placing the subject motor vehicle on sale and directing it to unconditionally return the subject motor vehicle pending determination of the main suit and a further order restraining the Appellant from selling the subject motor vehicle. (see annexures marked SWN3 and SWN9). The Appellant's motion which inter alia sought reference to arbitration was dismissed, giving rise to this appeal.
25. From annexure SWN12 it appears that the Appellant is still in possession of the subject motor vehicle. Unless stay or other appropriate order is granted, the Appellant will be compelled to unconditionally hand over the subject vehicle earlier offered as collateral, to the Respondent, who is allegedly in default, a fact not disputed. Equally, the Appellant could well be punished for contempt if he fails to release the subject vehicle in compliance with the orders of the lower court. The likelihood of substantial loss or prejudice to the Appellant appears real. Rather than prejudice the matter before the appeal is heard, it appears more prudent to craft an order that ensures that the subject matter is preserved pending appeal, and one which will be in the best interests of both parties. Indeed, in an application of this type, the court must balance the interests of the parties in order not to prejudice the appeal. The preservative order will secure the subject matter pending appeal.
26. In the result, in lieu of the prayer for stay of execution, the court will grant the first motion in terms that the status quo obtaining as of today's date, namely, the custody, possession and retention of the subject vehicle by the Appellant shall be maintained for a period of six months pending the determination of the appeal. The costs of the motions will abide the outcome of the appeal.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF JULY 2024.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Appellant: Mr. Murage

For the Respondent: Mr. Nyangito

C/A: Erick

