



REPUBLIC OF KENYA



**KENYA LAW**

THE NATIONAL COUNCIL FOR LAW REPORTING

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**Simon (Suing as Administrator of the Estate of Sammy Maweu Muthama  
- Deceased) v China Road & Bridge Corporation Kenya (Civil Appeal  
E029 of 2022) [2024] KEHC 9025 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9025 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CIVIL APPEAL E029 OF 2022  
GMA DULU, J  
JULY 18, 2024**

**BETWEEN**

**JULIANA MWENDE SIMON (SUING AS ADMINISTRATOR OF THE ESTATE  
OF SAMMY MAWEU MUTHAMA - DECEASED) ..... APPELLANT**

**AND**

**CHINA ROAD & BRIDGE CORPORATION KENYA ..... RESPONDENT**

**RULING**

1. Before me is an application by way of Notice of Motion dated 14<sup>th</sup> February 2024 brought under Order 42 rule 6 of the *Civil Procedure Rules* through counsel Ndegwa & Sitonik LLP, on behalf of China Road & Bridge Corporation Kenya.
2. The prayers in the application are as follows:-
  1. Spent.
  2. Spent
  3. An order of stay be issued to restrain the appellant by himself or through his agents, employees, servants, administrators or anyone acting on his behalf from proceeding with the attachment of the vehicles listed in the Proclamation Notices dated 1/2/2024 or in any other whatsoever from proceeding with execution of the decree issued herein on 23/11/2023 pending hearing and determination of this intended appeal.
  4. Costs of this application be provided for.
3. The application has grounds on the face of the Notice of Motion that the respondent had threatened to execute for kshs 1,675,563.70 and warrants of attachment had already been issued on 29<sup>th</sup> January 2024; that the appellant had issued three (3) proclamations notices proclaiming a total of 108 vehicles



with a total value of kshs 166,500,000/= merely to execute for kshs 1,675,563.70; that an appeal had been lodged as a Notice of Appeal dated 27<sup>th</sup> July 2023 under Order 42 Rule 6(4) of the Civil Procedure Rules had been lodged; that the appeal had very high chances of success; that the delay in filing the application was caused by inadvertent mistake of the respondent's advocates; that the respondent was willing to comply with any condition that would be set by the court including depositing the decretal sum of kshs 1,675,563.70 in court as security.

4. The application was filed with a supporting affidavit sworn on 14<sup>th</sup> February 2024 by Edgar Usagi Alema a Legal Officer of the respondent, which amplified the grounds of the application, and which annexed a number of documents including the decree and notice of proclamation issued by Betabase Auctioneers. A further affidavit sworn by the same deponent on 14<sup>th</sup> April 2024 was also filed.
5. The application has been opposed through a replying affidavit sworn on 23<sup>rd</sup> February 2024 by Juliana Mwendu Simon the appellant, in which it was deponed that the application is incompetent and an abuse of court process; that after judgment was delivered she filed her bill of costs and that stay of execution was by consent granted by the court for 30 days; that it was only after proclamation was issued by auctioneers that the respondent rushed to court to file the present application; and that it was the first time she was seeing the Notice of Appeal in this present application.
6. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Ndegwa & Sitonik LLP Advocates for the respondent/applicant as well as the submissions filed by Mutunga & Muindi Company Advocates for the appellant/respondent.
7. Under Order 42 Rule 6(1) (3) of the Civil Procedure Rules (Cap.21), this court being the court from which an appeal is to be preferred, has jurisdiction to grant stay of execution orders.
8. Rule 6(2) of Order 42 in particular, provides the parameters on which the court will consider in determining such an application for stay of execution of judgment or decree. The Rule provides as follows:-

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(2) No stay of execution shall be made under sub rule (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.
9. In the present case, judgment was delivered on 14<sup>th</sup> July 2023 and Notice of Appeal to the Court of Appeal filed on 27<sup>th</sup> July 2023. However, this application was filed on 14<sup>th</sup> February 2024 after notice of execution and proclamation was issued by auctioneers. This was a period of about eight (8) months.
  10. Though the delay of about eight (8) months was long, it was explained by the previous advocates Isika & Associates Advocates in their letter dated 2<sup>nd</sup> February 2024 as due to inadvertence on their part, which letter was annexed to the further affidavit sworn on 14<sup>th</sup> April 2024 by Edgar Usagi Alema the Legal Officer of China Road & Bridge Corporation Kenya.
  11. In my view therefore, the cause of the delay in filing the application was sufficiently explained and was not caused by the litigant. I thus find that the application was filed without unreasonable delay.



12. Will the applicant suffer substantial loss if the stay orders sought are not granted? I note that the decretal amount is large. The financial means of the respondent have not been indicated, even in the documents she filed in this court.
13. Therefore, in my view, if the decretal amount is paid to the respondent, and the applicant is successful in the appeal, the respondent in the application might not be able to repay the large amount, thus prejudicing the applicant herein.
14. I thus find that the applicant China Road & Bridge Corporation Kenya will suffer substantial loss if the stay orders sought are not granted.
15. With regard to provision of security, the applicant has offered to deposit the decretal amount in court. In order to protect the interests of both parties, I will grant stay orders, subject to the applicant depositing the entire decretal amount in court.
16. Consequently and for the above reasons, I allow the application, and order as follows:-
  - i. This court hereby issues stay orders to restrain the appellant Juliana Mwendu Simon by himself/herself or through his/her agents, employees, servants, administrators or anyone acting on his/her behalf from proceeding with the attachment of the motor vehicles listed in the Proclamation Notice dated 1<sup>st</sup> February 2024 or in any other way whatsoever from proceeding with execution of the decree issued herein on 23<sup>rd</sup> November 2023 pending hearing and determination of the intended appeal in the Court of Appeal.
  - ii. The above stay of execution orders are subject to the applicant China Road & Bridge Corporation Kenya depositing the decretal amount of Kshs 1,675,563.70 in this court within forty (40) days from today, otherwise the stay orders herein will lapse and be of no effect.
  - iii. The costs of this application will abide the determination of the intended appeal in the Court of Appeal.

**DATED, SIGNED AND DELIVERED THIS 18<sup>TH</sup> DAY OF JULY 2024 IN OPEN COURT AT VOI VIRTUALLY.**

**GEORGE DULU**

**JUDGE**

In the presence of

Alfred/Trizah – Court Assistants

Mr. Masila for Applicant

No appearance for Respondent

