



**Khushi Motors Limited v Waliera (Miscellaneous Application
E075 of 2024) [2024] KEHC 11019 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11019 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E075 OF 2024
JK NG'ARNG'AR, J
SEPTEMBER 24, 2024**

BETWEEN

KHUSHI MOTORS LIMITED APPLICANT

AND

BRIAN SIKHIRA WALIERA RESPONDENT

RULING

1. The Applicant filed a Notice of Motion Application dated 3rd May 2024 under Certificate of Urgency seeking stay of execution and leave to file appeal out of time.
2. The Application was premised on grounds on the face of the Application and the Supporting Affidavit sworn on 3rd May 2024 by Sahale Faris, the authorized representative of the Applicant.
3. The said grounds are that the Applicant wishes to file an appeal against the judgment of Hon. Gatambia Ndung'u delivered on 5th December 2023 in Mombasa Small Claims Court, Claim No E340 of 2023, Mombasa Khushi Motors Company Limited v Brian Sikhira Waliera. That the matter involves substantial financial implications and without stay of execution, there is imminent risk of losing valuable assets which are the tools of trade. That it is therefore important to preserve the subject matter pending the determination of the appeal.
4. The Applicant further states that the delay in filing the appeal is attributed to their effort in complying with the judgment of 5th December 2024 and procedural complexities of seeking redress at the trial court. That the Applicant has approached this court without undue delay from the date of the ruling delivered on 9th April 2024 where they were seeking stay of execution. That the Applicant has an arguable and meritorious appeal with good grounds of success and that no prejudice will be caused to the Respondent if the application is allowed.
5. In opposition to the Application, the Respondent filed a Replying Affidavit sworn on 27th June 2024 that the lower court rendered its decision on 5th December 2023 and ordered that the Respondent be



- accorded a refund of Kshs 1,044,500 or the Claimant to cause the motor vehicle KXC 875F released back to the Respondent. That the Claimant having failed to comply with the orders of the court to release the said motor vehicle to the Respondent, the Respondent through his advocates issued instructions to auctioneers to recover the decretal sum of Kshs 1,044,500/- from the Claimant. That auctioneers proceeded to attach the Claimant's motor vehicles KCP 380S and KDB 009J to recover the decretal sum but the Claimant used the criminal justice system to frustrate the execution, had the auctioneers arrested and unlawfully detained for no wrong done other than executing a lawful court order.
6. The Respondent further stated that the Claimant then filed an application dated 19th February 2024 seeking stay orders which stay orders the lower court granted and set down the application for hearing on 8th March 2024 together with the Respondent's application dated 20th February 2024 and ruling on both applications delivered on 9th April 2024. That in the Ruling, the court held that the stay of execution as prayed by the Claimant was bereft of merit consequently dismissing the Claimant's application with costs to the Respondent further directing that the Claimant be restrained from using the criminal justice system to intimidate the Respondent and his auctioneers. That the lower court also noted that the Claimant had been deliberate in frustrating the Respondent in recovering the decretal sum and made an order that where it then proves difficult for the execution of the release of the motor vehicle KCX 875F to the Respondent, the refund of the monies paid by the Respondent be effected within 7 days of the delivery of the ruling.
 7. That the Claimant once again failed to release the motor vehicle to the Respondent as ordered by the Court prompting the Respondent to initiate execution to recover the decretal sum of Kshs 1,044,500/- from the Claimant. That the Claimant purportedly instead of releasing the motor vehicle to the Respondent, released a wreckage of the motor vehicle to the Respondent which the Respondent declined to receive because whereas the Claimant unlawfully confiscated the subject motor vehicle from the Claimant in an immaculate condition, working and drivable and that the Auctioneers drove it away from the Respondent but the Claimant returned a wreckage of the motor vehicle to the Respondent.
 8. The Respondent argued that the Applicant enjoyed stay orders in the lower court on several occasions and therefore is approaching this court to again start another process purportedly to enjoy stay orders to the detriment of the Respondent who ought to be enjoying the fruits of the ruling and judgment. That this court cannot grant and/or issue orders in a vacuum and that the Applicant had not deposited any security for due performance of the decree. That in the event an order of stay is issued, the Applicant be ordered to deposit in this court the decretal amount of Kshs 1,044,500/-. The Respondent prayed for dismissal of the application.
 9. After considering the Notice of Motion application dated 3rd May 2024 and the Respondent's Replying Affidavit sworn on 27th June 2024, the issues for determination are whether the Applicant can be granted leave to file appeal out of time and whether the prayer for stay of execution pending appeal is merited.
 10. On whether the Applicant can be granted leave to file appeal out of time, Section 79G of the *Civil Procedure Act* provides: -

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having requisite for the preparation and delivery to the appellant of a copy of the decree or order: provided that an appeal may



be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

11. However, the court is required to consider several factors in granting leave to file appeal out of time as observed in *Edith Gichungu Koine v Stephen Njagi Thoithi* (2014) eKLR that: -

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

12. This court has established that judgment of the Small Claims Court was delivered on 5th December 2023. The Applicant herein then filed an application dated 19th February 2024 which was set down for hearing on 8th March 2024 together the Respondent’s application dated 20th February 2024 and ruling on both applications delivered on 9th April 2024. The said applications and ruling concerned execution of the judgment delivered on 5th December 2023. Inasmuch as the application herein was brought approximately 5 months after the judgment, this was 23 days after the ruling and this according to this court is not inordinate delay.

13. On whether the prayer for stay of execution pending appeal is merited, the guiding principles for grant of stay of execution pending appeal is provided for under Order 42 Rule 6(2) of the *Civil Procedure Rules* as follows: -

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 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.

14. In line with the above provision, this court is satisfied that the Applicant has demonstrated that they shall suffer substantial loss if the stay is not granted. The Applicants have furnished court with exhibits showing attempts to execute what they consider valuable assets which are their tools of trade and the subject matter of the appeal. The Respondent has not disputed the said actions which they consider as efforts to enjoy fruits of the trial court ruling and judgment. This court is also satisfied that the application for stay has been made without unreasonable delay as it is clear from the record of their attempts to comply with the judgment of the court.

15. Additionally, the purpose of stay of execution pending appeal was held in the case of *RWW v EKW* (2019) eKLR as follows: -

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.



Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

16. In light of the above, this court makes the following orders: -
- a. The appeal shall be filed and served within 14 days from the date of the ruling herein.
 - b. The stay of execution is granted on condition that Kshs 1,044,500 is deposited in a joint interest earning account within 30 days from the date herein and in default execution to proceed.
 - c. Costs be in the cause.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF SEPTEMBER, 2024.

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

No appearance Advocate for the Applicant

Sikuta Advocate for the Respondent

Court Assistant – Mr. Samuel Shitemi

