**Akbar & another v Adan (Miscellaneous Civil Case E007 of 2024)**
**[2024] KEHC 12547 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12547 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT GARISSA**

**MISCELLANEOUS CIVIL CASE E007 OF 2024**

**JN ONYIEGO, J**

**OCTOBER 17, 2024**

**BETWEEN**

**ADEEL AKBAR AKBAR ..... 1ST APPLICANT**

**AL-RAHIM TRADING LIMITED ..... 2ND APPLICANT**

**AND**

**AHMED OMAR ADAN ..... RESPONDENT**

**RULING**

1. The genesis of the suit herein is the alleged breach of contract by the respondent who allegedly bought mv registration no KDH 135N from the applicants on credit facility but failed to honour payment to the tune of kes 776,117. Consequently, the applicants traced the mv to Garissa and had it repossessed.

2. Aggrieved by the said repossession, the respondent herein moved to Garissa CM's court vide a notice of motion dated 06-03-2024 in civil suit no. E005 of 2024 seeking injunctive order restraining the applicants herein, their agents and or their servants from selling, disposing, transferring, leasing or immobilizing the said mv pending hearing and determination of the suit. The respondent further prayed for the release of the mv to him pending hearing and determination of the suit.

3. On 17-07-2024 the trial court granted the orders as stated above. Dissatisfied with the said orders, the applicants moved to this court vide a notice of motion dated 29.07.2024 seeking orders as follows:

    i. Spent.

    ii. Spent.

    iii. This Honourable Court be pleased to order stay of execution of the order dated 18.07.2024 in CM's court at Garissa, Civil Suit No. E005 of 2024 and all consequential orders granted or issued therein, pending hearing and determination of this application.

iv. This Honourable Court be pleased to order stay of execution of the order dated 18.07.2024 in CM's court at Garissa, Civil Suit No. E005 of 2024 and all consequential orders granted or issued therein, pending hearing and determination of the appellant's intended appeal.

v. The Honourable Court order the Honourable Court to make determination on the preliminary objection raised by the applicant.

4. The application is supported by the affidavit of the 1st applicant sworn on 29.07.2024 averring that prior to the hearing and determination of this matter, the applicant raised a preliminary objection which the court did not determine. In the same breadth, the court did not deliver its determination on the exact date that the same had been intended. It was argued that if the orders sought herein are not granted, then the applicant stands to suffer immense loss as the respondent will proceed to execute the same and at the same time, the intended appeal shall be rendered nugatory.

5. The applicant contended that the intended appeal is an arguable one with high chances of success and as such, should be heard and determined. Additionally, that the application has been filed expeditiously and the intended appeal is not frivolous. That in the interest of justice, the application be allowed to enable the applicants exercise their rights to be heard.

6. The respondent in opposing the said application filed a replying affidavit sworn by the respondent on 07.08.2024 deponing that he complied with the payment agreement as agreed between him and the applicants. That in as much as the respondents have a right to appeal, he equally has a right to enjoy his property and the same is currently not possible as the applicants repossessed the suit vehicle.

7. In regards to the issue of jurisdiction, the respondent stated that the law makes provision of place of filing a suit to include the place where the respondents reside, work for gain and where the cause of action arose. In that regard, it was contended that the trial court had the requisite jurisdiction to handle the matter as the suit motor vehicle was impounded in Garissa hence the place where the cause of action arose.

8. That the applicants were informed of the ruling date but chose not to attend court. Further, the applicants stand to suffer no prejudice and will be allowed to appeal and execute the same to its logical conclusion when the lower court orders are maintained as they are only temporary.

9. The court directed that the application be canvassed by way of written submissions. The applicant by his submissions dated 23.09.2024 urged that the trial court ought to have dealt with the issue of jurisdiction before delving into the suit herein. Reliance was thus placed on the case of Mukhisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd. The trial magistrate was faulted for having failed to make any deliberations on the preliminary objection noting that the parties submitted on the same.

10. It was urged that the filing of the suit herein offended sections 12,14 and 15 of the *Civil Procedure Act* as the agreement on the suit vehicle was signed and executed in Nairobi, where the 1st applicant also reside while the 2nd respondent carries out its business. The subject motor vehicle is also in a yard in Nairobi and therefore, the right jurisdiction to file the matter herein was in Nairobi hence not Garissa. In the end, it was urged that the application herein be allowed.

11. The respondent on the other hand filed submissions dated 30.09.2024 wherein it was urged that stay of execution as provided for under Order 42 Rule 6 of the Civil Procedure Rules makes provision on the considerations to be met before a court can issue such prayers. It was urged that the applicants did not demonstrate to the court the loss they stood to suffer and further, that the ruling on the preliminary

objection was delivered by the trial court on 07.08.2024, as was previously directed by the court. In the end, the respondent urged that the application herein ought to be dismissed for want of merit.

12. Having considered the application herein together with the response and submissions by the parties, the only issue that germinates for determination is whether the application meets the threshold for grant of stay of execution orders.

13. The law governing issuance of orders for stay of execution pending appeal is codified under Order 42 Rule 6 (1) and 2 of the Civil Procedure Rules which stipulates as follows:

    6.

    (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 referred 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.

14. The above provision requires an applicant seeking orders for stay of execution ought to establish that he/she has a sufficient cause for seeking the orders, that he stands to suffer substantial loss if the orders are not granted and lastly, that he is willing to furnish security for the due performance of the decree. In addition to the above conditions, an application for stay of execution pending appeal must be made without unreasonable delay. See Antoine Ndiaye v African Virtual University [2015] eKLR].

15. Further to the above, stay may be granted for sufficient cause and that the Courts are now enjoined to give effect to the overriding objective in the exercise of their powers under the *Civil Procedure Act* Sections 1A and B.

16. As to what constitutes substantial loss, the Court in the Case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR, observed thus:" 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.

17. It therefore follows that 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. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

18. The court in considering an application for grant of stay of execution, has to take into account the competing interests of both the applicants and the respondents and has therefore to endeavor to strike

a balance such that no party is exposed to suffer undue prejudice in one way or the other. [ See Absalom Dova vs Tarbo Transporters (2013) eKLR].

19. In the case herein, it is important to note that the applicant mainly submitted on the issue of the court lacking jurisdiction and clearly no submissions were made in regards to the application of stay of execution. Nonetheless, from his affidavit, it was deponed that if the orders sought herein are not granted, then the applicant stands to suffer immense loss as the respondent will proceed to execute the same.

20. From the record, the applicants did not express with precision or on a primafacie basis the nature or prejudice they are likely to suffer if the orders are not stayed. There was no proof of any pending payment or arrears to controvert the respondent's assertion that he had not breached the contract. The applicants did not attach any document to prove the existence of the contested arrears. The application for stay was not argued either orally or through submission to justify the grant of those orders. Counsel concentrated only on the preliminary objection which I shall consider in due course. In a nutshell, the element of substantial loss was not established.

21. On the question of whether the application was filed in time, the impugned ruling was delivered on 17-07-2024 and the instant application filed on 29th July 2024. The delay is not therefore an issue as the same was filed in good time.

22. As to deposition of security, nobody prayed for it and no basis was laid for the same. The essence of provision of security was aptly enunciated in the Case of Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others [2014] eKLR, where 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 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."

23. Since no basis was laid for the provision of security, I do not wish to order for any.

24. On the question whether the court did consider the preliminary objection in its ruling, I have perused the ruling by Hon. Omwange issued on 19th July 2024. Contrary to what the applicants averred that the learned magistrate did not address the issue of the preliminary objection on lack of jurisdiction, at page one of the said ruling, the learned magistrate dealt with the question of jurisdiction albeit summarily and gave reasons why he thought he had jurisdiction to handle the matter. The learned magistrate at page two 2nd paragraph two stated as follows;

> " I have carefully considered the submissions before the court and note that the subject matter herein is possession of the motor vehicle registration No.KDH 135N. This motor vehicle was taken from the possession of the applicant at Garissa. Though the agreement and the motor vehicle are currently in Nairobi, the cause of action leading to filing of this case occurred in Garissa. Consequent to the above I find that the preliminary objection is without merit and the same is dismissed with costs"

25. From the above wording, it would be unfair to say that the court did not consider the preliminary objection and consequently the issue of jurisdiction. It is trite that jurisdiction is everything and without it a court can not move any further step. See owners of motor vessel "LillianS" v Caltex Oil (Kenya)LTD (1989)e KLR.

26. There is no dispute that in filing a civil suit, the court with territorial jurisdiction is determined by certain well know criteria inter alia; where the cause of action arose; where the defendant resides permanently or temporarily or carries business. In this case the sale agreement was signed in Nairobi and the applicants/defendants reside and carry on business in Nairobi. What is the cause of action in this case and where did it occur?

27. The issue in contest is the alleged unlawful repossession of the subject motor vehicle. Repossession took place in Garissa. Naturally, Garissa court could rightly exercise jurisdiction. In other words, both Nairobi and Garissa have concurrent jurisdiction depending how one perceives the cause of action. If you look at it from the lenses of breach of contract, Nairobi is the ideal court with jurisdiction. If you use the unlawful repossession lenses, Garissa court has jurisdiction. In that context, I do not see any error committed by the trial court. To that extent, I do not see any arguable appeal on that ground alone.

28. Having held as above, the only conclusion am able to make is that the application herein has no merit and the same is dismissed with no order as to costs. Interim orders in place are hereby vacated.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 17TH DAY OF OCTOBER 2024.**

**J. N. ONYIEGO**

**JUDGE.**