Ahmed Motors Limited & another v Otieno (Miscellaneous Civil Application E107 of 2024) [2024] KEHC 12299 (KLR) (16 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12299 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CIVIL APPLICATION E107 OF 2024

E OMINDE, J

OCTOBER 16, 2024

BETWEEN

AHMED MOTORS LIMITED ..... 1ST APPLICANT

DESIRE AUCTIONEERS ..... 2ND APPLICANT

AND

KEVIN OTIENO ..... RESPONDENT

RULING

1. The application the subject matter of this Ruling is the Notice of Motion application dated 12th March, 2024 brought pursuant to the provisions of Sections 1A, 1B, 3A & 63 (e) of the *Civil Procedure Act*, Order 22, Rule 51 & 52; Order 40 Rules 1, 2 and 4; Order 42 Rule 6; Order 51 Rule 1 of the *Civil Procedure Rules*, and all other enabling provision of law.

2. The Applicants seek the following orders:

    1. Spent.

    2. Spent.

    3. That pending the hearing and determination of the intended appeal there be stay of execution of the judgment and decree delivered in Eldoret CMCC Case No. 1317 of 2017.

    4. That the Honourable Court be pleased to enlarge time within which the Appellant can file a Memorandum of Appeal to the judgment of Hon. P.N. Areri delivered in Eldoret CMCC Case No. 1317 of 2017.

    5. That upon prayer 4 above being granted, the Draft Memorandum of Appeal annexed to the Affidavit in support of this motion be deemed duly filed.

    6. That costs of this application be provided for.

3. The application is premised on the grounds of the face of it and it is further supported by the Affidavit sworn by Mudassar Ahmad who describes himself as a Director in the applicant Company.

4. In the said affidavit, he deposed that they were the 1st Defendant in Eldoret CMCC No. 1317 of 2017. That judgement and decree was passed against them in their absence and that of their then advocate Messrs Kamau Lagat & Company Advocates.

5. It is the applicant's contention that they only came to learn of the judgement and decree after being served with a decree, warrants of attachment and proclamation notice on 8th March, 2024 attaching their items/tools of trade with the threat to cart them away after expiry of seven (7) days.

6. that upon learning of the decree, he immediately contacted their then Advocates on record with the view of getting an update on the matter so as to take immediate action against the proclamation notice,

7. That the distance between Mombasa and Eldoret and the urgency of the issue at hand, prompted them to appoint another firm of Advocates based in Mombasa viz Messrs G.E.O Oduor & Company Advocates to take steps to peruse the court file, update them and take necessary steps to remedy the situation.

8. That it was through their new Advocates that they learnt that judgment and decree was passed against them in their absence on 26th September, 2023 and as such the 30 days widow to appeal had lapsed, hence this application.

9. He further deposed that he has been shown a copy of the Plaint filed in the Subordinate Court by the Respondent and notes that the Respondent did not plead nor pray for a relief in the nature of a refund or for Specific Performance and that with this obvious glaring omission, he has an arguable appeal with high chances of success.

10. The applicant deposes that the delay in filing the Memorandum of Appeal within time was occasioned by circumstances well beyond their control for reasons that at all material times, he was not aware of the date of entry of the said judgment and as such he should not be punished for it.

11. That there is imminent danger that should this Court not intervene, the impending execution could not only occasion substantial loss to their business but might also render their intended appeal nugatory/ an academic exercise.

12. That the possibility of the intended appeal being rendered nugatory is further buttressed by the fact that it would be an extremely daunting task, if not impossible to recover the decretal amount from the Respondent if the intended appeal succeeds.

13. In conclusion, he deposed that it in the best interest of justice to allow this application and the orders sought, if not for anything, to preserve their right to appeal.

14. The Respondent opposed the application through a Replying Affidavit sworn on 19th March, 2024. It is his contention that this application is fatally defective, bad in law, misconceived, vexatious, frivolous and an abuse of this Honourable Court.

15. The Respondent deposes that this application is anchored on irrelevant provisions of the law which are misconceived as follows;

    a. That Order 22 Rule 51 and 52 deals with objection proceedings which such application is preceded by the relevant notices to the court and to the decree holder. That in the instant case, no such notices have been issued and in any case the applicant herein being party to the case

the subject matter of the intended appeal viz Eldoret CMCC No. 1317 of 2017 is incapable of bringing objection proceedings.

b. Order 40 Rules 1, 2 and 4 of the *Civil Procedure Rules* deals with temporary injunctions. There is no prayer on the body of the applicant's motion which is seeking for an order of temporary injunction.

c. That in any case there are specific provisions of the law which deals with a Motion for stay of execution of a decree and that Order 40 Rules 1, 2 and 4 cited is not one of them.

d. Order 42 Rule 6 deals with stay where an appeal has been lodged or filed. There is no appeal that has been filed herein and also there is no such thing as an intended appeal from the Subordinate Court to the high court. There is either an appeal or no appeal.

e. No provision has been invoked by the applicant upon which their prayer for the enlargement of time to allow that they file appeal out of time is premised yet there is a clear provision under the *Civil Procedure Rules* governing such a prayer.

f. That it is now trite law that a party who seeks that the Court gives specific orders must cite the specific provisions of the law which clothes the court with the relevant jurisdiction to give those orders but not quote several provisions of the law in the hope that the court can rely on some.

16. That even assuming that the applicant had brought this application using the relevant provisions of the law, he has failed to explain and demonstrate to the court why this application is being filed over 6 months after the delivery of the impugned judgement which was delivered 26th September, 2023. Six months the respondent contends, is inordinate delay.

17. The Respondent further contends that the explanation that, the judgement was delivered in their absence and that of their advocates flies on its face as it is now very easy to follow the development of cases online through the Judiciary Public Kiosk and so the applicant cannot lay blame on its Advocates when what the advocate could have done, the applicant could also have done.

18. Given the above, the Respondent states that the excuse that the applicant was not aware of the judgement is therefore a lame excuse which this court should not rely on and particularly because no evidence has been placed before this court either by way of call logs, short text messages (SMS) or any letter in a bid to show that the applicant tried to reach their advocate in vain.

19. The Respondent therefore contends that because it is manifestly clear that the applicants were not bothered about their case, the Court should not allow them to get away in that state with this application.

20. The Respondent further deposed that even if the Applicants were properly seeking for orders under Order 42 Rule 6,they ought to have provided security for due execution of the decree and that has not been done.

21. That further, neither has the delay been sufficiently explained nor has irreparable loss been demonstrated and that this being a money judgement, it has not been demonstrated by way of an affidavit of means that in case the judgement sum is released to the respondent, he shall not be able to reimburse the same and so the statement that the applicant may not be able to recover the money has no evidential value.

Submissions

22. The application was canvassed by way of written submissions. The Applicants filed submissions on 20th March, 2024 while the Respondent filed on 30th April, 2024.

The Applicants' Submissions

23. Counsel for the Applicant cited Section 79G of the *Civil Procedure Act* which gives the Court the discretion to enlarge time. Counsel relied on the holding in case of *Bagajo vs. Christian Children Fund Inc* [2004] 2KLR 73.

24. In this case Ringera J (as he then was) set out the following guidelines with regard to the exercise of such discretion;

    a. The length of the delay in lodging the notice and record of appeal

    b. Where applicable, the delay in lodging the application for the extension of time, as well as the explanation thereof

    c. Whether or not the intended appeal is arguable

    d. The prejudice to the respondent if the application is granted

    e. The public importance, if any, of the matter; and,

    f. Generally the requirements of the interest of justice in the case.

25. On whether the Applicant has made out a case for this Court to enlarge time, Counsel submitted that the on the question of delay, the law does not set out any minimum or maximum period of delay, all it requires is that the delay be satisfactorily explained. He cited the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR.

26. Counsel further submitted that the Applicant has endeavoured to explain the delay in filing an Appeal as having been caused by the fact that the impugned judgment was delivered in their absence and that of the Advocates.

27. Counsel stated that this fact has not only not been controverted but can also be verified from the Court's record and that most important is the fact that without knowledge of entry of judgment, it is virtually impossible to keep track of time for purposes of lodging an Appeal against a judgment, and the Court should then ask itself whose fault it was that such an omission occurred.

28. Counsel proceeded to submit that it was the duty of the Applicant's erstwhile Advocates to be aware of the judgment date and promptly attend Court on that date and advice the Applicants on the option for lodging an Appeal a task their Advocate failed to perform.

29. That the Applicant has explained that she is based in Mombasa while their Advocates were based in Eldoret and that at the time of delivery of the impugned judgment in September, 2023, e-filing where litigants can now be personally notified of the status and progress of their matters had not yet been rolled out in Eldoret.

30. In the circumstances, Counsel submitted that the Applicant's only way of having knowledge of entry of judgment for purposes of filing an Appeal was by way of communication and update from their Advocate who were themselves not present. Counsel added that this is the practice that obtains in every day practice, as such the Applicant should not be made to suffer for the mistake of another.

31. On the issue of arguability of the intended Appeal, Counsel submitted that the Applicant has annexed a draft Memorandum of Appeal whose main grounds are that the impugned judgment granted reliefs to the Respondent that were not prayed for in their Pleadings.

32. It is Counsel's submission that this fact can very well be discerned from the copy of the Respondent's Plaint annexed at Paragraph 7 of the Affidavit in Support of the Motion which shows that there is no prayer in the Plaint for the Special Damages that were granted by the Hon Magistrate and that to make matters worse, is that the Learned Magistrate even appreciated this fact in the same judgment, but ended up granting the relief.

33. Counsel urged that other than demonstrating the fact that the intended appeal is not frivolous, the danger in disallowing this application would mean that the opportunity by this Court to remedy that obvious and glaring omission would have been sacrificed at the altar of a technicality, which in their opinion, has been sufficiently explained.

34. That this would be to allow the Respondent to unjustly enrich himself while the Applicant would suffer for that injustice and for the mistake of his Advocates.

35. On the contrary, Counsel submitted that there is no prejudice that would be occasioned to the Respondent because they had not intended to plead for Special Damages anyway, that relief was only granted by chance and it would not take anything away from them if the application is allowed.

36. Lastly Counsel submitted that there is no Rule or Law that requires that an Appeal be first filed before seeking extension, once time has lapsed, and further that the room for filing the said Appeal is not there until time is enlarged and that it would therefore make no difference. Counsel relied on the case of *Anastasia Okumu Were v Nyaoga Siango & another* (2021) eKLR and also *L R & another (Suing as the father, mother and next friend of A C) v C K* [2015] eKLR.

The Respondent's Submissions

37. Counsel for the Respondent cited Order 42 Rule 6(2) of the *Civil Procedure Rules* which sets out the conditions for granting an order for stay of execution. The said Order under Rule 6(2) a) requires a party seeking orders of stay to demonstrate what substantial loss he/she will suffer if the stay is not granted and Order 6(2) b) provides that the Court may direct an applicant to provide security for the due performance of such decree or orders hereunder;

> 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.

38. On the issue of substantial loss Counsel submitted that the Applicant has not demonstrated the manner in which he would suffer any substantial loss if orders sought are not granted.

39. He relied on the case of *James Wangalwa & another vs Agnes Naliaka Cheseto* (2012) eKLR in support of his submission. In this case, the Court held that 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. That because execution is a lawful process, an applicant must establish other factors which show that 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.

40. It is Counsel's submission that it is not enough to just merely state that the applicant may not be able to recover the money from the Respondent without availing any evidence to support such a statement by way affidavit of means of the Respondent to demonstrate that he will not be able to refund the money in the event that the Appellant is successful on appeal.

41. That further to the above, this is a money judgement and so the issue of irreparable loss cannot arise because whatever loss that may occur if at all, can easily be computed in monetary terms.

42. On the issue of unreasonable delay, Counsel in his submission restated the facts deposed in the Respondent's Replying Affidavit and I shall therefore not regurgitate the same. He submitted further that there is no evidence that the Applicants ever visited their former advocates' office and failed to receive information they desired to have.

43. Lastly on security for due performance as provided under Rule 6(2) b), Counsel submitted that the applicant has not furnished security to the Court, neither has it undertaken to do so for the due performance of decree should the appeal fail. Counsel relied on the case of *Arun C. Sharma vs Ashana Raikundalia t/a Raivundalia & Co.Advocates and 2 others* (2014) eKLR and the case of *Gianfranco Manenthi & Another vs Africa Merchant Assurance Company Ltd* (2019) eKLR.

44. In conclusion, Counsel maintained that the Applicant must satisfy the requirement for security so as not to deny the decree holder the opportunity to execute the decree in order to enjoy the fruits of his judgement in case the appeal fails and that the Applicant has not met this condition and therefore this honourable court should find no merit in the instant application.

Analysis and Determination

Issues for Determination:

45. Having considered and addressed my mind to the pleadings as well as the submissions by Counsel as herein above summarised, it is my considered opinion that the issues that arise for determination are as follows;

    a. Whether the application has been brought under the wrong provisions of law.

    b. Whether the Court should enlarge time within which to file the appeal

    c. Whether stay of execution of the judgment dated 26th September, 2023 should be granted.

a. Whether the application has been brought under the wrong provisions of law.

46. On this issue, having addressed my mind to the submissions made by both Counsel I agree with the Counsel for the Respondent that as much as possible and in all circumstances, all applications should indicate the provisions of the law under which they are brought and that a party should not cite all manner of provisions of the law and leave it to Court to choose which one to apply.

47. However, I am of the considered opinion that the issue of the failure of an applicant to cite the exact and/or correct provisions of the law under which an application is brought under the new Constitutional dispensation to wit The *Constitution* of Kenya 2010 and the Overriding Objectives of the *Civil Procedure Act* 2010 is a procedural technicality that should not be used to shut out an applicant from the seat of justice.

48. Indeed, to underscore the technical nature of the provisions of the law under which applications are brought, there is always the rider after a party has cited the relevant provisions under which they have come in their pleadings to ask that the Court also proceeds under "All Other Enabling Provisions of the Law"

49. In the spirit of Article 159 (2) of the *Constitution* and Section 1 A, 1B and 1C of the *Civil Procedure Act* 2010, it is my finding that failure to cite the correct provisions of law is not fatal to an applicant and would per se not warrant a dismissal of the application.

50. Given my finding as above and relying on Meru Misc Civil Application No. E007 of 2021 *Purity Kagendo Anampiu & Another vs Nellie Mugambi & Another*. And *Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs)* Civil Appeal No. 212 of 2015 [2019] eKLR, the Court shall proceed to hear this application on it's the merits.

b. Whether the Court should enlarge time within which to file the appeal

51. Section 79G of the *Civil Procedure Act* provides that:

> 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 been 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.

52. The Supreme Court in Civil Application No. 3 of 2016 - *County Executive of Kisumu –vs- County Government of Kisumu & 7 Others* at page 5 stated as follows;

> "... 23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court. Further, this court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon.....
>
> " the underlying principles that a court should consider in exercise of such discretion:
>
> 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
> 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
> 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
> 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

53. In the case of *Thuita Mwangi vs. Kenya Airways Ltd* [2003] eKLR, the Court explained that follows:

> " The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the *Court of Appeal Rules* (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered."

54. I have taken into account the reasons given by the applicant as to what occasioned the delay. It is because they lost touch with the Advocate they had appointed to represent them such that the judgement was given in their absence and in the absence of their Advocate and further that no notice of judgement was given to them.

55. A cursory glance at the impugned judgement indicates that even as a Statement of Defence was filed on behalf of the Applicants, the matter seemed to have proceeded largely in the absence of the defendants (now the applicants) and their Advocates thereafter. It is noted in the said that no witness was called to testify on behalf of the defendants.

56. There is also no indication in the said judgement of the participation of Counsel for the defendants in those proceedings and the Court also notes that the judgement does not indicate that it was delivered in the presence of the defendants and/or their Counsel.

57. Further to the above, Counsel for the then plaintiffs(now Respondents) did not avail any evidence to Court to show that notwithstanding the absence of the defendants and/or their Counsel at on the date the judgement was delivered as seems to have been the case, they did in fact serve a Notice of Judgement on either the defendants or their Counsel.

58. Further to the above, in taking Judicial Notice of the phased roll out of the e-filing system in the Judiciary, I do agree with the Applicant's submission that at the time of the delivery of the impugned judgement, e-filing had not yet been rolled out countrywide, Eldoret included.

59. For this reason, the submission by Counsel for the Respondent that even if they had lost touch with their Counsel the Applicants could easily have tracked the progress of their case online would not apply to all the litigants in Eldoret at that point in time, the Applicants included.

60. Given the above reasons and as guided by the authorities herein above cited as well as the now well established law that the sins of an Advocate should not be visited upon an innocent litigant, I am satisfied that the Applicants have reasonably explained the delay to the satisfaction of the Court and have thus laid a proper basis to warrant the exercise of the Court's discretion in their favour. I am therefore satisfied that the extension of time for filing the appeal is merited and I so find.

c. Whether stay of execution of the judgment dated 26th September, 2023 should be granted.

61. As already stated above, the principles guiding the grant of a stay of execution pending appeal are well settled as provided under Order 42 Rule 6 (2) of the *Civil Procedure Rules* which provides as follows:

62. In the case *Samvir Trustee Limited vs. Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997 the Court observed thus;

> " Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant.....The

Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion....For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss..."

63. What would amount to substantial loss was was clearly explained in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR 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.

64. In the instant case, the Applicant states that the Court granted a relief that the Respondent had not prayed for in their plaint, specifically, that the Court awarded Special Damages that had not been specifically pleaded and also judgement.

65. That to disallow their application therefore would be to allow the Respondent to unjustly enrich himself while the Applicant would suffer for that injustice and for the mistake of his Advocates and that further, no prejudice would be occasioned to the Respondent because they had not intended to plead for Special Damages anyway, and that the relief was only granted by chance even as the Court too noted in the judgement that it had not been pleaded, and so it would not take anything away from them if the application is allowed.

66. I have again had occasion to look at the prayers the Respondent sought in their plaint annexed to the application and dated 22nd December 2019. Indeed, there is no prayer for Special Damages and in fact none was pleaded. There was also no prayer for the refund of Any amount of money in the said plaint

67. However, I note that in his judgement, the Hon Magistrate has given judgement in favour of the plaintiff for a Specific amount of money, costs of the suit and interest at Court rates, reliefs that are completely out of consonance with the prayers sought by the plaintiff.

68. Given the scenario as above summarised, I am well satisfied that if the stay sought by the Applicant is not granted, substantial loss will be occasioned to the Applicant. This is because the intended execution if allowed, 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 intended appeal since on the face of it, the impugned judgement is per incuriam.

69. Given my finding as above, I do not find it necessary to direct that the Applicant deposits Security for Costs.

70. The upshot therefore is that I find that the Applicant's application has merit and I allow the same in its entirety as follows;

    a. That pending the hearing and determination of the intended appeal there be a stay of execution of the judgment and decree delivered in Eldoret CMCC Case No. 1317 of 2017.

    b. That the time within which the Appellant can file a Memorandum of Appeal to the judgment of Hon. P.N. Areri delivered in Eldoret CMCC Case No. 1317 of 2017 is now hereby enlarged.

    c. That the Draft Memorandum of Appeal annexed to the Affidavit in support of this motion is now hereby deemed duly filed.

    d. The Applicant is to bear the costs of the application.

READ DATED AND SIGNED AT ELDORET ON THIS 16TH DAY OF OCTOBER 2024.

E. OMINDE

JUDGE