



**Alkason Transports Limited v Mutisya & another (Suing as the Legal Representatives and Administrators of the Estate of the Late Kyalo Mutisya - Deceased) (Civil Appeal 119 of 2023) [2024] KEHC 14830 (KLR) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 14830 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL 119 OF 2023  
JRA WANANDA, J  
OCTOBER 4, 2024**

**BETWEEN**

**ALKASON TRANSPORTS LIMITED ..... APPLICANT**

**AND**

**TAVITHA MBITHE MUTISYA ..... 1<sup>ST</sup> RESPONDENT**

**SHADRACK MUTUA MUTISYA ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVES AND ADMINISTRATORS OF  
THE ESTATE OF THE LATE KYALO MUTISYA - DECEASED**

**RULING**

1. There are two Applications before Court, both filed by the Appellant. The 1<sup>st</sup> Application is the Notice of Motion dated 18/08/2023 and the 2<sup>nd</sup> is the Notice of Motion 09/10/2023. They are filed through Messrs Nyambura Kamau Advocates.
2. In the 1<sup>st</sup> Application, dated 18/08/2023, the orders sought are as follows:
  - i. Spent
  - ii. Spent.
  - iii. Spent
  - iv. That pending the hearing and determination of this Appeal, this Honourable Court be pleased to order stay of execution of the orders issued by the trial court, including the order that the Appellant do deposit the entire decretal amount being Kshs. 8,502,550.00 into a joint interest earning account within 60 days of the ruling and in default execution to proceed that was delivered on 22<sup>nd</sup> June, 2023.



- v. That this Honourable Court be pleased to stay further proceedings in Eldoret Chief Magistrate's Court Civil Suit Number 442 of 2020 Tavitha Mutua Mutisya (Suing as the legal representatives and administratrix of the estate of the late Kyalo Mutisya (Deceased) – versus Alkason Transports Limited, pending the hearing and determination of this Appeal.
- vi. That costs of this application be provided for.
3. The Application is premised on the grounds stated on the face thereof and is supported by the Affidavit sworn by one Mohamed Abubakar Salim, who described himself as a director of the Appellant.
4. In the Affidavit, he deponed that on 22/06/2023, the trial Court in Eldoret CMCC No. 442 of 2020 delivered a Ruling allowing the Appellant's Application seeking the setting aside of the Judgment delivered therein on 8/12/2022, that the same was on condition that the Appellant do deposit the decretal amount of Kshs 8,502,550/- into a joint account in the name of the Advocates on record within 60 days of the Ruling and that in default, the stay would lapse and the Respondent would be at liberty to proceed with execution. He deponed that dissatisfied with the decision, the Appellant instructed its Advocates to file this Appeal, that the said condition is against the principles that govern setting aside judgments and that it will lock out the Appellant from having its case heard considering that the Appellant has a meritorious defence. He urged further that the Appellant suffered substantial loss arising from the subject accident and filed Mombasa Civil Suit No. 312 of 2019 in which the Appellant was awarded damages having been found that its driver did not cause the accident, and that the Respondents greatly misrepresented to the trial Court the circumstances of the accident and also facts of service of hearing notices upon the Appellant and misleading the Court into hearing the suit *ex parte*.
5. He urged further that the decretal amount of Kshs 8,502,550/- is a colossal sum of money to raise within 60 days without liquidating the Appellant's assets and winding it up, that if the Respondents execute, the Appellant will suffer irreparable and substantial losses as it will definitely bankrupt the Appellant and will also deny the Appellant the opportunity to defend the suit and thus rendering this Appeal nugatory.
6. The 2<sup>nd</sup> Application, dated 9/10/2023, seeks the following orders:
  - i. Spent
  - ii. Spent.
  - iii. Spent
  - iv. That this Honourable Court be pleased to review its order given on the 21<sup>st</sup> of August 2023 and issued on 28<sup>th</sup> August 2023 to substitute the order for the Appellant to deposit a sum of Kshs 3 Million in an interest earning bank account in the joint names of the Advocates on record with an order for the Appellant to deposit original log books for motor vehicle registration numbers KBL 008B and KCD 451J into the Honourable Court as security
  - v. That costs of this application be provided for.
7. The Application is premised on the grounds stated on the face thereof and is, once again, supported by the Affidavit sworn by the said Mohamed Abubakar Salim.
8. In the Affidavit, he deponed that on 28/08/2023, this Court stayed the execution of the orders issued by the trial Court including the order that the Appellant do deposit the entire decretal sum of Kshs 8,502,550/- in a joint account within 60 days which was delivered on 22/06/2023, that in staying the



order of the trial Court, this Court imposed the condition that the Appellant within 45 days deposits a sum of Kshs 3 Million in an interest earning bank account in the joint names of the Advocates on record. He deponed that the Appellant, despite all the efforts it has put, has been unsuccessful in raising Kshs 3 Million to be deposited without liquidating the Appellant's assets, that the Appellant is a transport company and due to the economic hard times, the increase of fuel cost, drastic depreciation of the Kenya Shilling against the dollar and generally, loss of business, the Appellant's business is suffering greatly and is currently experiencing cash flow problems.

9. He deponed that the Appellant is now forced to buy fuel in cash as the oil marketers and petrol stations are not extending credit services anymore because of the increase in fuel prices, that this situation forces the Appellant to buy fuel in cash yet its customers still pay on delivery and some customers pay with a lot of difficulties. He deponed further that the Appellant is willing to obey this Court's orders, that it has assets and it is ready and willing to deposit the original log-books for motor vehicle registration numbers KBL 008B and KCD 451J in Court as security and whose accumulated forced market value is Kshs 3,750,000/-. He exhibited copies of the valuation certificates. He deponed further that in order for the Appellant to deposit the said log-books, it is necessary to review the orders of this Court issued on 28/08/2023. He urged that in light of the circumstances beyond the Appellants' control, it is only just that the said orders be reviewed and that the Respondents shall not suffer any prejudice if the application is allowed.

### **Replying Affidavit**

10. In opposing the 1<sup>st</sup> Application, the Respondents, through Messrs Morgan Omusundi & Co Advocates filed a Replying Affidavit on 31/08/2023. The same was sworn by the 1<sup>st</sup> Respondent, Tavitha Mbithe Mutisya. She termed the Application as an abuse of the Court process and deponed that the law that provides for security as a condition for stay of execution is mandatory, that the rationale of the rule is to give assurance to the Respondents that their judgment is intact and accessible should the appeal be unsuccessful and that the Appellant declined to comply with the orders of stay of execution given by the trial Court as the 60 days period lapsed on 22/08/2023 without good reason nor just cause. She deponed further that the Application is an act of time wasting aimed at frustrating the Respondents from enjoying the fruits of their judgment, that the Appellant has nothing to lose, suffer nor be prejudiced in any way so long as this matter is kept pending in Court to its joy, advantage and interest and that if the orders sought are granted, the same will amount to a miscarriage of justice.

### **Hearing of the Application**

11. I have not come across any further Response from the Respondents specifically addressing the 2<sup>nd</sup> Application and I therefore assume that, since the two Applications are closely intertwined, the Respondents rely on its said Replying Affidavit as responding to both. Be that as it may, this Court directed that the two Applications would be heard and determined together.
12. The parties were then directed to canvass the Applications by way of written submissions. Pursuant thereto, the Appellant filed its Submissions on 18/10/2023 and the Respondent filed on 30/11/2023.

### **Applicant's Submissions**

13. In citing the principles applicable when determining Applications for stay of execution pending appeal, Counsel for the Appellant cited are provided for under Order 42 Rule 6(1) of the Civil Procedure. She submitted that the Appellant will definitely suffer substantial loss if the stay is not granted, the Respondents having obtained the default judgment for Kshs.8,502,550/- the matter having proceeded in the absence of the Appellant for lack of service of a hearing notice upon the



Appellant's counsels. She reiterated that the decretal amount is colossal by all standards especially in the present economy and that if the Appellant is ordered to pay, it will adversely affect its financial position to a point of crippling its activities and even winding it up as it will be forced to liquidate its assets to realize the amount. She cited the case of *Boniface Kariuki Wahome v Peter Nzuki Nyamai & another* [2019] eKLR.

14. She submitted that the Respondents are persons whose means are unknown and that there is high likelihood that the Appellant will be unable to recover the decretal amount if it succeeds on appeal since the Respondents have not demonstrated their ability to repay. She submitted that the rules require an application for stay to be made without unreasonable delay, that in this case, the trial Court delivered its Ruling on 22/06/2023 and granted stay for a period of 60 days, that thereafter, the Appellant filed the Appeal herein on 03/07/2023 and the instant Application on 21/08/2023 which was within the period of stay given by the trial Court and that therefore, this Application was filed without any delay. She submitted further that the rules also require the Appellant to provide security for due performance of the decree, that however, it is a settled principle that the requirement for security should not fetter the Appellant's right of appeal, that therefore, the terms of the security should not be punitive to the Appellant but should serve the purpose of protecting the Respondents' interest in realizing the fruits of their judgment in the event the appeal is unsuccessful. She urged that the Appellant has assets and is ready and willing to deposit in Court the certificates of ownership of assets registered in its name to be held as security, that the assets' market value is sufficient to settle the decretal sum in the event the Appeal is unsuccessful. She submitted that certificates of ownership of assets are acceptable forms of security and cited the case of *Chairman, Board of Governors Mbaikini High School & another v Simecor Merchants 2002 Limited & 2 others* (2021) eKLR.

### **Respondents' Submission**

15. Counsel for the Respondent also cited Order 42 Rule 6 of the Civil Procedure Rules and urged that the duty of the Court is, as far as possible, to balance the interests of the parties, that this would require safeguarding the interests of the decree holder to the decretal sum, but also ensuring that should the Appeal succeed, it will not have been rendered nugatory by earlier payment to a party who is unable to repay the decretal sum. As to what amounts to "substantial loss", he cited the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR and submitted that the mere fact that the decree holder is not a man of means does not necessarily disqualify him from benefiting from the fruits of his judgment, that on the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgment save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. According to Counsel, the Respondents have shown that if the decretal sum of Kshs 8,502,550/- is paid, they will be able to refund it were the appeal to succeed, that in other words, the Appellant has not shown that the Respondents have no means. He cited the case of *Equity Bank Ltd v Taiga Adams Company Ltd* (2006) eKLR in which, he averred, the Court held that where the allegation is that the Respondent will not be able to refund the decretal sum, the burden is upon the Applicant to prove that the Respondent will not be able to so refund. He also cited the case of *Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999*.
16. He submitted further that the Appellant has a statutory right of appeal that he seeks to exercise but faces the real possibility of execution and thereby paying the decretal sum before his appeal is determined, that on the other hand, the Respondents has a decree in their favour that they wish to execute, but that they are also faced with the possibility that the appeal may succeed and they may be required to refund the decretal sum already paid and that this requires balancing of the two rights. He added that the



Appellant has not been clear what substantial loss it will suffer, that the Appellant has a duty to satisfy the Court that it will indeed suffer something special that cannot be undone should execution proceed.

17. On the issue of security, Counsel cited the case of Mwaura Karuga t/a Limit Enterprises vs Kenya Bus Services Ltd & 4 Others eKLR and submitted that the Appellant is required to offer security for due performance of the decree, that the law still remains that where the Applicant intends to exercise its undoubted right of appeal, and in the event it was to eventually to succeed, it should not be faced with a situation in which it would find itself unable to get back its money, and that likewise, the Respondent who has a decree in his favour should not, if the Appellant were eventually to be unsuccessful in the appeal, find it difficult or impossible to realize the decree. He submitted that this is the cornerstone of the requirement for security, and that once the security provided is adequate its form is a matter of discretion of the Court as was held in the case of Nduhiu Gitahi vs. Warugonuo 11988/ KLR 621: 1 KAR 100; [1988-92] 2 KAR 100. He submitted further that the Appellant has offered to furnish security, which to the Respondents is not appropriate security, and that in the Respondents' view, the Appellant should deposit the entire decretal sum.

### **Determination**

18. Evidently, the issue that arises for determination herein is “whether stay of execution pending Appeal should be granted herein”.
19. The principles applicable in the determination of Applications for stay of execution pending Appeal are well settled and are as set out in 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.
20. What constitutes “substantial loss” was explained in the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR, by Gikonyo J in the following terms:

“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.”

21. What triggered these proceedings is the entry of Judgment against the Appellant by the trial Court after ex parte proceedings in which the Appellant did not defend. According to the Appellant, the reason it did not defend the suit was because it was never served with hearing notices and was therefore unaware of the suit. The Appellant then successfully applied for the setting aside of the ex parte Judgment but the trial Court imposed conditions for the same. In allowing the Application, the trial Court made express findings that service was indeed effected upon the Appellant, that the judgment was regular



and lawful and that therefore, the Appellant had no excuse for failing to defend the suit. This finding has not been challenged. To this extent therefore, the trial Court was justified in imposing conditions for setting aside the Judgment.

22. The Appellant is not therefore seeking for stay of execution in the ordinary sense. The stay granted by the trial Court was on the condition that the Appellant deposits the entire sum of Kshs 8,502,550/- within 60 days, which condition the Appellant deems to be excessive and punitive. It is for this reason that the Appellant filed this Appeal challenging that condition. What the Appellant is therefore basically seeking is a review of that condition of stay. When the Appellant approached this Court under Certificate of Urgency *ex parte*, I issued a fresh interim order of stay on the condition that, pending inter partes hearing of the Application, the Appellant deposits a sum of Kshs 3,000,000/- as security within 45 days. However, before the Application could be heard inter partes, the Appellant once again, returned with an Application seeking substitution of the condition to deposit the said sum of Kshs 3,000,000/- with one for depositing of log-books for two motor vehicles whose value, it is said, is on aggregate, about Kshs 3,750,000/-.
23. The Appellant has stated that the substantial loss that it will incur will cripple its business completely. It has also stated that the Respondents are not “persons of means” and that therefore if the Appeal succeeds, the Respondents will not be able to refund the decretal sum if it is paid. In addressing this kind of argument, the Court of Appeal, in the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR, expressed itself as follows:

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge”
24. Whereas the Appellant has expressed concerns on the ability of the Respondents to refund the decretal sum, I am also cognisant of the fact that the ability to refund should not be a reason to deny the Respondents the fruits of their judgment. That notwithstanding, the ability to refund is crucial in this type of application, considering that the security that the Appellant was ordered by the trial Court to deposit was in excess of Kshs 8,500,000/- which is, in my opinion, colossal. The Respondents have, besides making bare statements, not done anything to lay to rest the Appellant’s apprehension that it would be unable to recover the money. The Respondents did not provide an Affidavit of means or any other proof that they are in a position to refund the decretal sum. I am therefore satisfied that substantial loss may, indeed, result if the trial Court’s order is not stayed.
25. Regarding whether there was delay in filing the Application, I note that the trial Court delivered its Ruling the subject of this Appeal on 22/06/2023 and granted stay on condition that the Appellant deposits the decretal sum within a period of 60 days. Thereafter, the Appellant filed this Appeal on 03/07/2023 and the 1<sup>st</sup> Application herein on 21/08/2023, all within the 60 days compliance period given by the trial Court. I am therefore satisfied that the Application was filed timeously, without any delay.
26. Regarding security, the Appellant has offered to deposit in Court log-books of for two of its motor vehicles as security. The Respondents have rejected the same and contend that the same do not amount to adequate security.



27. The purpose of security was clearly reiterated in the case of Arun C. Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others [2014] eKLR, as follows:

“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.”

28. The question that arises is therefore whether the mode of security proposed serves the purpose of guaranteeing the due performance of the decree. Granted, the Appellant has provided the Court with valuation certificates for the said motor vehicles which, as aforesaid, indicate that the forced sale valuation thereof is a total of about Kshs 3,750,000. However, in the case of Simba Coach Limited v Kiriuyu Merchants Auctioneers [2019] eKLR, W. Musyoka J, observed as follows:

“So, is motor vehicle logbook an ideal security in the circumstances? The issue of a logbook being used as security for stay of execution of a decretal sum has been widely discussed by courts in others cases. In Lochab Brothers Ltd vs. Lilian Munabi Nganga & 2 Others [2007] eKLR, for example, the court dismissed a similar application to substitute security with a logbook, the court expressed the view that –

‘there is no guarantee that by the time the appeal will be heard and determined the vehicle will be worth the same money or it be there at all. The vehicle is still under the control and use of the applicant. Many things can happen to it before the appeal is heard. It can be wasted and its value diminished or it can even be involved in an accident and be completely damaged. I am not saying that this is going to happen but it can happen. If that happens then there will be no security for the respondent to fall back on if the appeal is not successful. Deposit of motor vehicle log book is therefore not a satisfactory security.’

29. I, too, take the position that since motor vehicles depreciate with time, it is possible that by the time that the appeal will be concluded, the vehicles’ worth is likely to be much less than the current value. Considering that this Court is under the duty to protect the interests of both parties, and considering the colossal amount of the decretal sum, it is my considered view that the log-books will not serve as adequate security in the circumstances of this case. Taking the matter as a whole, I am persuaded to retain the order to deposit the sum of Kshs 3,000,000/- which I find to be fair and reasonable. While before, it was an interim order before the Respondent had filed its response, now that I have heard both parties, I now convert that interim order into a final order in settlement of the two Applications.

30. It is however necessary to clarify that I am in no way making a sweeping declaration that motor vehicle log-books can never be accepted as adequate security, far from it. Indeed, a log-book is acceptable as proper and adequate security where the circumstances dictate so. All I am saying is that in the circumstances of this case, I am not satisfied that it is the kind of security that would be deemed adequate. It must always be remembered that each case must be determined on its own facts, on the basis of its own unique and peculiar circumstances.



31. Regarding the 2<sup>nd</sup> Application for Review of the order for the Appellant to deposit a sum of Kshs 3,000,000/- within 45 days, it is clear that the Appellant misunderstood the same and seems to be treating it as the final order hence the quest to review it. The 1<sup>st</sup> Application, dated 18/08/2023 had not been heard and had not been determined as yet. On the contrary, and as already stated, the order to deposit Kshs 3,000,000/- was simply an interim ex parte measure pending inter partes hearing of the Application.
32. The Appellant is also coming out as a litigant demanding “self-entitlement” and/or “special treatment”. The Appellant was granted stay by the trial Court with the condition to deposit the decretal sum of Kshs 8,502,550/-. The Appellant was not satisfied with that condition and before compliance, came running to this Court seeking what basically amounts to a review of the orders. This Court, before it could even hear the matter inter partes, invoked its discretion and granted the Appellant an interim stay on the less onerous condition that it deposits the much lesser sum of Kshs 3,000,000/- pending hearing of the Application inter partes. The Court therefore removed a huge chunk of the burden imposed on the Appellant by the trial Court. Surprisingly, yet again, the Appellant was not satisfied and quickly returned with a fresh Application seeking further review of that condition as well. One may therefore be forgiven for viewing the Appellant as trying to push the Courts to operate at the whims of Appellant’s convenience. It should never be imagined that a Court will handle proceedings as dictated by one litigant and/or at the convenience of a litigant. The Appellant cannot therefore have “its cake and eat” it at the same time.
33. Regarding the prayer for stay of proceedings pending Appeal, no submission has been made thereon and I will not therefore belabour it. In any case, once the Appellant complies with the conditions that shall be imposed herein, it shall be fully entitled to defend the suit before the trial Court even as the determination of the Appeal is being awaited.

#### **Final Orders**

34. In light of the above, I order as follows:
  - i. The Applicants’ Notice of Motion dated 09/10/2023 is allowed in terms of prayer 4 thereof, i.e., stay of execution is granted suspending, barring and/or prohibiting execution of the Judgment entered in Eldoret Chief Magistrate’s Court Civil Suit No. 442 of 2020 but on the condition that the Appellant deposits the sum of Kshs. 3,000,000/- in a joint interest earning account in the names of the two Advocate law firms on record herein within a period of 45 days from the date hereof, or in the alternative, the Appellant may execute and deposit in Court a bank guarantee in the sum of Kshs 3,000,000/- within the same period cited above as security, pending the hearing and determination of the Appeal herein.
  - ii. The parties may also consider, with a view to fast-tracking the hearing and determination of the trial Court suit, whether to convert the above order settling the interlocutory Application into an order settling the entire Appeal.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 4<sup>TH</sup> DAY OF OCTOBER 2024**

.....

**WANANDA J. ANURO**

**JUDGE**

Delivered in the presence of:

Ms Kamau for Appellant



Ms Keston for Respondent

Court Assistant: Brian Kimathi

