



**Maina v Westrockie Ventures & 2 others (Civil Appeal E060 of 2024)
[2024] KEHC 16658 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 16658 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL E060 OF 2024
JL TAMAR, J
OCTOBER 17, 2024**

BETWEEN

HENRY MAINA APPELLANT

AND

WESTROCKIE VENTURES 1ST RESPONDENT

UWEZO MAIZE MILLERS LIMITED 2ND RESPONDENT

KENNETH KANITHI NJUMBI T/A CYAN TEQ 3RD RESPONDENT

RULING

1. The appellants/applicants herein being dissatisfied with the judgment of the learned magistrate delivered on 3rd June 2024, file a Notice of Motion application dated 1st July 2024 expressed under Article 159 (2) d of *the constitution* of Kenya, Sections 1A,1B,3A of the *Civil Procedure Act*, Cap 21 laws of Kenya, Order 42 Rule 6 Order 22 Rule 22 of the Civil Procedure Rules 2010 and all other enabling provisions of the law, seeking in the main;
 - i. A stay of execution of the judgement and the Decree of Hon. Jane Kamau in MCCC No E254 of 2023 pending the hearing and determination of the Appeal.
2. The application is premised on the grounds on the face of the application and the supporting affidavit of Alex Kangethe Gitau sworn on 1st July 2024, that the applicant stands to suffer irreparably as the respondent are likely to proceed and execute the decree. Further, as demonstrated in the Memorandum of appeal, the intended appeal has high chances of success and the same would be rendered nugatory if stay is not granted. The applicant further contend that the application was filed without delay and that they would abide by any conditions that the court may impose.
3. The application is opposed by the respondents who filed statement of grounds of opposition dated 16th July 2024. The respondent content that the application is frivolous, vexatious unmeritorious and



untenable in law and ought to be dismissed in limine. It is further contended that the application offends the principles guiding the grant of stay of execution as provided for in order 42 rule 6(1)(2) and Rule 4 of the Civil Procedure Rules to the extent that; the applicants have not demonstrated that they shall suffer substantial loss if execution proceed, that they are ready and willing to deposit the decretal amount in court, and the application was not filed timeously and that the applicants have failed to demonstrate sufficient cause to warrant a stay of execution.

Submission

4. I have read the submissions filed by both counsel appearing for the parties, the digest and the authorities supplied which I have found useful.

Analysis and Determination

5. The obvious issue for this court determination is whether the order for stay of execution should issue pending appeal.
6. The law governing applications for stay of execution and in which principles of law had been developed in myriads of decisions of the court is provided for in order 42 Rule 6 (1) (2) of the Civil procedure rules which provides;

“(2) 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.”

7. A party seeking the grant of an order of stay of execution pending appeal must show sufficient cause, demonstrate that he will suffer substantial loss unless the order of stay is granted, provide security and demonstrate the application was made without unreasonable delay. This is a discretionary remedy and the court has to determine whether it is equitable to issue the order or not.
8. Without going into the merits or demerits of the appeal, however, from the available evidence in the lower court record, the 1st and 2nd applicants herein were the driver and the owner of Truck reg. no KDG 115L/ZG 7738 respectively who were engaged by the Kenneth Kanithi Njumbi t/a CYAN - TEQ after the said Kenneth entered into a contract with the Respondent to transport maize from Zambia to Kenya. The evidence available is that while not being parties to the lease agreement between the respondent and Kenneth Kanithi, the 2nd applicant diverted and sold 185 bags of maize ostensibly to settle for his cost which matter became an issue that the learned magistrate determined in her judgement dated 3rd June 2024. The court determined that the 2nd and 3rd defendants now the 1st and 2nd applicant herein had no right to sell the 185 bags of maize purportedly to recover their expenses and therefore ordered that they compensated the respondents for the loss incurred.
9. The applicants contend that they are likely to suffer substantial loss in terms of losing the transportation cost and continuity of business if the stay order is not granted. Firstly, on the face of it, it is the 3rd respondent in this application who hired out the truck owned and operated by the 2nd applicant herein who in turn engaged the 1st applicant as a driver. If there are any losses that the applicants will suffer, then the same is recoverable as against the 3rd respondent who engaged their



services in the event that the appeal filed succeeds. It is important to note that Kenneth Kanithi t/a CYAN-TEQ was the 3rd defendant in the suit before the magistrate court together with the applicants herein but now enjoined by the applicants as a respondent in the present appeal.

10. In congress Rental South Africa vs Kenyatta International Convention centre (2019) eKlr, the court held.

“I am satisfied that the applicant has failed to prove, as is required by law; and by evidence that it shall suffer substantial loss, if the lawful court order is enforced and stay of execution denied...”

11. Further, in Kenya Shell Ltd vs Kibiru & Ano (1986) klr 410 the court of Appeal stated that;

“It is usually a good rule to see if order 42 of the civil procedure rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be rare case when an appeal would be rendered nugatory by some other events. substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what is to be prevented”

10. Yet still in James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR the Court held that: -

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.

12. Therefore, substantial loss depends on the circumstances of each case and the court has to consider the peculiar set of facts of each case and determine whether in the whole any substantial loss is likely to occur if stay is denied.
13. The applicant therefore in my view, has not proved any substantial loss that may be suffered if stay is not granted or how the appeal if successful would be rendered nugatory. There is no evidence and none has been presented that the 1st and 2nd respondent would not be able to pay the decretal amount if appeals succeeds.
14. Consequently, the Notice of Motion application dated 1st day of July 2024 lacks merit and the same is dismissed with cost.

DATED AND DELIVERED AT KJIADO THIS 17TH DAY OF OCTOBER 2024

JOHN T. LOLWATAN

JUDGE

