



**Northwave Credit Limited v Muthomi (Commercial Appeal 007 of 2023)
[2024] KEHC 13587 (KLR) (Commercial and Tax) (25 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13587 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL 007 OF 2023**

MN MWANGI, J

OCTOBER 25, 2024

BETWEEN

NORTHWAVE CREDIT LIMITED APPELLANT

AND

MUTHAMIA SHADRACK MUTHOMI RESPONDENT

RULING

1. The appellant filed a Notice of Motion application dated 16th June 2023 pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010, Section 3A of the *Civil Procedure Act*, and all other enabling provisions of the law, seeking an order for stay of execution of the ruling delivered on 16th June 2023 in CMCCOMM No. E5929 of 2022, and all the consequential orders made therein, pending the hearing and determination of this appeal.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Peter Njagi, the appellant's Director. He averred that on 18th July 2022, the appellant and respondent entered into a loan agreement for Kshs.1,561,097.00, secured by motor vehicle registration No. KDE 305Y. That after making two payments, the respondent defaulted, prompting the appellant to initiate the recovery process. The appellant subsequently attached the suit motor vehicle, however the respondent filed a Notice of Motion application dated 22nd November 2022, and obtained interim orders that restrained the appellant from advertising or selling the said motor vehicle.
3. The appellant contends that in a ruling delivered on 16th June 2023, the respondent's application was allowed. Aggrieved by the said ruling, the appellant lodged an appeal against it, but the respondent has since extracted orders from the said ruling. The appellant contends that in the event the instant application is disallowed, it will not only be prejudiced, but its appeal will also be rendered nugatory.



The appellant also expressed concern that continued use of the motor vehicle exposes it to damage and depreciation while the debt grows, thus potentially causing it to suffer substantial loss. It asserted that the appellant is ready and willing to abide by any conditions as to deposit of security.

4. In opposition to the application, the respondent filed a replying affidavit sworn on 24th July 2023 by Muthamia Shadrack Muthomi, the respondent herein. He stated that the instant application and the intended appeal are incompetent and should be dismissed for violating Section 79(B) of the *Civil Procedure Act*. He further stated that he made the full instalment for the month of August 2022 and partial payment for September 2022, but then discovered that the appellant was unjustly imposing a 5% daily penalty interest, contrary to the Credit Agreement. He stated that he then sought alternative ways to settle the loan and redeem the security, and Makini Credit Limited agreed to pay the remainder of the loan on his behalf, but despite a request for the outstanding balance and a statement of account, the appellant did not provide them.
5. He averred that on 22nd November 2022, the appellant unlawfully attached the suit motor vehicle. He then obtained orders for release of the said motor vehicle on 16th June 2023 in CMCCOMM No. E5929 of 2022, and served the orders upon the appellant. The respondent argued that the appellant would not suffer substantial loss if the orders sought are not granted, as it still holds the security documents and can lawfully initiate the realization process of the suit motor vehicle. He further averred that continued holding of the suit vehicle would lead to its depreciation, potential sale at a low price, and increased storage costs. He asserted that the motor vehicle's safety is ensured, as it is equipped with a tracking device for easy traceability. He accused the appellant of attempting to sell the vehicle illegally without complying with Sections 66, 67 and 73 of the Movable Properties Security Rights Act, and of refusing to allow him to settle the loan while imposing unlawful charges, thereby violating Section 68 of the Act.
6. The 2nd application is the respondent's Notice of Motion dated 30th November 2023 filed pursuant to the provisions of Order 40 Rule 7 of the Civil Procedure Rules, 2010, Sections 1A & 3A of the *Civil Procedure Act*, and all other enabling provisions of the law. The respondent seeks orders for setting aside of the ex parte orders issued by this Court on 20th June 2023, and that the appellant be compelled to surrender the suit motor vehicle to the respondent, and to produce the statements of accounts and loan agreements.
7. The application is premised on the grounds on the face of the Motion and it is supported by an affidavit sworn on the same day by Muthamia Shadrack Muthomi, the respondent herein. He averred that the appellant through Extra Mile Auctioneers issued him with a proclamation notice demanding Kshs.4,033,606,00, but has failed to provide him with an accurate statement of account reflecting the true balance of the loan amount as at 10th November 2022. He contended that the appellant has continued charging illegal and unlawful interest on the loan amount, thus fettering his right of redemption. He equated the amount demanded as tantamount to theft, a tort of deceit, conversion and unjust enrichment by the appellant in view of the fact that the loan herein was advanced to the respondent on 20th July 2022.
8. In response thereto, the appellant filed a replying affidavit sworn on 19th January 2024, by Peter Njagi, the appellant's Director. He contended that under the Loan Agreement, the loan was to be repaid in 36 monthly instalments of Kshs.110,796.00 at an interest rate of 6% per month, and in case of default, all outstanding amounts would become due immediately, and late repayment would incur an additional 10% interest on the instalment, along with a further 7% every seven (7) days on the overdue amount until fully settled. The appellant stated that since August 2022, the respondent had only paid Kshs.195,796.00. The appellant argued that the respondent's requests in Court would



effectively rewrite the loan agreement, allowing a defaulting borrower to escape his lawfully imposed contractual obligations. The appellant emphasized the need to preserve the motor vehicle to prevent potential damage, waste, or alienation. He asserted that continued use of the suit motor vehicle by the respondent could hinder the appellant's ability to recover the loan, leading to substantial loss.

9. The applications herein were canvassed by way of written submissions. The appellant's submissions were filed on 15th February 2024 by the law firm of M.W. Kimani & Co. Advocates, whereas the respondent's submissions were filed by the law firm of MGW Advocates LLP on 12th February 2024.
10. Mrs. Kimani, learned Counsel for the appellant cited Order 42 Rule 6 of the Civil Procedure Rules, 2010 and stated that the appellant has justified the need for a stay of execution pending appeal. She noted that the application was filed promptly, having been filed on the same day the Trial Court's ruling was delivered. She submitted that the respondent has not filed any documents showing that he has made any repayments of the loan advanced to him by the appellant in terms of the duly executed loan agreement. She cited the case of *Khunaif Trading Company v Equitorial Commercial Bank Limited* [2016] eKLR, and further submitted that releasing the suit motor vehicle to the respondent would cause the appellant substantial loss, since the loan debt grows while the vehicle's value depreciates. She then relied on the Court of Appeal case of *Air Travel & Related Studies v Equity Bank (Kenya) Ltd* [2017] eKLR, and argued that the respondent's contention is on interest, thus it should not have warranted the orders issued by the Trial Court.
11. Mr. Omayio, learned Counsel for the respondent relied on the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, where the Court addressed itself on what amounts to substantial loss. Counsel submitted that the appellant has not demonstrated that it shall suffer substantial loss in the event the orders sought herein are not granted. Counsel also relied on the case of *Awale Transporters Ltd v Kelvin Perminus Kimanzi HCCA No. 161 of 2019*, and argued that execution of the respondent's right will not derogate the appellant's right since the parties herein are jointly registered owners of the suit motor vehicle, thus the suit motor vehicle is safeguarded from any danger of disposal. Counsel asserted that the respondent is a man of means fully capable of paying the decretal sum assessed by the Court in the event the appellant's appeal is successful.

Analysis and Determination.

12. Having considered the applications herein, the grounds on the face of the Motions and the affidavits filed in support thereof, the replying affidavits by the appellant and the respondent in opposition to each other's applications and the written submissions by Counsel for the parties, the issues that arise for determination are—
 - i. Whether an order for stay of execution of the Trial Court's ruling and all the consequential orders thereto should issue; and
 - ii. Whether the respondent's application dated 30th November 2023 is merited.

Whether an order for stay of execution of the Trial Court's ruling and all the consequential orders thereto should issue.

13. The respondent contends that the appellant is yet to lodge an appeal against the Trial Court's ruling delivered on 16th June 2023, thus an order for stay of execution pending appeal cannot issue in the absence of an appeal. He averred that the instant application is incompetent and should be summarily dismissed since the appellant has not attached the order or decree appealed from, in compliance with the provisions of Section 79B of the *Civil Procedure Act*.



14. Upon perusal of the appellant's affidavit in support of its application dated 16th June 2023, annexed thereto is a copy of a Memorandum Appeal dated 16th June 2023 filed in HCCA No. E520 of 2023 at the Civil Division, which was subsequently transferred to the Commercial and Tax Division as HCCOMMA No. 007 of 2023. It is therefore not true that the appellant has not yet lodged an appeal against the Trial Court's ruling delivered on 16th June 2023. Annexed to the appellant's affidavit herein, there is also a copy of the order issued by the Trial Court against which the appellant has lodged an appeal. Further, the appellant has not yet filed a Record of Appeal for the appeal to be considered for admission by this Court, to warrant the respondent to raise such a defence. This Court does not agree with the respondent that the appellant has not complied with the provisions of Section 79B of the Civil Procedure Act.
15. Moving on to the merits of the appellant's application for stay of execution. Stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules, 2010. Sub-rule 2 provides for the conditions to be considered by the Court when dealing with an application of this nature. It states that –
 - 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.
16. In dealing with the application for stay of execution, I have a duty to balance the interests of the parties, by taking into account the fact that the appellant has an undoubted right of appeal, while the respondent has an order which he should not be obstructed from executing unless there is a good reason for so doing. The dispute between the parties herein arose from a loan agreement. The appellant advanced a loan facility of Kshs.1,561,097.00 to the respondent following a loan agreement entered into by the parties herein on 18th July 2022. It is not disputed that since the said loan was disbursed to the respondent, he has only made two instalments towards repayment of the said loan amount. The first repayment instalment was made in full in August 2022, and the second instalment was made partially in the month of September 2022.
17. The respondent contends that he then discovered that the appellant was unjustly imposing a 5% daily penalty interest contrary to the Credit Agreement, and that he sought alternative ways to settle the loan and redeem the security. He stated that Makini Credit Limited agreed to pay the remainder of the loan on his behalf, but despite a request for the outstanding balance and a statement of account, the appellant did not provide it. It is however noteworthy that the respondent has not adduced any evidence in support of the above allegations. For this reason, the said claims have little to no probative value in this case.
18. From the record, it is evident that the respondent defaulted in his loan repayment obligations and has to date not made any efforts to settle the outstanding loan balance. It is also evident that the parties herein did not enter into an Agreement deferring payment of the monthly instalments by the respondent pending the taking over of the respondent's loan by Makini Credit Limited or any other entity. In as much as the respondent was dissatisfied with the interest rates applied by the appellant, it still had a contractual duty under the Loan Agreement to continue making monthly instalments towards repayment of the loan advanced to him by the appellant.



19. The said loan was secured by a motor vehicle registration No. KDE 305Y. It is not disputed that a motor vehicle is an asset that depreciates in value as time goes by, unlike a parcel of land. This Court in the case of *Khunaif Trading Company vs. Equitorial Commercial Bank Limited* (supra), held that –

The subject matter of the dispute is motor vehicles and trailers. These are assets that depreciate quickly in value and any further delay in having the same disposed of will serve no useful purpose to the parties herein. In the case of *Andrew Muriuki Wanjohi vs Equity Building Society Limited & 2 Others* [2006] eKLR, Ochieng Judge stated thus -

“...In my considered view, if the 1st and 2nd defendants were restrained from selling off the property until the suit is heard and determined, there is a very real risk that the debt may outstrip the value of the property as the borrower has not made repayments for more than three years ...”

20. In the circumstances of that case, I am of the considered view that there is every likelihood that the debt owed to the appellant by the respondent will outstrip the value of the security offered, leaving the appellant with no avenue to recover its money as the outstanding loan balance continues to accrue interest, whereas the security continues to depreciate in value.

21. Substantial loss was defined by the Court in *James Wangalwa & another v Agnes Naliaka Cheseto* (supra) as follows –

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. This is what substantial loss would entail...

22. In the premise, it is my finding that the appellant has successfully demonstrated that it stands to suffer substantial loss in the event the orders sought are not granted.

23. There has been no inordinate delay in filing the instant application, noting that it was filed on the same day the Trial Court delivered the ruling that forms the subject of this appeal. In its affidavit in support of the instant application the appellant expressed willingness to deposit security for the due performance of the decree. In the case of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, it was stated that -

Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security.

24. In light of the foregoing, this Court is satisfied that the appellant has made out a case to warrant being granted an order for stay of execution pending appeal.

Whether the respondent’s application dated 30th November 2023 is merited.

25. In the application dated 30th November 2023, the respondent is seeking orders for the setting aside of the ex parte orders issued by this Court on 20th June 2023, that the appellant be compelled to surrender the suit motor vehicle to the respondent, and to produce the statements of accounts and loan agreements.



26. From the Court record, it is noteworthy that on 20th June 2023, this Court granted the appellant an order for stay of execution in terms of prayer No. 2 of the Motion. Upon perusal of prayer No. 2 of the application dated 16th June 2023, it is manifest that it seeks an order for stay of execution pending the hearing and determination of the said application. This means that the ex parte orders for stay of execution issued by this Court shall automatically elapse upon determination of the said application. In the premise, this Court finds that the respondent's prayer for setting aside of the ex parte orders issued by this Court on 20th June 2023 is spent, in view of the fact that the order for stay of execution issued by this Court on 20th June 2023 shall elapse as soon as this Court delivers this ruling.
27. On the prayer for release and/or surrender of the suit motor vehicle to the respondent, this prayer is also addressed by the determination of the appellant's application for stay of execution of the Trial Court's ruling and all the consequential orders thereto. This is because, in the event the appellant herein is granted an order for stay of execution, then the order for surrender of the motor vehicle cannot issue, and if the appellant's prayer for stay of execution is declined, then the suit motor vehicle will automatically be released to the respondent in accordance and/or compliance with the Trial Court's ruling delivered on 16th June 2023.
28. The prayer for production of statements of accounts and loan agreements was dealt with by this Court on 14th June 2024 when the Court held that matters that should be addressed before the Trial Courts should be done in those Courts and not at the appellate stage. The dispute between the parties herein is still live before the Trial Court since the same has not yet been determined. I still maintain that the prayer for production of statements of accounts and loan Agreements ought to be made before the Trial Court and not this Court.
29. The upshot is that the appellant's application dated 16th June 2023 is merited, whereas the respondent's application dated 30th November 2022 is devoid of merits.
30. In the premise, I make the following orders –
- i. This Court hereby issues an order for stay of execution of the ruling delivered on 16th June 2023 in CMCCOMM No. E5929 of 2022, and all the consequential orders made therein, pending the hearing and determination of this appeal;
 - ii. As a condition for being granted the said order, the appellant shall deposit in Court the amount of Kshs.2,000,000.00 within 30 days from today;
 - iii. The application dated 30th November 2023 is hereby dismissed; and
 - iv. Costs are awarded to the appellant.
- Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF OCTOBER 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mrs Kimani for the appellant

No appearance for the respondent

Ms B. Wokabi - Court Assistant.



NJOKI MWANGI, J.

