



Mutembei t/a Markfive Suppliers v Galaxy Merchants Ltd (Civil Appeal E042 of 2022) [2023] KEHC 24 (KLR) (12 January 2023) (Ruling)

Neutral citation: [2023] KEHC 24 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E042 OF 2022
EM MURIITHI, J
JANUARY 12, 2023**

BETWEEN

KENNETH MUTEMBEI T/A MARKFIVE SUPPLIERS APPELLANT

AND

GALAXY MERCHANTS LTD RESPONDENT

(Being an appeal from the ruling of hon. chief Magistrate J. Njoroge delivered in Meru Cmccc No. 40 of 2014 on 2nd march 2022)

RULING

1. The court has considered the Motion dated 24/11/2022 on the principles for the grant of stay of execution pending appeal set out in Order 42 Rule 6 of the Civil Procedure Rules with regard to the appellant's prayer that the court "be pleased to stay execution of the lower court decree by way of committing me to civil jail pending the determination of this appeal."
2. The supporting affidavit of the appellant sworn on 24/11/22 and the replying affidavit of the respondent sworn, together with submissions made orally before the court by the appellant and Counsels for the Respondent have been considered.
Sufficient cause
Arguability of appeal
3. The central issue before the court is the effect on the execution of a judgment of the admission and discharge of a debtor to the No Asset Procedure of the Insolvency Act, 2015.
4. Section 359 of the Insolvency Act provides, so far as material, as follows:"
5. The appellant contends at paragraph 5 of his supporting Affidavit that having been "admitted and discharged from the No Asset Procedure in accordance with section 359 and 360 of the Insolvency Act



2015... this debt ceased to exist since then. (see Annexure KMMM1 being a letter and documents from Official Receiver addressed to Meru Law Courts).”

6. The Official Receiver’s letter referred to above is dated 24/2/2022 and addressed to the Executive Officer of the Meru Law Court gratuitously that the application of the appellant for admission to the No Asset Procedure had been gazetted in gazette notice no. 11664 and advertised in the Daily Nation on September 30, 2019 and that –

“Despite the Notice, the Creditor failed and/or neglected to object admission of the Debtor to the No Asset Procedure. As a result all the debts he owed the Creditor were considered bad debts written off upon the lapse of one (1) year period. From the foregoing, the Creditor cannot purport to execute the decree.”

7. For the respondent Creditor, it was urged that the debt is undisputed and an appeal from the judgment was dismissed by the High Court and the appellant does not benefit from the NO Asset Procedure of the Insolvency Act because he had given cheques which were dishonoured and this amounted to fraud taking him from the protection of the Act in terms of section 360(2) thereof. The Respondent’s case is set out in the Replying Affidavit of the Managing Director sworn on 15/12/2022 as follows:

- “1. That I am a director of the respondent and well versed with the facts of this case and having authority from the respondent to make and swear this affidavit on its behalf.
2. That I wish to swear this affidavit in response to the application dated November 24, 2022.
3. That the appellant is a cunning litigant who has concealed several salient facts on the unfolding’s herein.
4. That first and foremost this appeal radiated from a Meru Cmcc No 40 of 2014, and whereby the appellant recently via an application dated January 18, 2022 sought orders of stay of execution citing provision of the no asset procedure.
5. That the court via a ruling delivered on 2.3.2022 dismissed the said application. Annexed and marked VAS1 is a copy of the said ruling. 6. That the appellant has the penchant and history of filing a plethora of pleadings in different forums in order to buy time and avoid paying debts. 7. That the debts herein were occasioned by issuance of several bounced cheques to the respondent in settlement of goods obtained
8. The appellant has not met the benchmark for grant of stay of execution.
9. That moreover the applicant is a multimillionaire with adequate means to settle this decree but has instead chosen to transfer his properties to his children in order to conceal the same as demonstrated by the ownership of parcel No. kiiruui Naari/4038 wherein he has built a hive worth more than Kshs. Ten Million (KSHS 10,000,000) and m/v reg KAN 177R. Annexed and marked VAS2, VAS3, VAS4 are copies of the Search certificates in respect of the land, search certificates in respect of the m/v and the search from the registrar of companies.



10. That all the above properties are registered in a company known as Metembe Construction Ltd whereby the applicant is a director and Shareholder; and the said registration was occasioned in order to defeat the judgement herein.
11. That the appellant is a dishonest applicant and this application is the epitome of abuse of court process.
12. That I pray that the application be dismissed with costs”

It is further submitted that the applicant has not met the requirements for stay of execution pending appeal relating to delay, substantial loss and security for the due performance of the decree.

Determination

8. I do not consider that the appellant is guilty of unreasonable delay in seeking stay of execution of pending appeal from the trial court’s ruling of 2/3/2022 in view of the application for leave to appeal dated 2/3/2022 filed before the trial court.
9. The dispute in the appeal appear to revolve around the interpretation of the provisions of section 360 of the *Insolvency Act* and the nature of the transaction between the appellant and the Respondent giving rise to the debt. Section 360 of the *Insolvency Act* is in the following terms:
 - “ 360. Effect of discharge of debtor’s participation in no-asset procedure
 - (1) On discharge under section 359—
 - (a) the debtor's debts that became unenforceable on the debtor's entry to the no-asset procedure are cancelled; and
 - (b) the debtor is no longer liable to pay any part of the debts, including any penalties and interest that may have accrued.
 - (2) Subsection (1) does not apply—
 - (a) to any debt or liability incurred by fraud or fraudulent breach of trust to which the debtor was a party; or
 - (b) any debt or liability for which the debtor has obtained forbearance through fraud to which the debtor was a party.
 - (3) The debts and liabilities referred to in subsection (2) again become enforceable on discharge under section 359, and the debtor is liable to pay any penalty or interest that may have accrued.”
10. The appellant urges that the criminal offence on dishonoured cheques does not relate to postdated cheques. The question to be determined is whether there is proof of fraud in terms of section 360 (2) of the *Insolvency Act*, which is, in the respectful view of this court, different from the question whether an offence of presenting dishonored cheques is proved.
11. Section 316A of the *Penal Code* on dishonoured cheques provides as follows:

“ 316A. Bad cheques



- (1) Any person who draws or issues a cheque on an account is guilty of a misdemeanour if the person—
 - (a) knows that the account has insufficient funds;
 - (b) knows that the account has been closed; or
 - (c) has previously instructed the bank or other institution at which the account is held not to honour the cheque.
- (2) Subsection (1)(a) does not apply with respect to a post-dated cheque.
- (3) Any person who, by deceit or any other fraudulent means, assists a person to obtain anything on the basis of a cheque drawn or issued in the circumstances described in subsection (1) is guilty of a misdemeanour.
- (4) A person who is guilty of a misdemeanour under this section is liable to a fine not exceeding fifty thousand shillings, or to imprisonment for term not exceeding one year, or to both.
[Act No. 54 of 1960, s. 31, Act No. 24 of 1967, Sch.]”

12. The trial court in the ruling subject of this appeal found the appellant had committed a fraud in relation to issue of the dishonoured cheques as follows:

“The Act provides under section 359(1) that:-

“A Debtor who is participating in the No Asset Procedure is automatically discharged from that procedure at the end of twelve months after the date when the debtors are addressed to it....”

In my view, that admission to No Asset Procedure, automatically lapsed after a period of 12 months and the applicant has since been discharged and the applicant is relied on the provisions of section 360(1), which provides that upon discharger-

“(a) The debtors debts that become unenforceable on the debtors entry to the No Asset Procedure are uncalled; and

(b) The debtor is no longer liable to pay any part of the debts, indicating the penalties and interest that may have accrued....”

The respondent/Decree holder, on the other hand has argued that the debt clarified 2nd liability based on fraud, and are therefore enforceable. The respondent for further stated that the applicant obtained credit by false pretense. This fact is deponed in section 316 of the [Penal Code](#):-

“Any person who:-

- a. Incurring any debt or liability, obtained credit by any false pretence or by means of any other fraud or
- b. with intent to defraud his Creditor or any of them makes or cause have is counsels to be made any gift delivery or transfer or apply charge on his property; or



- c. With intent to defraud his creditors or any of them conceals, sells or removes any part of his property, after or within two months before the date of any unsatisfied judgment or order for payment of money against him.....

Due to the above, reasoning, I find that though the applicant was automatically discharged from the No Assets Procedure, who accrued debt on liability, remains approachable, under section 360(2) of the Act”

13. Without deciding at this stage so as not to prejudice the hearing of the appeal, I consider that there is an arguable case, not necessarily one that must succeed, on appeal to warrant an investigation at the hearing by the appellate court.

Substantial loss

Whether appeal may be rendered nugatory

14. The application seeks an order for “stay of execution of the lower court decree by way of committing me to civil jail pending determination of this appeal.” I do not think it could be argued that the detention in civil jail in execution of a judgment the appeal, which eventually succeeds is not rendered nugatory, or that the incarceration on civil jail is not a substantial loss that may be suffered by an applicant on refusal of stay of execution. The court finds that the appellant stands to suffer substantial loss by way of committal to civil jail if stay is not granted.
15. The court notes that the trial court had already set a Notice to Show Cause why the Appellant should not be committed to civil jail for hearing/mention when the hearing of this application was scheduled for 20/12/2022. This court agrees that the appeal herein would be rendered nugatory if the stay of execution by way of committal to civil jail is not granted.

Security for performance of the decree

16. From the nature of the proceedings before the court where the appellant claims protection under the No Assets Procedure of the *Insolvency Act*, the appropriate security where execution proceedings by way of committal to civil jail have been commenced appears to be to ensure that the appellant is available to perform his civil jail in execution should his appeal be unsuccessful. The Court will therefore order that the appellant provides security for his availability for execution in terms of the application for execution by committal to civil jail, and for that purpose a security by way of deposit of his travel documents and restriction from traveling out of jurisdiction without leave of court is sufficient.

Expeditious disposal of the appeal

17. The court has noted that the ruling of 2nd March 2022 appealed from is already typed and certified and the Record of Appeal should only take short time to prepare. The appellant shall be required in the interests of an expeditious disposal of the dispute consistent with sections 1A and 1B of the *Civil procedure Act* to file the appeal with forty-five (45) days.

Orders

18. Accordingly, for the reasons set out above, the court makes the following orders:
 1. There shall be a stay of execution of the judgment and decree of the trial court delivered on 8/2/2017 pending the hearing and determination of the appeal herein.



2. As security for the eventual performance of any decree that may eventually become binding on him, the appellant shall not leave the jurisdiction of the court without leave, and, for that purpose, the appellant shall deposit his Passport into court within the next seven (7) days, in default of which the stay herein granted shall lapse.
 3. In the interests of expeditious disposal of the appeal, the appellant shall file Record of Appeal within forty-five (45) days, in default of which the appeal shall stand dismissed.
19. Costs to abide the outcome of the appeal.

Order accordingly.

DATED AND DELIVERED ON 12TH DAY OF JANUARY, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances

Appellant in Person.

Mr. K. Muriuki Advocate for the Respondent.

