



**Bliss Gus Health Care Limited v Consolata Hospital Mathari (Civil Appeal E049 of 2021) [2023] KEHC 18482 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 18482 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E049 OF 2021**

**M MUYA, J  
MARCH 16, 2023**

**BETWEEN**

**BLISS GUS HEALTH CARE LIMITED ..... APPLICANT**

**AND**

**CONSOLATA HOSPITAL MATHARI ..... RESPONDENT**

**RULING**

1. The Notice of Motion application dated the 17<sup>th</sup> day of March 2022 seeks the following orders:-
  1. Spent
  2. That there be a stay of execution of the ruling and all consequential orders arising therefrom by Hon. S. Macharia (SPM) delivered in Nyeri CMCC No.51 of 2018 on the 7<sup>th</sup> day of September 2021 pending the hearing and determination of the application.
  3. That there be a stay of execution of the ruling and all consequential orders arising therefrom by Hon. S. Macharia (SPM) delivered in Nyeri CMCC No.51 of 2018 on the 7<sup>th</sup> day of September 2021 pending the hearing and determination of the appeal herein.
  4. That there be a stay of the proceedings and orders issued by Hon. S. Macharia (SPM) delivered in Nyeri CMCC No.51 of 2018 on the 7<sup>th</sup> day of September 2021 pending the hearing and determination of the appeal.
  5. That the entire ruling delivered by Hon. S. Macharia be set aside.
  6. That the applicant be discharged from any consequential costs arising from this execution



7. That the decree, the warrants and proclamation orders issued therein for execution be immediately recalled and or cancelled for introducing a new party unknown to the pleadings and an exaggeration of the actual amount as pleaded by the Respondent.

2. The grounds are that :-

1. The Respondent and the applicant are parties in Nyeri CMCC NO.51 of 2018 in the capacity of plaintiff and defendant respectively.
2. That the applicant filed an appeal arising from the judgment in Nyeri CMCC No.51 of 2018 and an application for stay of execution.
3. That subsequently, the application for stay and the appeal were compromised by way of a consent entered to by the parties.
4. That in line with the consent therein, the applicant made payments.
5. The Respondent subsequently alleged that there was an error on the face of the record (consent) and filed an application to set aside the consent.
6. The application was dismissed for want of jurisdiction.
7. The Respondent proceeded to file an application for review in the lower court.
8. The application was allowed
9. The applicant preferred an appeal against that decision.
10. The Respondent proceeded to execute against the applicant without notice issued on the warrants of attachment.
11. That the applicant is aggrieved by the entire ruling on review and hence the appeal herein.

3. The Respondent filed a replying affidavit dated April 1, 2022 in opposition to the application.

The applicant filed a further affidavit and a Notice of Preliminary Objection dated 16<sup>th</sup> May 2022.

### **Respondents case**

4. The Respondent contends that parties herein entered into a consent for the decretal sum of Kshs 12,000,000/= and proceeded to set out the manner of payment. This consent was filed in court on 21st August and on 14<sup>th</sup> November, 2019.

It was adopted as an order of the court and subsequently the applicant made payments but it was later realized that the consent had an arithmetic error on the calculations regarding the instalments on the last payment to be made.

This anomaly was transmitted to the applicant's advocates but there was no agreement on the error with the applicant insisting that they had made full payment as per the consent.

5. The Respondent filed an application seeking for the amendment/or setting aside of the order. The court ruled that it had no jurisdiction as the consent emanated from the lower court that issued the consent order.



On 17<sup>th</sup> June 2021 the Respondent file an application to set aside the order and or in the alternative to amend it on account of an error in calculations.

The court proceeded to amend the order dated the 14<sup>th</sup> day of November 2019. The Respondent proceeded to extract a decree for the balance of the decretal sum including costs of the suit and proceeded to commence execution proceedings. Further that the amount in the decree dated 4<sup>th</sup> March 2022 is for Kshs,1,050, 000/= plus interest and costs of the suit assessed at Kshs 303,720/= which is the balance due and owing and at no time was there an introduction of a 3<sup>rd</sup> party.

It's the Respondents contention that the execution proceedings are proper and the applicant ought to settle the debt to alleviate further expenses instead of filing appeals each time execution is commenced.

6. It is further contended that the appeal has no chances of success as the ruling being challenged relates to an amendment of an apparent error on the face of the consent. No security of costs has been offered. In the event the court finds that is reason for stay the applicant be ordered to deposit the sum of Kshs,1,759320/= as a condition.

### Issues for determination

7.
  - a. Whether the court has Jurisdiction to entertain the preliminary objection.
  - b. Whether the applicant has met the threshold of the conditions for stay.

### The Law

8. Whether the court has jurisdiction to entertain the preliminary objection.

In the case of *Mukisa Biscuits Manufacturing Co. Limited v West End Distributors* 1969 EA 696. It was held:- A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. As per Charles Newbold:- "A Preliminary Objection is in the nature of what used to be a demurrer.

It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessary increase of costs and on occasion, confuse the issue, and this improper practice should stop."

In the case of *Hassan Nyange charo Versus Khatib Mwasbetani and 3 others*, (2014) e KLR. It was held:-

"Thus a Preliminary objection may be raised on a pure question of law. To discern such a point of Law the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record."

9. The Preliminary objection raised by the appellant is to the effect that, the plaint filed in the trial court was not accompanied by a written authority under a seal pursuant to order 4 rule 1(4) and 1 (6) of the civil procedure rules.
10. It is noted that this Preliminary Objection challenges a suit that was filed and concluded and judgment delivered. The appeal before this court is not against the Judgment and decree of the lower court and the preliminary objection though on a point of law is not capable of disposing off the appeal.



In the celebrated case of *Owners of the Motor Vessel "Lilians" –Versus – Caltex Kenya Ltd* (1989) e KLR. It was held:-

“Jurisdiction is everything, without it a court has no power to make one more step, where a court has no Jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of Law downs its tools in Respect of the matter before it, the moment it holds the opinion that it is without Jurisdiction.”

11. The Preliminary Objection before this court is on a pleading which was filed in the lower court. In the lower court the pleading was not challenged. The applicant participated fully in those proceedings to the point of entering a consent and subsequently paid substantial amounts towards settling the decretal sum.
12. The appellant/applicant ought to have raised the issue of challenging the pleadings, before the lower court so as to gain a stand point to challenge the ruling before this court on appeal. Having not raised that issue in the lower court, this court is not clothed with Jurisdiction to entertain the Preliminary Objection. The upshot is that the Preliminary Objection has no merit and it is dismissed with costs.

### **Whether the applicant has met the threshold of Conditions for stay**

13. Order 42 rule 6 (2) of the [Civil Procedure Rules](#)

“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 above performance for such decree or order as may ultimately be binding on him has been given by the applicant.

Under order 42 rule 6 (3) of the [Civil Procedure rules](#), the applicant has to satisfy the court that

- (1) Substantial loss may result to him
- (2) That the application has been made without unreasonable delay and
3. That the applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

In the case of [Butt Versus Rent Restriction tribunal](#) 1979 the court of appeal held:-

1. The power of the court to grant or refuse an application for a stay of execution is discretionary and the discretion should be exercised in such a way as not to prevent an appeal.
2. Secondly, the general principal in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the Judge’s discretion.
3. A judge should not refuse a stay, if there are good grounds for granting it merely because, in his opinion, a better remedy, may become available to the applicant at the end of the proceedings



4. The court in exercising its discretion whether to grant or refuse an application for stay will consider, the special circumstances and its unique requirements.

The court in exercising its power under order 42 rule (6) (2) of the Civil procedure rules can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

### **Substantial loss**

14. The applicant must state clearly what loss if any it stands to suffer.

In the case of Shell Ltd Versus- Kibiru and another (1986) e KLR 410 platt J A held:-

“The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages.

It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High court failed because the gist of the conditions set out in order 41 rule 4 (now order 42 rules 6 (2) of the Civil Procedure Rules was not met.

There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts. It was further held, it is usually a good rule to see if order 42 rule 6 of the civil procedure rules can be substantiated if there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event.

Substantial loss in its various forms is the cornerstone of both Jurisdiction for granting stay that is what has to be prevented. Therefore, without this evidence it is difficult to see why the Respondent should be kept out of their money.” In the present case it has not been demonstrated that if the application for stay is not granted, the appeal would be rendered nugatory and that the Respondent is so impecunious that it would not be in a position to refund the decretal amount.

### **Delay**

15. The ruling appealed from was delivered on 7<sup>th</sup> September, 2021. The application dated 17<sup>th</sup> March 2022 was filed on 22<sup>nd</sup> March 2022. This is a duration of six months. No proper explanation has been given for this delay.

However, in the exercise of this courts discretion, and bearing in mind that the applicant has already made payments to the Respondent which are substantial in nature and bearing in mind the principle of equality of arms I find in the circumstances of this case a stay ought to be granted which I do but on the condition that the applicants deposit in court the decretal sum of Kshs 1,739,320/= within 21 days from the date of this ruling.

**RULING DELIVERED, READ AND SIGNED IN OPEN COURT AT NYERI THIS 16<sup>TH</sup> DAY OF MARCH, 2023**

**HON. JUSTICE M. MUYA**

**JUDGE**

**In the presence**



Miss Ochieng.....Appellant

Moraa for Mugambi.....Respondent

Court clerk: Kinyua

30 days R/A.

