**Tahmeed Express Limited v Mohamed & 2 others (Civil Appeal E053 of 2022) [2023] KEHC 4119 (KLR) (5 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4119 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT VOI**

**CIVIL APPEAL E053 OF 2022**

**OA SEWE, J**

**MAY 5, 2023**

**BETWEEN**

**TAHMEED EXPRESS LIMITED ..... APPELLANT**

**AND**

**ZAITUN ALIAS ZAITUN AHMED MOHAMED ..... 1ST RESPONDENT**

**TAHMEED COACH LIMITED ..... 2ND RESPONDENT**

**CHARLES MUTUKU KAMBA ..... 3RD RESPONDENT**

**RULING**

1. This ruling is in respect the Notice of Motion dated November 3, 2022. The application was filed by the appellant, Tahmeed Express Limited, under Articles 10 and 159(2)(d) of the *Constitution*, Section 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya as well as Order 42 Rule 6, Order 45 and Order 51 Rule 1 of the *Civil Procedure Rules, 2010*. It seeks orders that:

   (a) Spent

   (b) Spent

   (c) Pending the hearing and determination of the appeal, a stay of execution in Voi SRM Civil Suit No 144 of 2019, of the ruling dated November 1, 2022, the judgment and decree dated September 21, 2021 and all consequential orders be granted.

   (d) The costs of the application be provided for.

   (e) Any other orders that meet the ends of justice be granted.

2. The application was premised on the grounds that, on the September 21, 2021, Hon F M Nyakundi, SRM, entered judgment in favour of the respondents for the sum of Kshs 5,835,350/= plus interest and costs; and that, aggrieved with the judgment, the appellant filed an application for review dated

June 21, 2022 on the ground that there was an error apparent on the face of the record. The appellants further complained that, instead of sending the file to Hon F M Nyakundi, SRM, for consideration, another magistrate, Hon Sinkiyian, SRM, proceeded to consider and dismiss the application vide her ruling dated November 1, 2022.

3. The appellant has consequently appealed the decision of Hon Sinkiyian, SRM, in this appeal and now seeks for stay of execution pending the hearing and determination of the appeal. He is apprehensive that the respondents may execute the decree before the hearing and determination of the appeal, which it believes has high chances of success. The appellant further averred that security has already been given by dint of the orders of the lower court; and therefore that no prejudice will be suffered by the respondents.

4. The application was supported by the affidavit of Nassor Khalifan Said, sworn on November 3, 2022 in which the grounds aforementioned were expounded on. The appellant also annexed to the Supporting Affidavit a copy of the judgment dated September 21, 2021, a copy of the ruling dated November 1, 2022 and a copy of the Funds Transfer Slip in respect of the security provided before the lower court. Thus, the appellant prayed that its application be allowed and the orders sought granted as prayed.

5. The respondents opposed the application vide their Replying Affidavit sworn by the 1st respondent, Zaitun Ahmed alias Zaituni Ahmed Mohamed. She averred that the application is incompetent for the reason that it was premised on an affidavit sworn without the authority of the appellant. She accordingly prayed for the striking out of the Supporting Affidavit. The 1st respondent further averred that in so far as it offends the provisions of Section 6 of the *Civil Procedure Act*, the application is a non-starter; and that in any event, the appeal being an appeal against a money decree, is incapable of being rendered nugatory. She therefore averred that the appellant has not demonstrated that it stands to suffer substantial loss if stay of execution is not granted.

6. The application was canvassed by way of written submissions, pursuant to the directions given on December 9, 2022. Consequently, written submissions were filed on behalf of the appellant on March 7, 2023 reiterating that the appeal is arguable and has been brought without delay. It was further the contention of the appellant that, unless the orders sought are granted, it stands to suffer substantial loss as the execution shall proceed to conclusion, thereby rendering the appeal nugatory. Counsel submitted that the respondents have not shown that they are in a position to refund the decretal sum in the event of a successful appeal. Reliance was placed on *Halai & Another v Thornton & Turpin [1990] KLR 365* and *KCB v KPCU*, Civil Appeal No 85 of 2010, among other authorities, to buttress the appellant's arguments that the onus was on the 1st respondent to prove her ability to repay the decretal sum in the event of a successful appeal.

7. In the 1st respondents' written submissions, filed on February 2, 2023, Mr Ndungu reiterated the grounds raised in opposition to the application dated November 3, 2022. He took issue with the fact that the appellant had not invoked the provisions of Order 40 of the *Civil Procedure Rules* as the basis for extension of the stay orders granted before the lower court. He therefore impugned the application, contending that it is an affront to Section 6 of the *Civil Procedure Rules* as a similar application had been argued and allowed in Voi CMCC No 144 of 2019.

8. On the authority of *Heywood Ochieng Aseso v Jackson Kimeu ulinge & 2 Others [2013] eKLR*, counsel sought that the Supporting Affidavit be struck out, for having been filed without the authority of the appellant. On the merits, counsel relied on Order 42 Rule 6 of the *Civil Procedure Rules* and the case of *Kenya Shell Limited v Kariga [1982-88] 1 KAR 1018*, among other authorities, to demonstrate that it was incumbent upon the appellant to prove substantial loss, which it failed to do. Accordingly, Mr Ndungu prayed for the dismissal of the appellant's application with costs.

9. I have given careful consideration to the application dated November 3, 2022 within the backdrop of the proceedings held by the lower court in Voi CMCC No 144 of 2019 and the impugned ruling dated November 1, 2022. The undisputed facts are that the 1st respondent filed a suit before the lower court for special and general damages, including damages for diminished earning capacity on account of injuries sustained by her in a road traffic accident that occurred on February 5, 2019. The 1st respondent was, at the material time, lawfully travelling as a fare paying passenger in Motor Vehicle Registration No KCC 201H belonging to the 2nd defendant in the lower court suit.

10. Upon hearing the parties, the learned magistrate, Hon FM Nyakundi, SRM, found in favour of the 1st respondent in a judgment dated September 21, 2021, and awarded her a total of Kshs 5,863,820/= in general and special damages on the basis of 100% liability on the part of the three defendants jointly and severally. An application for review was dismissed by Hon Sinkiyian, SRM, on November 1, 2022; and although no appeal was filed in respect of the judgment and decree dated September 21, 2021, the appellant has opted to challenge the ruling and order dated November 1, 2022.

11. Before delving into the merits of the application for stay, it is imperative to dispose of the preliminary points raised in respect thereof by counsel for the respondents; the first of which was that the application is incompetent for having been premised on an affidavit that was sworn without authority. At paragraph 4 of the 1st respondent's Replying Affidavit, she deposed that:

> " ...the deponent of the supporting affidavit does not have capacity to swear the affidavit and seek the orders sought as no authorization has been adduced authorizing the said deponent to swear the supporting affidavit and seek the orders sought on behalf of the defendant/ applicant company."

12. In his written submissions, counsel for the 1st respondent did not specifically point out which provision of the law was breached, but perhaps he had in mind Order 4 Rule 1(4) of the *Civil Procedure Rules*, which stipulates that:

> " Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so."

13. In an explication of the essence of the provision, the Court of Appeal held as hereunder in *Spire Bank Limited v Land Registrar & 2 others [2019] eKLR*:

> " It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized."

14. In this instance, the suit had been commenced before the lower court and has reached the appellate stage. To my mind, the mischief of an unauthorized person making a deposition in the appeal does not arise, considering that the same manager who deposed to the Supporting Affidavit participated in

the proceedings before the lower court. In fact, he was the deponent of the Supporting Affidavit filed in support of the review application that is the subject of this appeal. Moreover, in *Makupa Transit Shade Limited & Another v Kenya Ports Authority & Another [2015] eKLR*, the Court of Appeal held:

> " ...In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorised by it. It was therefore sufficient for the deponents to state that "they were duly authorised." It was then up to the appellants to demonstrate by evidence that they were not so authorised..."

15. In the impugned affidavit, Mr Nassor Khalifan Said deposed at paragraph 1 thereof, that he is the manager of the appellant/applicant and that he was authorized to swear the affidavit on behalf of the appellant. Accordingly, the evidential burden shifted to the 1st respondent to prove that Mr Said had no such authority, which burden was not discharged herein. I therefore find no basis for striking out the appellant's Supporting Affidavit as proposed.

16. The second preliminary point raised by the 1st respondent was that the application is incompetent from the standpoint of Section 6 of the *Civil Procedure Act*, which states:

> No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

17. The argument was raised on the ground that a similar application for stay had been filed before the lower court in respect of which a stay order had been issued. I have no hesitation in rejecting that argument granted the clear provisions of Order 42 Rule 6(1) of the *Civil Procedure Rules* that:

> No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside."

18. Turning now to the merits of the application, Order 42 Rule 6(2) of the *Civil Procedure Rules* provides that: -

> (2) No order for stay of execution shall be made under subrule (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.

19. Thus, the appellant had to satisfy the court that, it stands to suffer substantial loss unless the order for stay of execution is made; that it made the application without unreasonable delay; and finally, that it has provided security for the due performance of the order as may be made by court. However, before

embarking on a discussion of the conditions it is imperative for the Court to consider the nature of the order sought to be stayed and whether it is amenable to stay.

20. It is noteworthy that the appeal arises from the ruling and order of Hon Sinkiyian, SRM, dated November 1, 2022; which decision resulted in what was essentially a negative order in so far as the application for review was found to be lacking in merit and was therefore dismissed with costs. It is now trite that such an order is not amenable to stay. Hence, in *Cooperative Bank Limited v Banking Insurance & Finance Union Kenya [2015] eKLR*, the Court of Appeal explained that:

> "An order of stay of execution is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposed the existence of a situation to stay – called a "positive order"- either an order that has not been complied with or has partly been complied with...The Court has identified negative orders that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order."

21. The same approach taken in *William Wambugu Wahome v Registrar of Trade Unions & Another [2006] eKLR*, thus:

> "By dismissing the Judicial Review Application, the Superior Court did not thereby grant any positive order in favour of the Respondents which is capable of execution. If the order sought is granted, it will have the effect of reviving the dismissed application. This Court cannot undo at this stage what the superior court has done. It can only do so after the hearing of the appeal."

22. Likewise, in *Kanwal Sarjit singh Dhiman v Keshavji Jivraj Shah [2008] eKLR*, the Court of Appeal reiterated its stance thus:

> "The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on December 18, 2006. The order of December 18, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences v Oranga & Others [1976] KLR 63* at page 66 paragraph C)."

23. Moreover, it is significant that no appeal has been preferred in respect of the predicate judgment of the lower court dated September 21, 2021. This is an additional reason to decline stay; a point aptly discussed in *John Mbua Muthoni & Another v Ruth Muthoni Kariuki [2017] eKLR* and Nakuru Judicial Review No 1 of 2018:*Republic v Kenya Revenue Authority, Ex Parte Rayan Logistics Ltd*, with which I entirely agree. In the former case, Hon Ngugi, J (as he then was) held:

> "...A broader holding would be that whenever a Court strikes out a suit and refuses to grant the substantive orders sought by the court a stay of execution is not available since any such stay of execution would not be directed at a decision against which the intended appeal is not directed."

24. In the premises, it is plain that in the circumstances set out by the appellant in the application dated November 3, 2022, an order of stay would not lie.

25. In the result, I find no merit in the appellant's application dated November 3, 2022. The same is hereby dismissed with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 5TH DAY OF MAY 2023**

**OLGA SEWE**

**JUDGE**