



**Auto Selection (K) Limited v Mumo (Civil Appeal E162 of 2022)
[2023] KEHC 18285 (KLR) (Civ) (8 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18285 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E162 OF 2022

JN MULWA, J

JUNE 8, 2023

BETWEEN

AUTO SELECTION (K) LIMITED APPELLANT

AND

EUNICE KALONDU MUMO RESPONDENT

RULING

1. By an Application dated March 17, 2022, the Applicant seeks a stay of execution the decree and ruling of the trial Court's ruling dated March 14, 2022 in Milimani Small Claims Court No E1374 of 2022, pending hearing and determination of the appeals by a Memorandum of Appeal dated March 17, 2022 praying that the ruling and orders of March 14, 2022 be set aside.
2. The application is premised upon provisions of Order 22 Rule 51 and 52, Order 40 Rules 1, 2 & 4, Order 42 Rule 6 and Sections 1A, 1B and 3A of the Civil Procedure Act and the Rules thereunder, and Supporting Affidavit sworn on March 17, 2022 one Georgia Kioko.

The reasons for the application as stated at the face of the application and supporting affidavit are that the trial court ordered payment for the vehicle at the price of a new vehicle whereas the claimant had been in possession and had used the subject vehicle for two years, hence unjust enrichment, and which would remain the concept of the Hire Purchase nugatory.
3. It is a further averment that should the said sum of Kshs 750,000/= be paid to the Respondent, it would be difficult to recover the same, second the intended Appeal be successful, which if further detained will come further deterioration pending hearing and determination of the Appeal.
4. In opposing the application, the Respondent and by her replying affidavit, states that the intended Appeal has no chances of success as she had already paid owner 2/3 of the purchase price pursuant to the Higher Purchase Agreement and that no court order was obtained before repossession of the



same; and further that if the orders sought are granted, she will suffer double loss; loss of the vehicle and the already paid purchase price.

5. I have considered the parties submissions.

By the time of repossession of the vehicle, two thirds of the prize had been paid, this having been admitted by both parties.

However, under Section 5(4) of the Hire Purchase Act, it is clear that: -

5(4) Unless a hire-purchase agreement has been registered under Subsection 2 of this Section

a. no person shall be entitled to enforce the agreement against the hirer or to enforce any contract of guarantee relating to the agreement, and the owner shall not be entitled to enforce any right to recover the goods from the hirer.

6. In the case *Taawawa Supermarket Limited v Fina Bank Ltd*, Civil Appeal No 118 of 2002, the court of Appeal rendered that failure to register did not render the agreement void or the result that the company would be refunded all the money it paid under the agreement; that it retained its validity as a contract and was enforceable as such.

7. Upon the above, the trial court in its judgment sought to be appealed against allowed the claimant's (Respondent's) prayers; that she was entitled to the Kshs 750,000/= as prayed in the Plaint; this sum is stated to have been the economic loss assessed by the trial court from the date the vehicle was repossessed by the Applicant, and which continues to impact adversely to the Respondent circumstances.

8. Stay of execution orders pending Appeal are premised under Order 42 Rule 6(2) of the Civil Procedure Rules; and the conditions a party ought to demonstrate are stated as:

- a. Demonstration of substantial loss to the applicant if stay is denied.
- b. Application ought to be made without undue or unreasonable delay.
- c. Scrutiny for the due performance of the decree ought to be furnished by the Applicant as the court my order.

9. These conditions have been stated in numerous decisions *RWW vs EKW vs EKW* [2019] eKLR.

James Wangalwa & Another vs Agnes Naliaka Chesolo [2012] eKLR *Kenya Shell Limited v Kibiru* [1986] KLR 410; *victory construction v BM (a minor suing through next friend one PMM* [2019] eKLR among many others.

10. The thread running across all the decisions is that substantial loss, being the cornerstone for an application for stay must be demonstrated to the satisfaction of the court; that chances of the Appeal succeeding must also be established and that sufficient security ought to be provided.

11. I have considered what loss the Applicant considers to be substantial loss.

Indeed, the Respondent had paid a substantial sum of the purchase price, more than 2/3, at the date of repossession of the vehicle which was two years as at date of the impugned judgment, a fact admitted by both parties. The trial court in its judgment assessed the economic loss to the Respondent at Kshs 750,000/= and decreed payment of the same by the Appellant.

12. Further, the Appellants having repossessed the vehicle and the 2/3 purchase prize having been aid, there would be no reason whatsoever to hold that it would suffer any loss, as it holds both the money



and the vehicle. Indeed, it is the Respondent who would suffer substantial loss if the orders sought by the Appellant are granted. To grant or refuse an order of stay of execution is discretionary –RWW vs EKW (*Supra*).

13. The purpose for an order of stay of execution pending appeal is to preserve the subject matter in dispute; in this case both the money paid and the vehicle.

Both ought to be safeguarded so as not to render the Appeal nugatory. The court is also mandated to make sure that none of the parties suffers prejudice that cannot be compensated in costs.

14. As to security, though upon the court's discretionary, circumstances to each matter ought to be taken into account. As stated earlier, the Appellant is in possession of both the money and the vehicle.

No prejudice can be suffered by the Appellant in the circumstances. As for the Respondent, her rights from the judgment of the trial court, an order of stay would deny her enjoyment of the judgment fruits. There is no dispute that the appeal may take quite a long time to be heard due to the backlog of appeals in the High Court.

15. The Appellant submits that the Respondent may not be financially able to pay the sum of Kshs 750,000/= being the judgment such if the same is paid to her.

In the case Stephen Wanjohi V Central Glass Industries Ltd, Nairobi Hcc No 6726 of 1991, the Court held that:

“----- Lack of means is not necessarily a ground for granting stay ----- that financial ability of a decree holder solely is not a reason for allowing stay;”

16. For the above reasons, I find that the Applicant has failed to establish the two conditions; substantial loss and prejudice it would suffer if the stay orders are denied, and find that it would be the Respondent who would suffer.

17. Consequently, the court finds and holds that the Applicant has failed to meet the conditions upon which a stay order pending appeal may be granted as stated under Provisions of Order 42 Rule 6 of the Civil Procedure Rule.

18. However, to preserve the subject matter of the Appeal, the Applicant/Appellant is ordered to deposit the sum of Kshs 750,000/= in an interest earning account in the joint names of the Advocates for the parties within 30 days of this ruling, failing which the Respondent will be at liberty to execute the decree.

19. The costs of this application shall abide the outcome of the Appeal.

20. Orders accordingly.

DELIVERED DATED AND SIGNED THIS 8TH DAY OF JUNE, 2023

JANET MULWA

JUDGE

