**Mochoge v One Day Pay Credit Limited & another (Civil Appeal E439 of 2022) [2023] KEHC 18415 (KLR) (Civ) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18415 (KLR)

**REPUBLIC OF KENYA**

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

**CIVIL**

**CIVIL APPEAL E439 OF 2022**

**JN NJAGI, J**

**JUNE 14, 2023**

**BETWEEN**

**SEME MOCHOGE ..... APPELLANT**

**AND**

**ONE DAY PAY CREDIT LIMITED ..... 1ST RESPONDENT**

**LEONARD CHEGE T/A LAAR AUCTIONEERS ..... 2ND RESPONDENT**

**RULING**

1. The Appellant/Applicants have filed an application dated June 22, 2022 seeking for prayers that:
    1. Spent
    2. Spent
    3. This Honourable court do order stay of execution of the ruling and order in MCCC No E439 of 2022, Seme Mochoge v One Pay Day Credit Limited & Leonard Chege t/a Laar Auctioneers pending the hearing and determination of the appeal herein.
2. The application was premised on grounds stated on the face of the application and supported by the affidavit of the Applicant, Seme Mochogo. The grounds thereof are that the Applicant was advanced a loan by the 1st Respondent and placed his motor vehicle Registration No KCF393 Izusu lorry as security. The Applicant deposited with the 1st Respondent postdated cheques for the payment of the full loan amount together with interest. That on January 21, 2022 around 10 am the 1st Respondent instructed the 2nd Respondent to impound and repossess the Applicant`s motor vehicle on alleged failure to service the loan. That the due date for the repayment of the loan was on January 22, 2022 and therefore it was malicious and without justification for the 1st Respondent to repossess the motor vehicle when the due date had not passed and the Applicant had not defaulted payment. That he filed

an application with the trial court which wrongly dismissed the application. This prompted him to file the appeal pending herein.

3. The Applicant contends that if the application herein is not allowed he will be condemned unheard which is contrary to the rules of natural justice. That he has a tenable appeal. That the Respondents will not suffer any prejudice that cannot be compensated by way of damages if the application is allowed. That he is willing to abide by such reasonable conditions that this court may grant to enable him pursue the appeal.

4. The application was opposed by the Respondents through the replying affidavit of Nazir Madatali, the General Manager of the 1st Respondent wherein he deposed that the Applicant was advanced a loan of Ksh 1,852,000/= by the 1st Respondent to be paid in monthly instalments of six months. That the loan was secured by a charge on motor vehicle reg No KCF 393Y. That the Applicant gave post dated cheques towards the payment of the loan. The first cheque of Ksh 49,508/= dated January 17, 2022 was presented to the Applicant`s bank on January 19, 2022 and was dishonored on the ground that the Applicant had closed his account with the bank. That the second cheque of Ksh 404,267/= dated January 21, 2022 was presented for payment on January 24, 2022 and was again dishonored for the same reason. Copies of the front image of the two cheques were annexed and marked NM 1 and NM 2 respectively. The 1st Respondent thereupon instructed the 2nd Respondent to seize the subject motor vehicle as the Applicant had defaulted in meeting his obligations as per the terms of the loan agreement. That after delivery of the ruling by the lower court the Applicant was granted 30 days stay of execution. Therefore, that the instant application is a scheme calculated to delay the matter and to deny the 1st Respondent the enjoyment of the fruits of a regular judgment procedurally entered.

5. It was deposed that the 1st Respondent is a person of means and able to refund the sum in the unlikely event that the Applicant is successful with the appeal. That the Applicant has not offered any security and therefore does not deserve the orders sought. That the Applicant has already been granted a stay of 30 days and has not demonstrated the prejudice he will suffer if the prayers sought are not granted. The Respondents urged the court to decline to grant the orders sought and dismiss the same with costs to them.

**Submissions**

6. The application was canvassed by way of written submissions. The Applicant through the firm of Atuti & Associates Advocates, submitted that whereas the court is guided by the provisions of Order 42 Rule 6 in deciding whether or not to grant an application for stay of execution, the court is obligated to consider the same in light of the overriding objective stipulated in Sections 1A and 1B of the *Civil Procedure Act*. Reference was made to the case of *Stephen Boro Gitiha v Family Finance Building Society & 3 Others*, Civil Application No. Nai. 263 of 2009 where Nyamu JA (as he then was) held that the overriding objective overshadows all technicalities, precedents and rules. Further reliance was made on Article 159 (2) (a) and (b) of the *Constitution* which obligates the courts to do justice to all without undue regard to procedural technicalities.

7. The Applicant also made reliance on the case of *Shah v Mbogo* (1974) E.A. where the court stated that the main concern of the court must always be to do justice to all parties provided that no irreparable damage was suffered by the opposing party. The case of *Kenya Shell Limited v Kibiru* (1986) KLR 410 was cited where Kneller Ag.JA (as he then was) stated that:

> It is usually a good rule to see if order XLI rule 4 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 corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.

8. The advocates for the Respondents, S N Thuku & Associates, on the other hand submitted that the 1st Respondent will suffer more irreparable harm due to the extended nature of the loan repayment period which shall arise in the event that stay of execution is granted. That the Applicant will not suffer any irreparable harm should the stay of execution be denied. The Respondents relied on the holding in the case of *Megashell Transporters Limited v Co-operative Bank of Kenya Limited* (2021) eKLR where the court held as follows:

> It has not been shown that the Respondent was not entitled to repossess the subject motor vehicle in event of default by the Appellant. If this court grants an injunction as sought, then it will have the effect of widening the outstanding amount and at the same time diminishing the Respondent's security. To that extent, I agree with the finding of my brother Hon. P J. Otieno in the case of John Mwashigandi (supra) that an injunction of this nature will be injurious to both the parties and not just at all.

9. It was submitted that the subject matter herein is a vehicle that can be valued and quantified. That in the event that the Appellant succeeds in his claim then the damage caused can be quantified and the Appellant would be adequately compensated. Reliance to that end was made in the holding in the case of Megashell Transporters (*supra*) where it was held that:

> The Appellant was in clear understanding that default on its part would attract repossession of the vehicle, and eventually a sale. In event the sale is effected and the Appellant succeeds in its claim against the Respondent, then the loss it might suffer can be quantifiable in monetary terms and be considered. I am therefore not persuaded that the failure of granting injunction at this stage will occasion irreparable loss to the Appellant. Consequently, I find no merit on the application dated 3/12/2020 and the same is hereby dismissed with costs to the Respondent."

10. The Respondents submitted that the order of the trial court was a negative order that is incapable of execution. The Respondents cited the case of *Gerald Masibayi Wafula vs Richard Wafula Masinde* (2022) eKLR where the court in dismissing an application for stay of execution held that for such an order to be granted there must be a positive order. Otherwise a negative order is incapable of execution and cannot be stayed.

**Analysis and Determination**

11. This being a first appeal, it is the duty of this court to revisit and exhaustively re-evaluate the evidence presented before the trial court and draw its own independent conclusions but bearing in mind that unlike the trial court, this court did not have the advantage of seeing and hearing the witnesses and give due allowance for that disadvantage - see *Selle & Another V Associated Motor Boat Company Ltd & Others*, [1968] EA 123.

12. I have considered the grounds in support of the application, the grounds in opposition thereto and the submissions by the respective advocates for the parties. The Respondents argued that what the trial court issued was a negative order] that is incapable of execution and therefore that the same cannot be stayed. However, it is admitted in the pleadings that the trial court ordered the Applicant to pay the decretal sum within 30 days failure to which execution was to proceed. This, contrary to the submissions by the Respondents, is not a negative order. It is a positive order for which this court has

the discretion on whether to allow or not to allow stay of execution pending appeal. The argument that the order of the trial court is a negative order is thus dismissed.

13. The question then is whether the instant application is merited. An applicant for stay of execution pending appeal has to satisfy three conditions set out in Order 42 Rule 6(2) of the *Civil Procedure Rules, 2010*. These are that:

    1. The application was brought without unreasonable delay.
    2. The applicant will suffer substantial loss unless the orders sought are granted.
    3. The applicant has given security for due performance of the decree as may be binding on him.

14. The impugned ruling of the trial court was delivered on June 8, 2022. The instant application was filed on June 24, 2022 which was three weeks after the delivery of the ruling. The application was thus filed without unreasonable delay.

15. The applicant is further required to demonstrate that he will suffer substantial loss if the orders sought are not granted. In this respect, the courts have stated that it is not just sufficient for a party to allege that he will suffer substantial loss and fail to substantiate the type of loss he will suffer unless the orders sought are granted. In the case of *Samvir Trustee Limited vs. Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997, Warsame J.(as he then was) expressed himself as thus:

> For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...

16. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, it was observed that for a party establish substantial loss he/she has to show:

> ..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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

17. In Kenya Shell case (*supra*), Platt, Ag JA (as he then was) expressed himself as follows on this subject:

> " It is usually a good rule to see if Order XLI Rule 4 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 corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money".

18. The Applicant herein contended that in the event that the Respondents proceed to sell the motor vehicle he will suffer irreparable loss and damage as the appeal herein will be rendered nugatory. The Applicant however did not substantiate the loss he would suffer if the orders sought are not granted.

The argument that he would suffer irreparable loss if his motor vehicle is sold does not amount to substantial loss due to the fact that execution is a lawful process as was noted in the James Wangalwa case (*supra*), where the court stated that:

> " No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

19. The matter herein involves attachment of a motor vehicle whose value can be quantified. It was part of the agreement between the parties that default of payment of the loan would lead to repossession of the motor vehicle. There was no allegation by the Applicant that the Respondents are not in a position to refund any money paid to them in the event that the appeal by the applicant will be successful. Instead it is the Respondents who said that they are in a position to refund any money paid to them in the event that they lose the appeal. This was not controverted. In the premises the Applicant has not shown that there is a possibility of him losing his money once paid to the Respondent as money is something capable of being refunded. He has thus not shown that a refusal of a stay of execution would render the appeal nugatory. In the case of Kenya Shell Limited v Kibiru & another (1986) KLR 410 which involved a money decree, the Court of Appeal held that:

> In this case the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being paid.

In the instant case there is no evidence that the Applicant will suffer substantial loss unless stay of execution is granted.

20. An applicant for an application for stay of execution pending appeal is required to give security for due performance of the decree. This is meant to give the parties an equal footing so that the Respondent has ready security to turn to in the event that the appeal is not successful. Having found that the Applicant has not shown that he will suffer substantial loss there is no need for me to consider the issue of security.

21. The purpose of an application for stay of execution pending appeal is to preserve the subject matter of the appeal. The court is required to balance the interests of the two parties. In *HGE v SM*, Civil Appeal No.20 of 2020, Kakamega (2020) eKLR the court observed that:

> The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

22. I have perused the grounds of appeal. The Applicant contends that the attachment of his motor vehicle was unjustified because the due date of the repayment of the loan had not passed. He however placed no evidence before the court to demonstrate so. In view of the finding of the court that the Applicant has not shown that he will suffer substantial loss unless the orders sought are granted, coupled with the fact that the decree herein involves money which can be refunded in the event that the appeal is successful, there is no reason to stay the execution of the decree in this matter.

23. The upshot is that the court finds no merit in the application for stay of execution dated June 22, 2022. The application is thus dismissed with costs to the Respondents.

Delivered, dated and signed at **NAIROBI** this **14th June 2023**

**J. N. NJAGI**

**JUDGE**

**In the presence of:**

Mr Nyangoro for Appellant/Applicant

Mr Thuku for Respondents

Court Assistant – Amina

30 days Right of Appeal.