



**Mega Transporters Co Ltd v Rage & another (Civil Appeal  
E005 of 2022) [2023] KEHC 20800 (KLR) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20800 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CIVIL APPEAL E005 OF 2022  
JN ONYIEGO, J  
JULY 21, 2023**

**BETWEEN**

**MEGA TRANSPORTERS CO LTD ..... APPELLANT**

**AND**

**ABDI ALI RAGE ..... 1<sup>ST</sup> RESPONDENT**

**ICON AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The consolidated applications for determination before this court are a notice of motion dated 02.06.2023 seeking stay of execution of the judgment/decree of the judgment delivered in CMCC No. 23 of 2020 pending the hearing and determination of the intended appeal and the application dated 5.06.2023 seeking release of mvs KAV015X-ZE727, KBD 555P-ZC and KBE 877V-ZD 3554 from the custody of Icon Auctioneers (2<sup>nd</sup> respondents) who had attached the same pursuant to the said judgment.
2. The two applications are supported by the affidavits sworn by Mr. Mohamed Ali, the director of the applicant herein and sworn on 02.06.2023 and 5.6.23 respectively in which he reiterated the grounds set out on the face of the notice of motion applications. In respect to the application dated 2-6-2023, he deposed that; after the trial court delivered its judgment, he filed an application for stay of execution but it was not allowed; his appeal has high chances of success; the respondent's suit was filed out of time without leave of the court; the applicant will suffer substantial loss if the same is not allowed and; the respondent will not suffer any prejudice if the application is not allowed.
3. With regard to the application dated 5<sup>th</sup> June 2023, it was averred that the process relied on by the 1<sup>st</sup> respondent in an effort to recover the decretal amount was legally flawed and if allowed, the respondents would have perpetuated an illegality. He deponed that he followed the decretal amount with Amaco



Insurance as the insurance was to indemnify the applicant by depositing the said amount in court as previously ordered.

4. He swore that the motor vehicles are the core and source of the applicant's revenue hence losing them to the respondents irregularly and unprocedurally would severely affect the applicant. It was stated that should execution issue and the appeal succeeds, it would be rendered nugatory and a mere academic exercise.
5. The said application was opposed by the 1<sup>st</sup> respondent via his replying affidavit sworn by Abdi Ali Rage on 08.06.2023 to the effect that on 14.05.2022, the trial court delivered a judgment in his favour. That the applicant preferred an appeal and simultaneously filed an application for stay of execution which was heard and via a ruling delivered on 23.11.2022 by Lady Justice Muchemi, a conditional stay was granted to wit that the applicant deposit half the decretal amount in a joint interest earning account within 45 days.
6. He deponed that the applicant failed to adhere to the said directions and therefore, the execution process was started after six months had elapsed without any action by the applicant. That the vehicles in question which the applicant sought to be released were attached pursuant to a valid court judgment and therefore, no justification was offered to enable their release. It was stated that the allegation that Amaco Insurance ought to have deposited the amount is a mere scapegoat given that Amaco Insurance is not a party to the suit herein.
7. When the matter came for directions, parties agreed to canvass the matter by way of written submissions but none of the parties complied.
8. I have considered the applicant's application wherein he is seeking stay of execution of the decree and judgment delivered by the trial court pending the hearing and determination of the intended appeal. I have also considered the ruling by Honourable Lady Justice Muchemi delivered on 23.11.2023 regarding the same subject.
9. The law regarding stay of execution pending appeal is clearly spelt out in order 42 rule 6 of the [Civil Procedure Rules](#) which stipulates as follows:
  6.
    - (1) 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.
    - (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.

10. It is trite law that a judge should not decline to issue a stay of execution order 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. The court in exercising the discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case is that the respondent has a right to enjoy the fruits of his judgment and the appellant has an undoubted right of appeal.
11. The 1<sup>st</sup> respondent urged this court to disallow the application and let him execute the judgment since the application lacks merit and deserves to be dismissed with costs. In this case, all that the applicant needed to establish are the three grounds set out under order 42 rule 6 of the Civil Procedure Rules As hereunder;
- i. That substantial loss may result to the 1<sup>st</sup> applicant unless stay of execution is ordered;
  - ii. The application for stay is brought without undue delay; and
  - iii. That 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 applicants.
12. The requirements for grant of stay pending appeal were clearly set out in Butt v Rent Restriction Tribunal [1982] eKLR 417 wherein the Court of Appeal held that the power of the court to grant or refuse an application for a stay must be exercised in such a way as not to prevent an appeal.
13. It is therefore incumbent upon the applicant to satisfy the essential elements above stated. On the first condition of proving whether substantial loss may result unless stay order is made, the Court of Appeal in the case of Mukuma v Abuoga(1998) KLR 645 held that substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory. It was therefore upon the applicant to demonstrate the kind of substantial loss he would suffer if the stay order was not, made in his favour and not merely stating that he would suffer loss if the order of stay was not issued.
14. It is clear that there is no contest that the judgment was entered for the 1<sup>st</sup> respondent in which it had been declared that he was entitled to an amount of Kes. 7,333,350.00 and costs and interests of the lower court.
15. In an application of this nature, the applicant should show the loss he would suffer if the stay order is not granted. The applicant averred that he is likely to lose out if the motor vehicles are sold and the appeal succeeds. In the case of National Industrial Credit Bank Limited v Aquinas Francis Wasike Misc Application 238 of 2005, the Court of Appeal was of the view that the evidential burden lies with the decree holder to prove that he has resources to pay back the decretal sum should the appeal succeed. On that ground alone, the applicant is likely to suffer substantial loss if the MVS are sold, appeal succeeds and the respondent fails to refund.
16. It should be noted that the right to be heard is provided for in our constitution. The applicant having expressed his intention to be heard, it is paramount that he be granted the opportunity. This is buttressed by Article 50 of the constitution which provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.



17. On the second condition, there is no contestation that the judgment of the trial court was delivered on 14.05.2022. A previous application seeking similar orders as these ones was filed and a determination made by this court although differently constituted. That notwithstanding, the appeal was not settled for hearing and therefore, the 1<sup>st</sup> respondent started the process of execution to realize the fruits of his judgment; it is the same action that necessitated the filing of the applications herein.
18. In my view, the applicant should not be shut out from exhausting his legal rights since the orders sought depend on the discretion of this court. In the case of *Jaber Mohsen Ali & Another v Priscillah Boit & Another* E & L No. 200 of 2012[2014] eKLR, the court stated that what is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the circumstance of the instant case, it is my view that the delay herein is not inordinate or excessive given that the court had already allowed the same.
19. From the record, the decree whose stay of execution is sought is a monetary decree. The applicant deposed that the intended appeal will be rendered nugatory if the stay is not granted. He proceeded to submit that he is apprehensive that if the orders of stay are not granted, he will suffer irreparable damage. Further, that the respondent had on 24.05.2023 purportedly in execution of the decree dated 17.05.2020 unlawfully and illegally attached the applicant's motor vehicles KAV 015X- ZE7273, KBD-ZC 3220 and KBE 877V -ZD 3554 without proclamation as is required by the law.
20. That the 2<sup>nd</sup> respondent repossessed the said vehicles without any notice of attachment or proclamation notice in accordance with the *Auctioneers Act*. He further submitted that the vehicles are the core and source of its revenue and that losing them in an unprocedural and illegal manner would severely affect him.
21. The court has a duty not to deny the judgment debtor his fruits of judgment and equally the applicant his right to a fair hearing and appeal as enunciated in Article 50(2)(q) of *the Constitution*; In the same breadth, the court in *Century Oil Trading Company Limited Vs Kenya Shell Limited Nairobi* [2008] eKLR held the view that: -

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful to the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”
22. From the depositions on record, it is more probable that the issue at hand calls for status quo pending the hearing and determination of the appeal. Indeed, if the respondent is left to execute the decree, it is my view that this will complicate the situation further and render the appeal nugatory if the applicant becomes successful.
23. On the 3<sup>rd</sup> condition, the Applicant ought to have offered such security for the due performance of the orders as may ultimately be binding on it; the applicant did not submit on the same but as already noted above, this court has the powers to make directions on the same. In my view, security must be one which can serve the purpose of guaranteeing due performance of such decree or order as may ultimately be binding on the applicant. This was the court's holding in the case of *Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR.



24. In the foregoing, I allow the application in the following terms;

- i. That an order of stay be and is hereby issued staying the execution of the judgment and consequential orders of the CMCC No. 23 of 2020 and entered on 14.05.2022 pending the hearing and determination of the intended appeal which in any event should be filed within 14 days from the date of delivery of this ruling in default the stay order granted herein shall lapse.
- ii. That the applicant to deposit half ( $\frac{1}{2}$ ) of the decretal sum in an interest earning account in the joint names of counsel for the parties within 60 days and in any event before the attached MVS would be released.
- iii. That failure to comply with order (ii) above, the stay orders herein shall automatically stand vacated and the execution process takes place.
- iv. That the 1<sup>st</sup> respondent shall have the costs of the application.
- v. The applicant to pay auctioneer's costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 21<sup>ST</sup> DAY OF JULY 2023**

**J.N. ONYIEGO**

**JUDGE**

