



REPUBLIC OF KENYA



KENYA LAW
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**Mogo Auto Limited v Opiyo (Civil Appeal E010 of 2023)
[2023] KEHC 19976 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19976 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E010 OF 2023
DO OGEMBO, J
JULY 12, 2023**

BETWEEN

MOGO AUTO LIMITED APPELLANT

AND

VICTOR WASONGA OPIYO RESPONDENT

RULING

1. The appellant/applicant, Mogo Auto Limited, has moved this court by way of a notice of motion application dated May 8, 2023. The application is brought under order 42 rule 6 and order 51 rule 1 of the *Civil Procedure Rules*, and section 3A of the *Civil Procedure Act*. The material prayer in the said application is prayer 3, that;

“That this honorable court be pleased to order stay of execution of the judgement delivered on January 27, 2023 (in Bondo PMCC No E78 of 2022), decree and all consequential orders thereto pending the hearing and determination of the appeal herein.”

2. By agreement of the parties, this application was canvassed by way of written submissions.
3. The submissions of the appellant/applicant were filed herein on May 30, 2023. In the same way, it was submitted that the financial position of the respondent is unknown and were the applicant to be successful in the appeal, there is no guarantee that he can refund the decretal sum. And that the applicant is ready and willing to furnish security by depositing the entire judgement sum in court, issuing a bank guarantee for the judgement sum or securing the same in any other manner. It was further submitted that this application has been made without delay after a failure to be supplied with certified and verifiable ruling (*Mvinga Co Ltd Archdiocese of Nairobi Registered Trustees* [2020] eKLR.



4. The court was urged to consider the possible prejudice that a party stands to suffer, the need to balance the interest of the 2 parties, need to protect a party's opportunity to agitate its dispute and need of a party to be heard substantially in a matter. The applicant cited several authorities to support its case that the respondent would not be in a position to pay back the decretal amount should the appeal succeed. Those included, [Focin Motorcycles Co Ltd v Ann Wambui Wangui and another](#) [2018] eKLR, [Lucy Nyamu Kimani v Lawrence Mburu Mutbinga](#) [2006] eKLR, and the Court of Appeal decision in [National Industrial credit Bank Ltd v Aquinas Francis Wasike and another](#), Nai civil appeal No 238 of 2005.
5. The applicant re-iterated its position of being ready to furnish security in any form they could order. The applicant based his submissions on the focin motorcycles case and that of [Stanley Karanja Wainaina and Ano v Ridon Anyango Mutubwa](#) [2016] eKLR.
6. On the respondent's side, it was submitted that this application is opposed. That the applicant has not shown sufficient cause to warrant granting of the orders sought, the application has been brought by undue delay and that there is no evidence the applicant stand to suffer substantial loss. That the applicant has not mentioned the filing of a memorandum of appeal and has never served any.
7. It was further submitted that this application has been filed after undue delay. That the judgement was delivered on January 27, 2023 and the applicant sought a stay of execution before the lower court on February 9, 2023, which stay orders were discharged on March 17, 2023.
8. That the applicant waited till May 8, 2023 after auctioneers had commenced execution process. The respondent relied on order 42 rule 6 (2) of the [Civil Procedure Rules](#) on principles guiding the grant of orders of stay of execution pending appeal. That;

“No order for stay of 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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
9. As to what constitutes substantial loss, the respondent relied on [James Wangulwa and another v Agnes Naliaka Cheseto](#) [2012] eKLR, that the applicant must establish other 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. That substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory. That the applicant must show that he will suffer substantial loss [Kenya shall Ltd v Kibiru and another](#) [1986] KLR 40. And also, the case of [Samvir Trustee Ltd v Guardian Bank Ltd](#), Nai HCCC 795/97, in which the court held in part;

“But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory, while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his Judgement. It is a fundamental factor to bear in mind that a successful party is prime facie entitled to fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion.”



10. The respondent maintained that there is no appeal which has been filed in this case, no memorandum of appeal nor a draft memorandum of appeal on record. And that no appeal stands to be rendered nugatory.
11. I have considered this application, the affidavit in support of the same, the submissions filed by both sides and the authorities relied on by the parties. This is an application for stay of execution pending the hearing and determination of the appeal filed herein. Order 42 of the Civil Procedure Rules provides for stay in case of appeal. At sub-rule 2;
- “No order of 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 undue 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.
12. The above is basically the standard proof of what is required of an applicant in order to succeed in an application for stay pending appeal. And the parties referred this court to several authorities regarding this point including:-
- (i) James Wangalwa and another v Agnes Naliaka Cheseto (2012) eKLR, that the applicant must establish other 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 i.e. that such loss would render the appeal nugatory. The same position is held in Kenya shell Ltd v Kibiru and Another [1986] KLR 410.
 - (ii) Samrir Trustee Ltd v Guardian Bank Ltd, Nai HCCC 795 of 1997, that the court is to weigh or balance the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement.
 - (iii) Muringa Co Ltd v Archdiocese of Nairobi Registered Trustees [2020] eKLR, that the court must consider the need to protect a party's opportunity to fully agitate its dispute against the need to ensure timely resolution of disputes.
 - (iv) National Industrial Credit Bank Ltd v Aquinas Francis Wasike and another, Nai civil application No 238 of 2005, (CA), that once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.
 - (v) Arum C Sharma v Ashana Raikundalia and Co Advocates, (no citation), that the purpose of the security needed under 042 is to guarantee the performance of such decree or order as may ultimately be binding on the applicant.
13. The record herein show that the aggrieved judgement of the lower court was delivered on January 27, 2023 where upon the applicant, on February 9, 2023 filed an application for stay. Same was dismissed on March 17, 2023. And on March 29, 2023, the appellant moved to this court. In my view these are not actions of a party bent on delaying the execution or determination of this matter. With the judgement being delivered on January 27, 2023, to the failed application for stay on March 17, 2023, to



the filing of the appeal herein on March 29, 2023, I am persuaded by the submissions of the applicant that there has been no undue delay in filing this application.

14. In the submissions of the applicant, the respondent has not shown that he is able to repay the decretal sum (if released to him) should the appeal succeed. The burden of proof lay on the respondent to prove his ability to pay (see the NIC Bank Ltd case). The respondent has not laid any evidence and or discharged this burden. The resultant is the possibility that the respondent may not be in a position to repay the decretal sum (if already paid) should the appeal eventually succeed. In that sense, the appeal would be rendered nugatory.
15. On the other hand, the applicant has proposed to deposit the whole decretal amount pending the hearing and determination of this appeal. Deposit of the whole decretal amount should surely secure the interests of both the applicant and the respondent. I find this proposal reasonable in the circumstances.
16. The respondent's counsel made submissions on the basis that only a notice of appeal has been filed herein. And that no appeal itself has been filed. For avoidance of doubt, there is on record a duly filed memorandum of appeal dated March 28, 2023 and filed on March 29, 2023. This application based on the appeal filed, is therefore properly before the court.
17. The upshot is that I find merit in the application of the applicant dated May 8, 2023. I allow the same on the following terms:-
 - i. That there be and is hereby issued an order of stay of execution of the judgement delivered on January 27, 2023 (in Bondo PMCC No E078 of 2022, the decree and all consequential orders thereto pending the hearing and determination of the appeal herein.
 - ii. That the appellant/applicant to deposit the whole decretal amount i.e Kshs 5,442,384, in court as security. The said amount to be deposited within 14 days from the date of this order.
 - iii. That should the applicant fail to deposit the said security as ordered in (ii) above, the order of stay of execution as ordered herein in (i) above shall automatically expire and lapse and the respondent shall be at liberty to proceed with execution proceedings.
 - iv. Costs of this application to be paid to the respondent.

Orders accordingly.

D. O. OGEMBO,

JUDGE

12.7.2023

Court:

Ruling read out on-line in the presence of Mr. Oriema for applicant and Mr. Odinga for the Respondent.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 12TH DAY OF JULY, 2023

D.O. OGEMBO

JUDGE

12.7.2023



Court:

Matter fixed for mention for directions on how to proceed with the appeal.

Mention on 25-9-2023.

D.O. OGEMBO

JUDGE

