



**Otieno v Aleki Holdings Limited & another (Civil Appeal
E862 of 2022) [2023] KEHC 20027 (KLR) (Civ) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20027 (KLR)

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

CIVIL

CIVIL APPEAL E862 OF 2022

CW MEOLI, J

JULY 6, 2023

BETWEEN

JACKLYNE ATIENO OTIENO APPELLANT

AND

ALEKI HOLDINGS LIMITED 1ST RESPONDENT

CENTSAVVY CREDIT LIMITED 2ND RESPONDENT

RULING

1. The motion dated November 2, 2022 by Jacklyne Atieno Otieno (hereafter the Appellant/Applicant) primarily seeks an order to stay order no 3 of the ruling delivered by the trial court in Nairobi Milimani CMCC No E733 of 2022 pending hearing and determination of the appeal. Essentially, the order directed the Appellant/Applicant to deposit security in the sum of Kshs 500,000/- into a joint interest earning account to be opened in the names of the parties' advocates within 30 days from the date of the ruling, in default of which the temporary injunction granted would lapse and Centsavvy Credit Limited (hereafter the 2nd Respondent) at liberty to repossess the motor vehicle registration number xxxx (hereafter the subject motor vehicle) for sale by public auction.
2. The motion is expressed to be brought inter alia under Sections 1A, 1B, 3A, 63(e) and 75 (1)(h) of the Civil Procedure Act and Order 12, Rule 7; Order 42 Rule 6 and Order 51, Rule 1 of the Civil Procedure Rules, and premised on grounds on the face of the motion as amplified in the supporting affidavit sworn by the Appellant/Applicant.
3. In her affidavit, the Appellant/Applicant stated that she filed Nairobi Milimani CMCC No E733 of 2022 in a bid to recover the subject motor vehicle which she had purchased from Aleki Holdings Limited (hereafter the 1st Respondent) at the consideration of Kshs 1,580,000/- but that she was not provided with the original log book. That sometime in August 2022 the 2nd Respondent's agents visited



- her home and towed away the subject motor vehicle claiming that the same formed security for an outstanding loan in the sum of Kshs 600,000/- which had been advanced to the 1st Respondent by the 2nd Respondent.
4. That upon filing the suit accompanied by an application seeking injunctive orders, the trial court by the impugned ruling granted an interlocutory injunction on the condition that the Appellant/Applicant deposits the security sum of Kshs 500,000/- into a joint interest earning account. It was stated that the order for deposit is oppressive as the subject motor vehicle constituted sufficient security and hence the decision to challenge the ruling by way of the appeal.
 5. It was further averred that the Appellant/Applicant is unable to raise the security sum and she is apprehensive that unless the order for stay sought herein is granted, the 2nd Respondent will likely proceed to sell the subject motor vehicle in an attempt to recover the loan sum from the 1st Respondent, thereby causing her substantial loss.
 6. The 2nd Respondent opposed the motion through the replying affidavit sworn on December 5, 2022 by its General Manager, Michael Wesonga, stating that the Appellant/Applicant has not complied with the conditions set by the trial court and further, that the Appellant/Applicant has not disclosed to the court the fact that at the time of swearing the reply, there was a pending application for review of the impugned ruling, filed by the 2nd Respondent. Hence, there is no risk of execution.
 7. In rejoinder, the Appellant/Applicant through her further affidavit sworn on January 10, 2023 averred that the condition for deposit of the security was an independent order from the order granting an interlocutory injunction restraining the 2nd Respondent from disposing of the subject motor vehicle pending the hearing and determination of the suit. That the duration given by the trial court for compliance with the condition on security was too short. That at the time of bringing the instant motion, the Appellant/Applicant had not been served with the 2nd Respondent's application for review filed before the trial court. She reiterated that unless the stay order is granted, she stands to suffer irreparable loss.
 8. Although the court directed that the motion be canvassed by way of written submissions, at the time of writing this ruling, only the submissions by the Appellant/Applicant were on the record. The 2nd Respondent did not file its submissions in good time, while the 1st Respondent did not participate in the hearing of the motion.
 9. The Appellant/Applicant anchored her submissions on the provisions of Order 42 Rule 6 of the Civil Procedure Rules. The Appellant/Applicant through her counsel advanced the argument that the court has discretionary power to grant an order for to stay execution upon an applicant satisfying the conditions set out under Order 42, Rule 6. The cases of *Ezekiel Mule Musembi v H Young & Company (EA) Limited [2019] eKLR* and *Vishram Ravji Halai v Thornton & Turpin Civil Application No Nai 15 of 1990 [1990] KLR 365* were cited.
 10. On substantial loss, counsel argued that the Appellant/Applicant has demonstrated that unless stay is granted, the injunctive orders granted by the trial court shall lapse and she could lose her interest in the subject motor vehicle through disposal by the 2nd Respondent. Counsel reiterated the averments made in the Appellant's/Applicant's respective affidavits, namely, that the timelines given for compliance with the impugned order were too short and that she was unable to raise the security amount within such period.
 11. Counsel asserted that the Appellant/Applicant had demonstrated the manner in which she stands to suffer substantial loss, which event would render the appeal nugatory. Counsel cited the decision in



Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR. It was submitted that the motion had been timeously filed and that the Applicant had an arguable appeal. Overall, it was asserted that all conditions for granting of an order to stay execution pending appeal have been met.

12. The court has considered the material canvassed in respect of the motion. It is pertinent to state that at this stage, the Court is not concerned with the merits of the appeal. It is trite that the power of the court to grant stay of execution of a decree pending appeal is discretionary, however such discretion ought to be exercised judicially. See *Butt v Rent Restriction Tribunal [1982] KLR 417*.
13. The Appellant's/Applicant's prayer for stay of execution pending appeal, is brought under Order 42 Rule 6 of the Civil Procedure Rules which provides that:

- ' (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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'.

14. It is apparent from the record that the motion was timeously filed, thereby satisfying the foremost condition for stay which requires that the application be brought without unreasonable delay. That said, the cornerstone consideration in the exercise of the discretion is whether the Appellant/Applicant has demonstrated the likelihood of suffering substantial loss if stay is denied. One of the most enduring legal authorities on the issue of substantial loss is the case of *Kenya Shell Ltd v Kibiru & Another [1986] KLR 410*. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the Shell case are especially pertinent. These are that:

- ' 1. .
2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just



cause and secondly that execution would render the proposed appeal nugatory.

4. 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 repaid.'

15. The decision of Platt Ag JA, in the Shell case, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. Platt Ag JA (as he then was) stated inter alia that:

' The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages. It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts.'

16. The learned Judge continued to observe 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 cornerstone of both jurisdictions for granting 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.'

17. Earlier on, Hancox JA in his ruling observed thus:

' It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would,... render the appeal nugatory. This is shown by the following passage of Cotton L J in Wilson -vs- Church (No 2) (1879) 12ChD 454 at page 458 where he said:-

'I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.'

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.'

18. Flowing from the foregoing, it is clear that substantial loss in its various forms, is the cornerstone of the jurisdiction for granting stay pending appeal. That is what must be prevented. In this respect, the Applicant deposed that unless the order to stay execution is granted, she stands to lose her interest in the subject motor vehicle since the interlocutory injunctive order may lapse and the 2nd Respondent may proceed to sell the subject motor vehicle in a bid to recover the sums allegedly owed to it by the 1st Respondent. That as a consequence, the appeal would be rendered nugatory.



19. Upon considering the material on record, it is apparent that the subject motor vehicle forms the subject matter of the suit before the trial court. The Appellant/Applicant annexed as JAO 1 a copy of the sale agreement dated May 13, 2021 entered into between her and the 1st Respondent in respect to the subject motor vehicle and which supports her assertions that she purchased the said vehicle from the 1st Respondent. The Appellant/Applicant also exhibited as JAO 5 a copy of the impugned ruling by which the trial court granted an interlocutory injunction restraining the 2nd Respondent from selling or otherwise disposing of the subject motor vehicle pending the hearing and determination of the suit.
20. The impugned ruling also contained an order for release of the said vehicle to the Appellant/Applicant all subject to the condition that the Appellant/Applicant does deposit the sum of Kshs 500,000/- into a joint interest earning account within 30 days therefrom, failing which the injunctive orders and order for release of the vehicle would lapse.
21. The court notes that the Appellant/Applicant furnished material in support of her averment that given her financial situation, the timelines for compliance with the order for deposit were short and that if she did not comply, there was a likelihood that she would suffer substantial loss, rendering the appeal nugatory. The court is therefore satisfied that this condition has been established.
22. Regarding the condition on provision of security, while the court has acknowledged the Appellant/Applicant's statements on her financial capacity, it is clear that security is a mandatory requirement for the granting of an order to stay execution pending appeal.
23. In view of all the foregoing, the court is persuaded to grant the order to stay execution of order 3 of the ruling of the trial court delivered on October 21, 2022 pending the hearing and determination of the appeal on the condition that the Appellant/Applicant deposits the sum of Kshs 300,000/- in an interest earning account in the joint names of the parties' advocates within 30 days of this ruling, and also prosecutes this appeal within 12 months of today's date failing which, the stay order herein shall automatically lapse. The costs of the motion shall abide the outcome of the appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 6TH DAY OF JULY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Mare

For the 1st Respondent: N/A

For the 2nd Respondent: Mr. Simiyu

C/A: Carol

