



REPUBLIC OF KENYA



KENYA LAW
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Associated Construction Limited v Kyamu Construction Limited (Civil Appeal 87 of 2018) [2022] KEHC 141 (KLR) (15 February 2022) (Ruling)

Neutral citation: [2022] KEHC 141 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 87 OF 2018
MW MUIGAI, J
FEBRUARY 15, 2022
MAVOKO SPMCC NO 205 OF 2016**

BETWEEN

ASSOCIATED CONSTRUCTION LIMITED APPLICANT

AND

KYAMU CONSTRUCTION LIMITED RESPONDENT

RULING

1. The Respondent/Applicant filed the application seeking for the following orders:
 - i. (Spent)
 - ii. That an order be issued staying the execution of the judgment and orders of this Court dated 1st December, 2020 pending the hearing and determination of this application.
 - iii. That an order be issued staying the execution of the judgment and orders of this court dated 1st December, 2020 pending the hearing and determination of the appeal before the Honourable Court of Appeal
 - iv. That the warrants of attachment and sale dated 24th August 2021 and the proclamation notice dated 1st September, 2021 be recalled and cancelled.
 - v. That the costs of the application be in the cause.
2. The Respondent/Applicant lodged an appeal on 15th December 2020 in the Court of Appeal against judgment and orders of this Court of 1st December 2020.
3. The execution has been commenced by the Appellant/Respondent in execution of the said judgment and the orders of this Court will occasion miscarriage of justice and render the appeal in the Court of Appeal nugatory whereas the appeal is meritorious with high chances of success.



GROUND OF OPPOSITION

4. That the Appellant herein has not and has never sought to execute the judgment of this honourable Court as there is no decree there from capable of being executed.
5. That the judgment in Mavoko SPMCC No. 205 of 2018 was delivered on 14/03/2018 which judgment the Respondent has never appealed against before this Honourable court or any other court over 1[5] years down the line.
6. The Appellant appealed against the Ruling delivered post judgment of 4th July 2018 arising from Mavoko SPMCC 205 of 2018 and not the judgment or decree from the delivered judgment.
7. The appeal herein was determined on 1st December 2020 and to that extent this court is functus officio and by large extent this Court cannot alter the execution of the decree from judgment in Mavoko SPMCC 205 of 2016 delivered on 14th March 2018.
8. The Notice of Appeal filed in Court of Appeal is not an appeal, the Respondent has never applied for proceedings nor sought enlargement of time within which to file the appeal.
9. The appellant has never been in possession of any logbook and no one has tendered evidence before any Court on compliance by the Respondent with the judgment and/or decree pursuant to the Trial Court's judgment.
10. The instant application is merely calculated to delay execution and deny the Appellant enjoyment of fruits of the said judgment.

RESPONDENT/APPLICANTS WRITTEN SUBMISSIONS

11. The instant appeal originated from Mavoko SPMCC No. 205 of 2016 in which the Appellant herein sued the Respondent for delivery of the logbook of a Komatsu PC200 Hydraulic Excavator which the Respondent had sold to the Appellant vide a duly executed Sale Agreement between the Respondent and Appellant.
12. There was delay in obtaining the said Logbook on the part of the Respondent herein and that delay was wholly attributable to the bureaucratic structures of the State Department concerned and that it was no fault of the Respondent.
13. That duly captured in the parties' sale Agreement, was a term envisaging the possibility of there being a delay in obtaining the Logbook from the relevant state Departments.
14. On the 14th March, 2018 judgment was entered against the Respondent herein to the effect that the Respondent avail and deliver the said logbook to the Appellant within 30 days of the judgment, failing which the Respondent refund the purchase price of Kshs.6.5 million to the appellant.
15. The Respondent filed an application dated 24th April, 2018 seeking inter alia, stay of execution of the said judgment. The said application was allowed vide ruling dated 4th July, 2018.
16. The said Ruling was to the effect that the Respondent herein deliver the said logbook to the appellant within 14 days, staying execution within those 14 days and allowing execution to proceed after lapse of the 14 days in the instance that the respondent failed to comply.
17. The Respondent managed to obtain the original logbook (which was held up by the necessary Government Authorities) and delivered the same to the Appellants Advocates' offices on 12th July, 2018 (eight days after the ruling)



18. That the Respondents, being dissatisfied with the Ruling of the Lower Court dated 4th July, 2018 decided to prefer the instant appeal on the grounds on the inter alia that the lower court was functus officio.
19. On the 17th December, 2019 during a mention in open court, parties agreed to have the appeal canvassed by way of written submissions. Each party was given days to file and serve their submissions. Parties were then to take a mention date after complying with filing and serving submissions.
20. That the respondents herein were never served with the Appellant's submissions whether physically or electronically to enable a response by the Respondent as due process demands. The Respondent was also never served with the mention notice to confirm filing of submissions, or notice of entry of judgment as due process mandate.
21. On 1st December, 2020 the Respondent was served with the judgement of this court which allowed the appeal against the Respondent.
22. That the Respondent filed a Notice of Appeal on 15th December 2020 via the e-filing platform but to date, no assessment has been done by the Appellant Court Registry to enable payment despite several follow- ups.
23. On 1st September, 2021, the Respondents were ambushed by Auctioneers seeking to enforce the judgment of the lower court hence the instant application seeking stay orders.
24. In citing the Court of Appeal case of *Butt –vs – Rent Restriction Tribunal* [1979], the Court in the above cited case went on the state at par. 10)

“The power of the court to grant or refuse an application for stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion. Thirdly, a judge should not refuse a stay 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. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

25. The court does not become functus officio merely because it has delivered a final decision in civil proceedings. The court retains its power to undertake several actions including but not limited to stay, review, execution proceedings and such other acts and steps towards the closure of the file. This was the ratio decidendi in the case of *Leisure Lodges Limited – Japhet S. Asige & another* [2018] eKLR where the court held thusly [at par.25)-

“On the question that this court is functus officio, I do find that a trial court retains the duty and jurisdiction to undertake and handle all incidental proceedings even after a final judgment is delivered provided such proceedings do not amount to re-trying the cause but geared towards bringing the litigation to an end. That is the reason, the court must undertake settlement of a decree, if parties cannot agree, handle applications for stay, review, setting aside and even execution proceeding including applications under Section 94 of the Act.

In *Mombasa Bricks & Tiles Ltd & 5 Others vs Arvind Shah & 7 Others* [2018] eKLR, this court said of the doctrine of functus officio:-



If one was to accede to the position taken by the judgment debtor that the court is functus officio then it would mean that the provisions of law providing for such proceedings are otiose or just decorative and of no substance to the administration of justice. As far as the application before the court is concerned, the court is well seized of power and jurisdiction to entertain and determine same on the merit and based on materials availed.”

APPELLANT/RESPONDENT’S SUBMISSIONS

26. Appellant in its grounds of objection inter alia raised the following issues:-
 - a. The Respondent/Applicant has never sought to appeal against the decision of the Magistrate’s Court in Mavoko SPMCC No. 205 of 2018.
 - b. The Appellant/Respondent had only appealed against a ruling but not the judgment or decree of the Mavoko SPMCC No. 205 of 2018.
 - c. The application seeks redress in the wrong forum with the intention of denying the Appellant of the fruits of its judgment.
 - d. That the Respondent/Applicant has never requested/or paid for any proceedings from this court and there is therefore there is no evidence that an appeal has been filed.
 - e. The Respondent/Applicant has not sought to enlarge time to lodge an Appeal to the Court of Appeal.
27. On the issue whether the application has met the legal threshold for granting of an order of stay pending Appeal it is submitted that application for stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules as well as Rule 75 of the Court of Appeal Rules.
28. On the issue whether there is an Arguable appeal on record it is submitted that even though there was no notice of appeal filed or served upon the appellant by the Respondent within the legally stipulated time under the rules. Further, no Memorandum of Appeal was annexed to the application now was any served upon the appellant/Respondent or its advocates.
29. Further in Rule 75 of the *Court of Appeal Rules, 2010* it is clear that the Notice of Appeal is to be filed in the Court whose decision is sought to be challenged. It is beyond question that no Notice of Appeal has been lodged in this court and therefore it cannot be said that there is an Appeal on record.
30. In the case of *Congress Rental South Africa v Kenyatta International Convention Centre; Co-operative Bank of Kenya limited and Another (Garnisbee)* (2019) eKLR, the learned trial Judge while citing with approval several relevant precedents had the following to state;

“In dealing with issue of substantial loss, I am alive to the fact that the applicant ought to establish that the execution will create a state of affairs that will irreparably affect or negate the very essential core of applicant as a successful party in the appeal. This cause arose in 2015. The Respondent has since then been deprived of its money for a period of over 3 years. The applicant has the burden to prove that by refusal to grant stay of execution it stands to suffer substantial loss. In the instant application no such evidence has evidence; as the applicant has not discharged their duty to prove the nature of loss that they are likely to suffer should an order of stay be denied. It has not been demonstrated that if stay of execution is denied, that it would not recover its money if payment was made since the Respondent would be unable to repay the money. In short I find that the Applicant has failed to avail



evidence to support its alleged claim of irreparable loss, should the application for stay of execution be denied.

31. The decree the Applicant intends to stay was the one issued by the lower and affirmed by this court in its decision of 1/12/2020. The lower Court decree was valued at Kshs. 6,500,000/- and which as at August, 2021 had accrued interest to the tune of Kshs. 2,660,547.94/- making a total of Kshs.9,163,322.94.
32. Under the provisions of Order 42 rule 6 (1) (2) of the *Civil Procedure Rules*, a party seeking a stay of execution pending Appeal must offer such security for the due performance of the orders as may ultimately be binding on the Appellant. In the instant matter, the Applicant was required to provide the actual security for consideration by the Court's as to its sufficiency. In the case of *Equity Bank Ltd -v- Taiga Adams company ltd* [2006] it was held that:-

“of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought.... let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay.....” which principle was also emphasized in *Carter & Sons Ltd -vs- Deposit Protection Fund Board & 3 Others*.

DETERMINATION

33. The Court has considered pleadings and submissions by parties through learned Counsel on record. The issue that emerges for determination is whether this Court should grant Stay of execution pending appeal to/in the Court of Appeal of this Court's Ruling of 1st December 2020.

COURT'S JURISDICTION

34. “Jurisdiction” refers to the rights or authority by which a specific court is able to judge a case. Jurisdiction may either be original or appellate or even both.
35. In the locus classicus case of *Owners of the Motor vessels “Lillian S” -Vs- Caltex Oil (K) Ltd*. Civil Appeal No. 540 of 1989 where it was held that;

“...Jurisdiction is everything. Without it a court has no power to make one more step. Where the Court has no jurisdiction, there would be no basis for a continuation of procedure pending other evidence. A Court of law shall lay down tools in respect of the matter before it the moment, it holds the opinion that it is without jurisdiction”

36. As elucidated in *Leisure Lodges Limited – Japhet S. Asige & another supra* this Court is not functus officio from hearing and determining post judgment incidental applications without retrying the finally determined issue(s). In that vein, this Court is clothed with requisite jurisdiction to hear and determine the instant application under Order 42 Rule 6 of CPR 2010 for stay of execution pending appeal to Court of Appeal of this Court's judgment of 1st December 2020.

ARGUABLE APPEAL



37. As to what constitutes an arguable appeal, the Court of Appeal in *Nairobi Women's Hospital vs. Purity Kemunto* [2018] eKLR:-

“To say that an appeal is arguable is another way of saying that it is not frivolous and that it raises a bona fide issue deserving full consideration by the Court. Even one bona fide issue will satisfy the requirement, for the law does not look for a multiplicity of arguable issues.”

38. The impugned Judgment of 1st December 2020 by this Court the subject of the intended appeal was against the impugned Ruling by the Trial Court of 4th July 2018 which was a departure from the said Trial Court's judgment of 14th March 2018 which remains a valid regular and legal order of the Court until successfully appealed against. The gist of this Court's Ruling was to the effect, that in delivering Ruling of 4th July 2018, the Trial Court was without jurisdiction, the Trial Court was functus officio as it was reopening the determined issues in the Judgment of 14th March 2018. As this Court put it; at Clause 8 of the Judgment of 1st December 2020;

‘It would appear that the Trial Court exercised powers to review its judgment and yet there was no application and no grounds for the same’

39. The gist of the Judgment of 5th March 2018 by the Trial Court was that the Defendant delivers to the Plaintiff the logbook and/or registration documents for motor vehicle/Machine make PC 200-6 Reg Nos KAZ 279 Z Chassis Number 123 177 within 30 days of the judgment. In default, the Defendant to refund to the Plaintiff Ksh 6,500,000/- and the Plaintiff returns the Motor Vehicle/machine to the Defendant.

40. On 25th April 2018, after over 30 days the Defendant filed Notice of Motion and sought stay of execution of the judgment and to be allowed to change advocates and stay pending hearing and determination of Application for leave to appeal in High Court Misc 137 of 2018.

41. On 4th July 2018, the Trial Court reiterated the compliance of delivery of the Logbook by the Defendant to the Plaintiff within a further 14 days and in the meantime stay of execution was granted and in default execution was to take effect.

42. It is this Ruling of 4th July 2018 that was appealed against before this Court and resulted in the Ruling of 1st December 2020.

43. The Applicant has not filed Memorandum of Appeal in the Court of Appeal for this Court to consider whether there is an arguable appeal or not.

UNREASONABLE DELAY.

44. The Notice of appeal is a notice of intention to file an appeal but not the appeal. It is over a year and there is no evidence of an existing appeal. There is no pending application in the Court of Appeal for extension/enlargement of time to file an appeal. There is therefore unreasonable delay to file the appeal in the Court of Appeal.

SUBSTANTIAL LOSS

45. The Judgment of this Court of 1st December 2020 allowed the appeal and set aside the Ruling of 4th July 2018 and hence the Judgment of 14th March 2018 took effect. Therefore, even this Court were to grant stay of the Court Judgment of 1st December 2020 it would not prevent or pre-empt execution as a result of the Trial Court's judgment of 14th March 2018.

FURNISH SECURITY



46. The Applicant has not proposed any security for this Court to consider as security.

FINDING

47. The totality of the evidence on record leads to the conclusion that the Applicant has failed to satisfy the requirement for stay of execution pending appeal as outlined in Order 42 Rule 6 CPR 2010. Furthermore, this Court is not satisfied that there is a pending appeal filed in the Court of Appeal as no such evidence was presented in this Court. Secondly, no leave application is shown to be pending in the Court of Appeal to file an appeal out of time.

This Court finds the issue of stay of execution sought in the instant application is perplexing for the following reasons;

48. The Applicant/defendant was to provide the Logbook/transfer documents to the Plaintiff/Respondent within 30 days from 14th March 2018 and thereafter was granted 14 days from 4th July 2018 in default execution for recovery refund of purchase price of Ksh 6.5 million was to ensue and thereafter, the said vehicle be returned to the Defendant/Applicant by the Plaintiff.

49. There are parallel submissions, on this question/issues the Applicant claims delivery of the Logbook was made to the Plaintiff albeit after the requisite period and claims unjust enrichment by the Plaintiff as having the logbook and motor-vehicle and yet pursuing execution to recover Ksh 6.5 million at the same time.

50. The Respondent on the other hand claims the Logbook has never been availed and the Ruling of 4th July 2018 curtailed execution proceedings vide the Trial Court's judgment of 14th March 2018. After the appeal herein was allowed, they proceeded with execution process.

51. In light of the conflicting submissions, even if this Court were to grant stay of execution pending appeal, what would be/is being stayed? The status quo is not confirmed at this stage and therefore, this Court cannot exercise judicial discretion to grant stay of execution prayer at this stage.

52. Finally, Order 42 Rule 6 CPR provides in part;

“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”.

53. The Applicant is at liberty to pursue stay of execution from the Court of Appeal.

DISPOSITION

1. The application of 3rd September 2021 is hereby dismissed with Costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 15TH FEBRUARY 2022 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

Mr. Mureithi H/b For Nzaku - For The Respondent

No Appearance - For The Appellant

Geoffrey – Court Assistant

