



**Barno v Tiny Bees Credit (K) Ltd (Civil Appeal E143 of 2024)
[2024] KEHC 14377 (KLR) (20 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14377 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E143 OF 2024
E OMINDE, J
NOVEMBER 20, 2024**

BETWEEN

HENRY KIBET BARNO APPELLANT

AND

TINY BEES CREDIT (K) LTD RESPONDENT

RULING

1. The Applicant filed a Notice Motion dated 16/07/2024 seeking orders inter alia;
 1. Spent.
 2. Spent.
 3. That this Honourable Court be pleased to issue orders of stay of execution of the Ruling delivered on 12/07/2024 and or restrain the Respondents, their agents, servants, representatives, employees and/or anyone dealing through them from attaching, impounding and/ or repossessing, selling and transferring the Appellant/Applicant motor vehicle registration number No. KCV 351Z pending the hearing and determination of the appeal.
 4. That costs of the Application be provided for.
2. The Application is premised on the grounds therein and is further supported by the Affidavit sworn by Appellant/Applicant on the same date.
3. The Applicant deposed in the Supporting Affidavit that the trial Court being Eldoret Chief Magistrate's Court delivered a Ruling in Miscellaneous Civil Application No. E048/2024. He annexed a Copy of the Ruling, the Application dated 27th March 2024 and the Order as HKB1 (a) (b) and (c).
4. He stated that that he is the registered owner of motor vehicle registration number KCV 351Z and has been repaying the loans very well as is expected of him. The Applicant seeks that the Court issues orders



- restraining the Respondents, their agents, servants, employee, representatives, and/or anyone claiming through them from selling and/or transferring motor vehicle number KCV 351Z. He annexed proof of ownership being a copy of Motor vehicle search as HKB2
5. That aggrieved by the Ruling of the Trial Court, he instructed his Advocates herein to lodge an appeal on his behalf but the proceedings are yet to be typed. He deposes that his appeal has a very high chance of success and the same is arguable also arguable. He annexed a copy of the Memorandum of Appeal and the letter requesting for proceedings as HKB3 and HKB4
 6. He further deposes that there is need to preserve the suit property pending the hearing and determination of the appeal and that unless the orders of stay are granted, the suit property may be disposed of hence rendering the judgment on appeal nugatory.
 7. The Applicant maintained that it is only fair, just and prudent that the orders of stay of execution and or preservation of the suit property be granted pending the hearing and determination of the appeal and that it is in the interest of justice that the Application be allowed and further no party will suffer any prejudice should the Application be allowed.
 8. In opposing the Application, the Respondent filed Grounds of Opposition dated 30/07/2024 as follows;
 - i. That the Appellant's Notice of Motion is incompetent, frivolous, vexatious, lacks merit and is a gross abuse of the Court process.
 - ii. That the Appellant has not provided or offered security as per the law.
 - iii. That the intended appeal is not arguable hence the current Application should be dismissed with costs.
 - iv. That the loan is still due and payable and continues to attract default interest.
 9. The parties agreed to canvass the Application by way of written submissions. The Applicant filed his submissions on 18/09/2024 and the Respondent filed on 15/10/2024.

The Applicant's Submissions

9. Counsel for the Applicant submitted that the issue for determination was whether the applicant had demonstrated that the order for stay of execution pending appeal is merited. In this regard he relied on the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules.
10. He submitted that stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court is no longer limited to the foregoing provisions. That the Courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Civil Procedure Act or in the interpretation of any of its provisions.
11. Counsel added that Section 1A (2) of the Civil Procedure Act provides that "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objectives are; "the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties."
12. Counsel submitted that an Applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned, namely:



- (a) that substantial loss may result to the Applicant unless the order is made,
 - (b) that the Application has been made without unreasonable delay, and
 - (c) that such security as the Court orders for the due performance of such decree or order as may ultimately be binding on the Applicant has been given.
13. In regard to sufficient cause, Counsel submitted that the purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of the case. Counsel cited the Court of Appeal decision in *RWW vs. EKW (2019) eKLR* where the court addressed itself on this as hereunder:-
- “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.
9. Indeed to grant or refuse an Application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”
14. Counsel also cited the Court of Appeal in *Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nairobi 15 of 1990 [1990] KLR 365*, wherein the court outlined the requirements for granting stay of execution pending appeal. It held that, whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 (as it then was) of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.
15. Counsel submitted that a look at the Memorandum of Appeal filed herein shows that the grounds raised therein are triable. According to Counsel, the first ground has been met, the essence of considering whether the appeal raises triable issues is to avoid the same being rendered nugatory should the decision of the appellate Court overturn that of the trial Court.
16. In regard to inordinate delay, Counsel submitted that there has been no inordinate delay in bringing the instant Appeal as the Ruling being appealed against was delivered on the 12/07/2024 the Memorandum of Appeal filed four days later on the 16/07/2024.
17. With respect to substantial loss, Counsel submitted that substantial loss was explained in the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR*, to the following effect;
- “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. 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... 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.”



18. Counsel urged that the present Application before Court supported by the annexures thereto clearly indicate that the Appellant/Applicant has been using the said motor vehicle as the tool of trade to the effect that he is operating a driving school and the said motor vehicle is used in practical lessons for his students, and that this being the case, if the orders sought herein are not granted the Appellant stands to suffer irreparable loss and damage, and the appeal will be rendered nugatory.
19. Counsel added that this principle was enunciated in the decision of the Court of Appeal in Absalom Dova vs. Tarbo Transporters [2013] eKLR, where it stated:-

“The discretionary role of of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the Court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court In balancing the two competing rights focuses on their reconciliation...”
20. Counsel urged that if this Court were to deny the Applicant the order for stay of execution, it would place him at a more prejudicial position than the Respondent. That further, the Applicant did state that he is apprehensive that the Respondent may proceed to dispose of the property thus rendering the appeal nugatory.
21. That this fear is not far-fetched as Respondent has neither rebutted his deposition and has also not demonstrated that they have the means and capacity to refund the Applicant. Counsel submits that given these prevailing circumstances, they are apprehensive and have also adequately demonstrated that he stands suffer substantial loss if their Application is not granted.
22. With regard to security, Counsel simply restated his submissions as already herein summarised and that this is not a money appeal which requires the Appellant to deposit a security in Court. and as such the Appellant should not be directed to deposit the security, for the reasons that there is no decretal sum, to be used to arrive at the amount that can be deposited as the security. However, Counsel submitted that the Appellant is ready and willing to abide with all the terms and/or conditions that this Honourable Court may set.

The Respondent's Submissions

23. Counsel for the Respondent submitted that the principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the Civil Procedure Rules as follows: "No appeal or a 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 an Application being made, to consider such Application and to make such orders thereon as may to it seem just, 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 the orders set aside."
24. Counsel also reiterated the provisions and import of Order 42, rule 6 aforementioned.
25. With regard to substantial loss, Counsel maintained that the Applicant must clearly demonstrate which loss they stand to suffer if the order for stay is not granted. Counsel submitted that the Applicant herein filed a Miscellaneous Application seeking injunctive orders and restructuring of the loan, that



the Respondent raised a preliminary objection on grounds that the Application offends Order 3 Rule 1 of the Civil Procedure Rules and that the preliminary objection was upheld as the Court agreed that prayers sought by the Appellant cannot be decided in a miscellaneous Application rather than a substantive suit.

26. According to Counsel, the Applicant best recourse was to file a substantive suit seeking for the injunctive orders rather than instituting an appeal that is frivolous and non-starter, that the ruling and order from which the Appellant is appealing on is of a negative nature and incapable of being executed, that the ruling does not order either party to do anything or refrain from doing something, the ruling basically dismissed the Applicant's Application on a point of law so then what would the Court be issuing stay of execution against.
27. Counsel relied on the case of *Ndungu v Mutua* (Civil Appeal E047 of 2024) [2024] KEHC 6276 (KLR) where the Court restated the decision finding of the court in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR relied on by the Applicant as summarised above and is to the following effect as is relevant to his submission that the order sought to be appealed against is negative in nature and so there is nothing for the court to stay;
 27. From the Court record, the ruling dated 7th March 2024 dismissed the Applicant's Application dated 21st December 2023. Notably, the Court cannot grant stay of the impugned ruling as it dismissed the Application dated 21st December 2023 which in essence is a negative order and incapable of execution. This principle was enunciated by the Court of Appeal in *Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya)* [2015] eKLR where the Court held as follows:-An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay-called a positive order - either an order that has not been complied with or has partly been compelled with.
 28. Similarly in *Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others* [2016] eKLR the Court of Appeal expounded on stay of execution stating:-In *Kanwal Sarjit Singh Dhiman vs Keshavji Juvral Shah* [2008] eKLR the Court of Appeal while dealing with a similar Application for stay of a negative order, held as follows:-The 2nd prayer in the Application is for stay (of execution) of the order of the superior Court made on 18th December 2006. The order of 18th December 2006 merely dismissed the Application for setting aside the judgment with costs. By the order, the superior Court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only. The same reasoning was applied in the case of *Raymond M. Omboga vs Austine Pyan Maranga* (supra) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter: The order dismissing the Application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay

Where there is no positive order made in favour of the Respondent which is incapable of execution, there can be no stay of execution of such an order....The Applicant seeks to appeal against the order dismissing his Application. This is not an order capable of being stayed because there is nothing the Applicant has lost. The refusal simply means that the Applicant stays in the situation he was in before coming to Court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....



29. Relying on the foregoing authority. It is noted that the order grant by the magistrate was a negative order which did not compel any of the parties to do anything or restrain from doing anything is incapable of execution and thus the Court cannot order stay of execution of that negative order.
28. Counsel submitted that the Applicant has not demonstrated any substantial loss that cannot be compensated by damages and if the orders sought are granted they would be vain as the orders of the lower Court are incapable of being executed hence nothing to stay.
29. With regard to delay, Counsel submitted that the ruling was delivered on 12/07/2024 and the instant Application filed on 16/07/2024 hence there has been no inordinate delay.
30. With regard to security, Counsel submitted that the third condition for grant of stay is the Applicant must be willing to deposit security in Court for due performance of the decree. In the instant case the Applicant has not offered to provide any such security.
31. Counsel cited the case of Michael Ntouthl Mitheu v Abraham Kivondo Musau [2021] eKLR where the Court held as follows;
- “The next issue for consideration is the issue of security. It is true that under Order 42 rule 6 aforesaid, the Applicant is required to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an Application thereunder. I agree with the position in Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others [2015] eKLR, where it was held that:
- “... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the Applicant. The rule does not, therefore, envisage just any security. The words “ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules Includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.
30. I also associate myself with the holding in Gianfranco Manenthi &another vs. Africa Merchant Assurance Company Ltd [2019] eKLR, where the Court observed:
- “... the Applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower Court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal falls.
32. Counsel submitted that the subject motor vehicle was offered as security of a loan granted by the Respondent to the Applicant, the Applicant defaulted in payment resulting to the repossession of the motor vehicle and the loan arrears have continued to accrue and it is only prudent that the Applicant offers security as the Respondent continues to incur losses.



33. In conclusion, Counsel for the Respondent submitted that the Applicant has failed to meet the conditions for granting of stay of execution. Counsel urged that Application and the intended appeal all dated 16/07/2024 ought to be dismissed with costs to the Respondent as they do not meet the threshold for grant of stay of execution.

Determination

34. Having considered the application, the facts in support thereof, the Grounds of Objection and the submissions, it is my considered opinion that the issues for determination are as follows;

- i. Whether the order of the lower court was a negative order
- ii. Whether the order for stay should issue.

35. On the first issue, I have perused the Ruling of the lower court. It is correct that as Counsel for the Respondent has submitted, the said Ruling was made in reference to a Preliminary Objection raised in respect of a Notice of Motion filed by the Applicant herein. In the said Ruling, the Court was of the finding that the Application before it was not premised on any suit as is required under the provisions of Section 2 and 19 of the *Civil Procedure Act*, Order 3 Rule 1 and Order 40 Rule 1 of the Civil Procedure Rules. The Court therefore dismissed the Application and set aside interim orders that were issued in favour of the applicant.

36. This being the position then I agree with the submissions of the Counsel for the Respondent as supported by the authorities that he has cited and relied upon which I wholly associate myself with that this is an Application made to stay the Ruling of the lower court wherein the Court gave negative orders in the sense that it did not make a determination on any right of either one of the parties vis a vis the other.

37. The Court in actual fact made a determination on a point of law that determined the Applicant's Application in its entirety in limine. The Applicant having not filed any suit subsequent to that decision, then the position as it is now is that there is no suit upon which the order of stay of execution sought by the applicant before this court can be premised.

38. In light of the above, my finding is that the Application before the Court misconceived, is bad in law and lacks merit. This finding then also determines the second issue as drawn for determination. The upshot then is that the Application is dismissed in its entirety with costs to the Respondents.

READ DATED AND SIGNED AT ELDORET ON 20TH NOVEMBER 2024

E.OMINDE

JUDGE

