Kifedha Limited & another v Kimani (Civil Appeal E198 of 2024)
[2024] KEHC 14835 (KLR) (21 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14835 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E198 OF 2024

FN MUCHEMI, J

NOVEMBER 21, 2024

BETWEEN

KIFEDHA LIMITED ..... 1ST APPELLANT

MINIU KIRATHI T/A MIKAEL AUCTIONEERS ..... 2ND APPELLANT

AND

SALOME WAITHIRA KIMANI ..... RESPONDENT

RULING

Brief facts

1. The application dated 31st July 2024 seeks for orders of stay of execution in respect of the ruling in Ruiru Small Claims Court Scccomm E345 of 2024 delivered on 31st July 2024 pending the hearing and determination of this appeal. The applicant further seeks for orders of stay of proceedings of the lower court in Ruiru SCCCOMM E345 of 2024 pending the hearing and determination of the appeal.

2. In opposition to the application, the respondent filed a Replying Affidavit dated 29th August 2024.

Appellants'/Applicants' Case

3. The applicants state that on 31st July 2024, the magistrate court at Ruiru SCCCOMM E345 of 2024 issued a ruling to the effect that they release the suit motor vehicle registration number KDG 186R registered jointly in the name of the 1st applicant and the respondent and further that the warrants of attachment of moveable property dated 10th July 2024 be set aside. Being aggrieved by the ruling of the court, the applicants lodged an appeal vide their Memorandum of Appeal filed on 2nd August 2024.

4. The applicants state that the suit motor vehicle was issued to the 1st applicant by the respondent sometime in January 2024 after obtaining a loan facility of Kshs. 486,000/- from the 1st applicant's

premises and the said suit motor vehicle was issued as collateral for the said loan. The applicants further state that the respondent owes the 1st applicant over Kshs. 900,000/- in loan arrears.

5. The applicants are apprehensive that the respondent will move to remove the said suit motor vehicle from their yard and try to dispose it and they would have no other way of recovering their loan arrears.

6. The applicants argue that the appeal raises arguable points of law and has high chances of success. The applicants further state that the respondent will not suffer any prejudice in the event the orders sought are granted.

The Respondent's Case

7. The respondent states that on 31st January 2023, she borrowed from the 1st applicant a sum of Kshs. 399,590/- and on 27th January 2024 she applied for a sum of Kshs. 98,607/-. The respondent further states that she has diligently remitted a sum of Kshs. 624,800/-, an excess of Kshs. 125,210/- of the borrowed sum. The respondent argues that the loan application dated 12th January 2024 produced by the 1st applicant of Kshs. 482,333/- is a misrepresentation of facts as the 1st applicant only disbursed a total of Kshs. 98,607/-. The respondent argues that the loan agreement produced by the 1st applicant is a made up document with many inconsistencies evidently tampered with by the 1st applicant to their advantage with canceled figures and new figures and no signature to ascertain the actions therein.

8. The respondent avers that on 10th July 2024, the 2nd applicant with the instructions from the 1st applicant repossessed motor vehicle registration number KDG 186R from William Kabuu at Kenyatta Road claiming that she was in default to the tune of Kshs. 886,799/- Upon repossession of the suit motor vehicle by the 2nd applicant, the auctioneer demanded for a sum of Kshs. 886,799/-. Further, the 2nd applicant and others took possession of the suit motor vehicle from William Kabuu without informing him who they were neither did they produce a court order warranting them to take possession of the motor vehicle nor did they issue an official Notice upon proclamation.

9. The respondent states that she received a letter from the 1st applicant dated 14th May 2024 signed by Felix Kabechu requesting that she clears her arrears of Kshs. 159,000/- at a 5%monthly interest rate. The respondent argues that at no particular time has the 1st applicant been honest with their demand as per the conversation, the 1st applicant demands for arrears of Kshs. 244,388.21/- or a payoff of Kshs. 905,256.40/-.

10. The respondent states that on 11th July 2024, she requested for a breakdown of the balance owed to the 1st applicant and she received an unsigned and undated document with just an indication of her name and account showing a balance of Kshs. 906,256.41/-.

11. In reference to the ruling delivered by the trial court on 31st July 2024, the 1st applicant was directed to submit the proper books of accounts highlighting the balance owed as they had inflated the sums to a balance unknown so as to illegally retain the motor vehicle.

12. The respondent argues that the applicants cannot be allowed to run to court seeking its protection whereas it is clear that they do not come with clean hands as they have doctored their documents with inconsistent sums of money at her expense. Consequently, the respondent states that the suit motor vehicle be released to the rightful owner and the 1st applicant be compelled to transfer the log book back to her.

13. The respondent further urges the court to compel the 2nd applicant to release the motor vehicle to her as it is her only mode of transport in line to her business as she continues to incur losses. The respondent

further argues that the 1st applicant intends to detain or dispose the motor vehicle with a view to earn interest at her expense knowing well that she has already offset the sum borrowed to an excess sum.

14. The respondent states that the onus of proof lies on the applicants, who failed to do so, opting to appeal the same without the production of the books of accounts to support their claim.

15. The applicants filed a Further Affidavit and states that the respondent applied for a loan with the 1st applicant twice, the 1st loan facility applied on 26th January 2023 amounting to Kshs. 486,000/- and after processing costs, the amount disbursed to the respondent was Kshs. 399,000/-. The total loan to be repaid by the respondent for the loan obtained in the year 2023 totaled to Kshs. 804,022/- inclusive of 5% interest and 5% penalty for every month the loan was unpaid. The applicants state that out of the said loan, the respondent paid Kshs. 513,000/-. The applicants state that the loan balance to be cleared by the respondent is Kshs. 290,000/- which balance was carried forward to the year 2024, when the respondent applied for a second loan facility as a top up amounting to Kshs. 482,333/- on 12th January 2024.

16. The applicants state that out of the 2nd top up loan of Kshs. 482,333/-, the 1st applicant deducted Kshs. 290,000/- being the loan balance from the year 2023, deduction of lawyer fees, logbook transfer fees, loan processing fees and bank charges. Further upon request by the respondent, the 1st applicant paid Kshs. 71,370/- as insurance to Kenya Orient Insurance Company. The balance of Kshs. 98,607/- was deposited in the respondent's account number 2045786717. Thus, the applicants state that the total loan payable for the year 2024 by the respondent is Kshs. 894,819/- inclusive of interests and penalties.

17. The applicants state that due to the respondent's continued default, the 1st applicant sent a demand letter to the respondent dated 14th May 2024 demanding for arrears which at the time stood at Kshs. 159,653/-.

18. The applicants argue that the loan processing form/schedule dated and signed by both parties on 12th January 2024 is a true copy of the loan form signed by the respondent. Further the amendments and crossing made on the said loan form were human errors which were crossed and corrected in the presence of the respondent who approved the entire loan calculations before appending her signature.

19. The applicants argue that at no point has the 1st applicant contradicted themselves on the amount owed as the respondent has been updated time and again about her arrears.

20. The applicants state that the 1st applicant being a secured creditor, did not need a court order to sell the collateral as parties were bound by the loan agreement and thus the 1st applicant reserved the right to sell the said collateral as a secured creditor.

21. The applicants state that the whatsapp conversation between the respondent and one Peter Gathathai shows a demand of Kshs. 244,000/- as arrears or repayment of the entire loan quoted at Kshs. 906,000/- as the arrears demanded as at May 2024 had increased to Kshs. 244,000/- due to continued default by the respondent. Thus the respondent was given an option of either to clear the current loan arrears of Kshs. 244,000/- and continue repaying her loan at monthly deposits of Kshs. 51,300/- per month or clear the entire loan balance which stood at Kshs. 906,000/- at the time. The applicants state that they have been lenient and have now discounted the loan to Kshs. 894,819/-.

22. The applicants aver that they have not received the sum of Kshs. 624,800/- from the respondent and the amount paid by the respondent is shown on the credit column of the respondent's statement of account for the year 2023. Further, the applicants argue that the respondent is misleading the court by claiming that she repaid the loan in excess.

23. The applicants state that the collateral being motor vehicle registration number KDG 186R is jointly registered with the respondent as security for its loan. The respondent is a businesswoman residing and doing business in Uganda and if the said collateral is released to her before she clears her loan arrears, the 1st applicant will be prejudiced in trying to recover its huge loan arrears.

24. In the event the court releases the collateral back to the respondent, the applicants request that the court direct the respondent to clear the outstanding arrears totaling to Kshs. 894,819/- prior to the release.

25. Directions were issued that the application be canvassed by way of written submissions and the respondent elected to not file any written submissions.

The Applicants' Submissions

26. The applicants reiterate what they deponed in their affidavits and submit that they have proved their case on a balance of probability as the loan applications forms and the amounts disbursed shows that the respondent obtained a loan from the 1st applicant and has defaulted on the same. To support their contentions, the applicants rely on the cases of James Muniu Mucheru vs National Bank of Kenya Ltd [2019] eKLR and CMC Aviation Ltd vs Cruisair Ltd No. 1 1978 KLR 103 [1976-80 1 KLR 835].

27. The applicants submit that from the loan schedule the outstanding loan by the respondent is Kshs. 804,023/-. The respondent only paid Kshs. 513,000/- leaving a balance of Kshs. 290,523/- as the loan due in the year 2023 which amount was carried forward to the year 2024 when the respondent applied for another top up loan. The applicants submit that the respondent has not shown that she has cleared the entire loan arrears and thus urges the court to release the motor vehicle to the 1st applicant.

28. Pursuant to Section 2 of the Moveable Property Security Rights Act 2017, the applicants submit that there exists a security agreement between the 1st applicant and the respondent wherein the 1st applicant granted the respondent a loan of Kshs. 482,333/- and as a sign of acceptance, the respondent issued her car registration number KDG 186R as collateral for the said loan.

29. The applicants rely on Section 71 of the Moveable Property Security Rights Act and the case of National Bank of Kenya Limited vs Chepkwesi & Another [2024] KEHC 8298 (KLR) and submit that one of the auctioneers who attached the motor vehicle showed that there was no objection from the person in possession of the suit motor vehicle at the time of attachment thus the applicants were within the law. Further, the applicants submit that until the respondent clears her loan arrears, the 1st applicant has the right to sale the suit motor vehicle in order to recover its full loan amount of Kshs. 804,023/-.

The Law

Whether the applicants have satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

30. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-

    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 orders set aside.

2. No order for stay of execution shall be made under sub rule 1 unless:-

   a. The Court is satisfied that substantial loss may result to the 1st 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.

31. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:

   1. Substantial loss may result to him/her unless the order is made;

   2. That the application has been made without unreasonable delay; and

   3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

32. Substantial loss was clearly explained in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR:-

> "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.

33. The applicants submit that they stand to suffer substantial loss as they are apprehensive that if the suit motor vehicle is released to the respondent, she will dispose it off yet she is in loan arrears of over Kshs. 900,000/-.

34. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show how execution shall irreparably affect him or will alter the status quo to its detriment therefore rendering the appeal nugatory. In the instant case, it is not disputed that the respondent took a loan with the 1st applicant. What is disputed is the actual amount of the loan arrears the respondent owes the 1st applicant. According to the 1st applicant, the respondent owes them Kshs. 804,023/- yet the respondent states that she cleared the loan amount and even paid an excess of Kshs. 126,210/-. Thus it is clear that the amount is dispute is ascertainable and quantifiable. Therefore the 1st applicant is tasked to show how they shall suffer substantial loss which will render the appeal nugatory. In my view, the 1st applicant has failed to demonstrate how they stand to suffer irreparably if the motor vehicle is released to the respondent Furthermore, from the trial court's ruling, the learned magistrate directed that the 1st applicant provide in court proper books of account to highlight the balance owed to the respondent. The 1st applicant did not avail such accounts in the trial court but instead filed the instant application and appeal. Thus, in my view, the 1st applicant has not shown what substantial loss hey stand to suffer.

Has the application has been made without unreasonable delay.

35. The ruling was delivered on 31st July 2024 and the applicant filed the instant application on 2nd August 2024. The application having been filed two days after the ruling has been filed timeously.

Security of costs.

36. The purpose of security was explained in the case of Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR the court stated:-

> " The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

37. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicants have not offered any security.

38. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR the court stated:-

> " The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. 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 judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion."

39. The court in granting stay has to carry out a balancing act between the rights of the two parties. The question then begs as to whether there is just cause for depriving the respondent her right of enjoying her judgment. I have perused the grounds of appeal and without going into the merits of the appeal noted that they do not raise arguable points of law. Therefore, it is my considered view that the applicant has not met the threshold of granting stay of execution pending appeal.

Whether the applicants have met the conditions for grant of stay of proceedings pending appeal.

40. It is trite law that whether or not to issue an order for stay of proceedings is a matter of the court's discretion exercised after due consideration of the merits of the case and the likely effect on the ends of justice. The exercise of that discretion should be premised on conscientious and judicious decision based on defined principles which were expounded by Ringera J in Global Tours & Travels Limited, Nairobi HC Winding Up Cause No. 43 of 2000:-

> " As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice .....the sole question is whether it is in the interest of justice to order a

stay of proceedings and if it is so, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously."

41. Similarly the threshold for stay of proceedings has been illuminated in the passages in Halsbury's Law of England, 4th Edition, Vol. 37 page 330 and 332 that:-

> " The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.
>
> This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.
>
> It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show merely that the plaintiff might not, or probably would not, succeed but that he could not possible succeed on the basis of the pleading and the facts of the case."

42. In that regard, for an order of stay of proceedings to issue the following points of consideration ought to be adhered to:-

    a. Whether the applicant has established that he has a prima facie arguable case;

    b. Whether the application was filed expeditiously; and

    c. Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

Whether the applicants have established that they have a prima facie arguable case

43. Cognizant of the fact that an arguable appeal needs only raise a single bona fide point worthy of consideration by the Judge who will hear the appeal and it need not be one that must necessarily succeed. Cooperative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya) [2015] eKLR.

44. I have keenly perused the memorandum of appeal and note that the 1st applicant's main contention is the amount owing to them by the respondent in terms of loan arrears. I have also perused the trial court's ruling and looked at the court's reasoning. Without going to the merits of the appeal, I find that the applicants have not raised any arguable grounds of appeal.

. Whether the application was filed expeditiously

45. As discussed above, the application was filed expeditiously.

Whether the applicants have established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought

46. In an application to stay proceedings the court is required to exercise judicial discretion in the interest of justice. This has been demonstrated in the case of Christopher Ndolo Mutuku & Another vs CFC Stanbic Bank Limited (2015) eKLR the court observed that:-

> "…..what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice…"

47. The applicant has not given any reasons why the proceedings in the trial court should be stayed. I have however perused the record and noted that one of the directions the trial court made on 31st July 2024 was for the 1st applicant to produce proper books of account to highlight the balance owed by the respondent. The 1st applicant did not comply with the said directions. It is my considered view that the 1st applicant ought to have complied and filed proper books of accounts to allow the case be ventilated in the trial court. At thus juncture, this court cannot stay the proceedings in the trial court as the 1st applicant has not given any sufficient cause for doing so and further staying the proceedings would not be in the interest of justice to the parties. Accordingly, the applicants have not given any plausible reasons for staying the proceedings in Ruiru SCCCOMM No. E345 of 2024. It is noted that after the full trial of the case at Ruiru, the applicants will still have a right of appeal against the judgment. I am convinced that no prejudice will be caused to the applicants in the event that the orders in this application are not granted.

Conclusion

48. I find that the application dated 31st July 2024 lacks merit and is hereby dismissed with costs.

49. It is hereby so ordered.

RULING DELIVERED VIRTUALY, DATED AND SIGNED AT THIKA THIS 21ST DAY OF NOVEMBER 2024.

F. MUCHEMI

JUDGE