



**Munyi & another v Diamond Trust Bank Kenya Limited & another; National Transport & Safety Authority (Interested Party) (Civil Appeal E016 of 2024) [2024] KEHC 14597 (KLR) (Commercial and Tax) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14597 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E016 OF 2024  
JWW MONG'ARE, J  
NOVEMBER 21, 2024**

**BETWEEN**

**MICHAEL MUNYI ..... 1<sup>ST</sup> APPELLANT**

**SAMUEL MUGENDI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DIAMOND TRUST BANK KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**JOHNSON MUGAI FERNANDES ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**NATIONAL TRANSPORT & SAFETY AUTHORITY ..... INTERESTED PARTY**

**RULING**

1. The Appellants filed the Notice of Motion dated 11<sup>th</sup> March 2024 under Order 42 rule 6 of the *Civil Procedure Rules*, seeking stay of execution of the judgment and decree given on 27<sup>th</sup> December 2023 in MCCC No. E8477 of 2021 - Michael Manyi & another versus Diamond Trust Bank Kenya Limited & Others, by the Honourable Wendy Micheni (CM) (as she then was) pending the hearing and determination of the appeal.
2. The Application is supported by supporting and further affidavits sworn by the 1<sup>st</sup> Appellant, Michael Munyi on 11<sup>th</sup> March 2024 and 28<sup>th</sup> July 2024 respectively. The Appellants also filed written submissions dated 30<sup>th</sup> June 2024.
3. In a nutshell, the grounds are that the Judgment appealed against was delivered on 27<sup>th</sup> December 2023, dismissing the Appellants' suit and allowing the 1<sup>st</sup> Respondent's counterclaim with costs. The trial



court also issued an order of stay of execution of the judgment for 30 days which lapsed on 27<sup>th</sup> January 2024 hence the Appellants' apprehension that the 1<sup>st</sup> Respondent shall execute. The 1<sup>st</sup> Respondent has issued them with a demand letter dated 24<sup>th</sup> January 2024 for the surrender of motor vehicles registration Nos. KBX 162K and KBX 165K, the subject of this appeal.

4. The Appellants argued that they have an arguable appeal with high chances of success as it challenges the trial court's decision to grant the 1<sup>st</sup> Respondent motor vehicles registration Nos. KBX 162K and KBX 165K, not sought for in the counterclaim.
5. The Appellants further argued that if the Respondent proceeds with execution, the appeal will be rendered nugatory. The impugned judgment is not a money judgment and as such the Appellants only seeks to stay the question of surrender of the subject motor vehicles. Since the trial court did not nullify the logbooks in the Appellants' possession, the stay of execution sought ought to be unconditional. The 1<sup>st</sup> Respondent will not suffer any prejudice if stay orders are granted as it has already secured a money judgment of Kshs. 11 million as against the 4<sup>th</sup> and 5<sup>th</sup> Respondents in the counterclaim, hence the orders of stay sought should be granted as a right. The Kshs. 11 Million awarded to the 1<sup>st</sup> Respondent was by way of default judgment given by the court and not challenged at all.
6. In response the 1<sup>st</sup> Respondent opposed the application through a replying affidavit sworn by its debt recovery officer Faith Ndonga on 2<sup>nd</sup> April 2024. It also filed written submissions dated 27<sup>th</sup> June 2024.
7. The salient points were that the Appeal is an afterthought and is manifestly devoid of any real triable issues for consideration; that the Respondents are entitled to the fruits of their Judgement and that the grant of stay of execution would deprive the Bank of the same as the successful party. There must be an end to litigation. The Appellant has failed to offer security for the Appeal. The Appellant has failed to show that they will suffer any substantial loss should the Honourable Court decline to grant the Orders sought.

### **Analysis and Determination**

8. I have considered the application, the affidavits and submissions. The issue is whether the Appellants have made a case for the grant of stay pending appeal.
9. Order 42 Rule 6 of the [Civil Procedure Rules](#) provides as follows: -

“[Order 42, Rule 6.] Stay in Case of Appeal.

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.



3. Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”
10. In *Vishram Ravji Halai v Thornton & Turpin* Civil Application No. Nai 15 of 1990 [1990] KLR 365, the Court of Appeal 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 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. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that 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. 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. According to section 1A (2) of the *Civil Procedure Act*:

“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.”

11. In addition, the Court should balance between the Appellant’s right to appeal and the Respondent’s right to enjoy the fruits of its judgment. The key consideration is whether the circumstances of the case warrant stay not to prevent the appeal.
12. In *Butt v Rent Restriction Tribunal* [1979] KECA 22 (KLR), the Court of Appeal underscored that:-

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church (No 2)* 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:

“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 nugatory.”

Whether the Application has been filed timeously

13. The impugned judgment was delivered on 27<sup>th</sup> December 2023. The appeal was filed on 24<sup>th</sup> January 2024. The instant application was filed on 11<sup>th</sup> March 2024. Hence, I find that it was filed without inordinate delay.

Whether the Appellants have demonstrated that they will suffer substantial loss if a stay is not granted

14. In the suit before the trial court, the Appellants claimed that they were innocent purchasers for value having purchased the motor vehicles from the 2<sup>nd</sup> Respondent. They instituted the suit after the 2<sup>nd</sup> Respondent attempted to repossess the vehicles. The 1<sup>st</sup> Respondent’s case was that the aforementioned motor vehicles were the subject of a Hire Purchase agreement entered between it and



a company known as Kipsigis Stores Limited (in Liquidation). The trial court held that the motor vehicles were the lawful properties of the 1<sup>st</sup> Respondent.

15. On substantial loss, the Appellants submitted that they would be prejudiced if the demand to the surrender of the subject motor vehicles crystalizes. They argued that there is nothing to prevent the Respondents from disposing them or using it in a way that may change the character of the property.
16. The Appellant relied on [Githunguri v Jumba Credit Corporation \(No.2\)](#) (1988) KLR 838 where it was stated that:-

“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if not reversible whether damages will reasonably compensate the aggrieved party.”

17. I note that the matter involves motor vehicles which may be disposed if surrendered. I also note that if the vehicles are disposed without valuation, the Appellants’ appeal may be rendered nugatory. Therefore, the Appellants have demonstrated that they stand to suffer substantial loss is stay is not granted.

Whether the Appellants have offered to furnish security

18. On the issue of security, the Appellants submitted that the subject of the appeal is not a money decree and that they seek to stay the surrender of the subject motor vehicles. On the other hand, the Respondents argued that the Appellants had failed to offer security for the Appeal. However, Order 6 Rule 2 (b) provides that it is the Court that orders the kind of security the applicant should give. This is to ensure that the Court’s discretion is not fettered. See [James Wangalwa & Another v Agnes Naliaka Cheseto](#) [2012] eKLR.

### **Final Disposition**

19. In conclusion, I find that the Appellants have satisfied the conditions as required. The Appellants application dated 11<sup>th</sup> March 2024 is allowed in the following terms:-
  1. The Appellants do surrender possession of the Motor Vehicles Registration Numbers KBX 162K and KBX 165K which are currently in their possession, to a car yard mutually agreed upon by the parties and to be valued by a registered valuer pending the hearing and determination of the Appeal.
  2. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 21<sup>ST</sup> DAY OF NOVEMBER 2024**

.....

**J. W. W. MONGARE**

**JUDGE**

In the presence of

Mr. Mungai holding brief for Mr. Bryan Khaemba for the Appellant/Applicant.

Ms. Kavata holding brief for Mr. Kisinga for the Respondent.

Amos - Court Assistant

