Kenya National Highways Authority v Njue (Civil Appeal E245 of 2024) [2024] KEHC 15691 (KLR) (5 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15691 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E245 OF 2024

FN MUCHEMI, J

DECEMBER 5, 2024

BETWEEN

KENYA NATIONAL HIGHWAYS AUTHORITY .... APPELLANT

AND

JUDY MURUGI NJUE .... RESPONDENT

RULING

Brief facts

1. The application dated 18th September 2024 seeks for orders of stay of execution and orders of varying or setting aside orders of the magistrate in Gatundu SPMC Civil Miscellaneous Application No. E024 of 2024 delivered on 17th September 2024 pending the hearing and determination of the appeal.

2. The respondent filed a Replying Affidavit dated 25th September 2024 in opposition to the application.

Applicant's Case

3. The applicant states that it is a state corporation established pursuant to Section 3 of the *Kenya Roads Act*, No. 2 of 2007 with the mandate to manage, develop, rehabilitate and maintain national trunk roads as provided under Section 4(1) of the Act. The applicant manages various static, virtual and mobile weighbridges and monitors and evaluates the use of national roads in Kenya in line with its mandate under Section 4(2)(d) and (f) of the Act.

4. The applicant states that on 19th August 2024 motor vehicle registration number KDE 023F was intercepted along Sagana to Marua road near Sagana to Kagio junction by their officers attached to Gilgil mobile weighbridge team. The applicant further states that the police officers accompanying the said team suspected the suit motor vehicle to be overloaded and as it was making a u-turn towards Karatina, it was flagged down which signal the driver obeyed. The driver however declined to have the vehicle weighed and informed the officers that he had contacted the owner who he said was on her way

to witness the weighing process. Upon arrival, the owner of the suit motor vehicle, was requested by the officers to instruct the driver to weigh the suit motor vehicle but she offered a bribe to the officers in a bid to compromise them not to weigh her vehicle.

5. The applicant states that the officers declined her offer and she gave out her telephone number as 0728630403 indicating that the documents on overload were to be sent to that number in case the vehicle was found to be overloaded.

6. The applicant avers that as the team was preparing to commence the weighing process, 40 goons arrived in motorbikes and disrupted the whole process. They took control of the suit motor vehicle and commandeered the driver and instructed him to drive off. The police officers tried to disperse them but they were overpowered and by that time the goons had offloaded part of the sand in the vehicle.

7. The applicant states that the officers retreated back to Sagana Police Station to seek reinforcement which they received from the OCS and his officers and they managed to secure the scene. The applicant further avers that more officers from Juja and Athiriver weighbridge and ALEHU central were deployed to assist the team. The officers managed to load the sand which had been offloaded by the goons back to the suit motor vehicle and the vehicle was later escorted to Juja weighbridge for weight confirmation.

8. The applicant states that the suit vehicle was weighed at Juja weighbridge and found to be overloaded at a Gross Vehicle Weight of 15,060 Kgs having carried 41,060 Kgs instead of the legal permissible limit of 26,000kgs on the Gross Vehicle Weight. Furthermore, the vehicle had an overload on the axles of 480 Kgs having carried 8,800Kgs instead of the legal permissible limit of 8,400Kgs on the Group One Axle Grouping and an overload of 13,280Kgs having carried 32,180Kgs instead of the legal permissible limit of 18,900Kgs on Group Two Axle Grouping.

9. The applicant states that the scale used for weighing is the correct meteorological equipment calibrated by weights and measures department and it is the correct equipment for the purpose of the enforcement of the East African Community Vehicle Load Control Act, EACVLC Act. The applicant further states that it is the responsibility of every transported including the respondent to ensure that the vehicle is correctly loaded at all times and that decriminalized overloading does not require a party to be charges for an offence in court.

10. The applicant states that Section 17 of the EACVLC Act provides for procedures in case of vehicle overloading and the same requires that a party pays the overload fees. Accordingly, the respondent is required to pay overload fees of USD 21,132 (Kshs. 2,727,509/-) computed based on the Act as read with the East African Community Vehicle Load Control (Enforcement Measures) Regulations 2018 and which sum the respondent was duly advised.

11. The applicant states that in accordance with Section 17(6) of the EACVLC Act, an overloaded vehicle shall be detained without charge for a period of three days and thereafter a fee of USD 50 shall be charged for each extra day of detention and as at 29th August 2024, the vehicle had accrued parking fees of Kshs. 38,712.77/- having stayed at the weighbridge for 6 days. Thus, the total amount payable is Kshs. 2,766,221.27/-.

12. Pursuant to the trial court's directive that the suit motor vehicle be re-weighed, the applicant states that the suit motor vehicle was reweighed on 29th August 2024 in the presence of all parties' representatives who acknowledged the results thereof by appending their signatures of the weight ticket.

13. The applicant argues that the orders granted by the lower court was issued in contravention of the express provisions of the law and have the effect of negating the very safeguards established by

legislation to protect the interests of the Government of Kenya to secure the payment of prescribed fees, and to protect the roads in Kenya from being damages by such overloaded motor vehicles.

14. The applicant is apprehensive that the intended appeal will be rendered nugatory should the suit motor vehicle be released without any guarantee of ever finding the said motor vehicle again for purposes of enforcement of the law on such overloading and contrary to the law on such release. Unless the enforcement of the ruling is stayed by the court as prayed, the right of appeal would be unduly compromised and clogged.

15. The applicant avers that this court as a state organ and all the parties concerned are bound by the national duty imposed by Articles 10, 159 and 259 of *the Constitution* of Kenya to uphold national values and principles of governance on their duty of patriotism, social justice and good governance, to protect public funds and functionaries of the public, from probable disruption of the critical function of national road construction, regulation and maintenance in circumstances where the ruling challenged in the appeal is likely to be set aside and where there is a genuine concern that the intended appeal is likely to be rendered nugatory.

16. The applicant filed a Supplementary Affidavit dated 19th September 2024 and states that the trial court in Gatundu MCCC Miscellaneous Application No. E024 of 2024 delivered its ruling on 17th September 2024 which the applicant lodged an appeal against. The applicant argues that if the orders in the instant application are not granted, their appeal shall be a mere academic exercise.

The Respondent's Case

17. The respondent states that an application under Order 42 Rule 6 of the Civil Procedure Rules is meant to preserve the subject matter of the suit while balancing the interests of both parties and considering the circumstances of the case.

18. The respondent states that the applicant detained and impounded at Juja Ruiru Weighbridge, motor vehicle registration number KDE 023F having found the same to be overloaded. The respondent states that she was then issued with a weighbridge certificate indicating the amount she was supposed to pay but she moved the court for re-weighing of the vehicle which was done pursuant to a court order dated 28th August 2024 and in the presence of both parties' advocates.

19. The respondent avers that she was never charged with any offence but the applicant filed a preliminary objection dated 27th August 2024 where parties were invited to put in written submissions.

20. The respondent thus argues that the instant application is vexatious and meant to deter her from enjoying the fruits of her judgment. The respondent further states that the suit motor vehicle has been in the custody of the applicant from 19th august 2024 making it difficult for her to service her loan as the suit motor vehicle is charged to Neno Sacco.

21. The respondent states that no prejudice will be occasioned to the applicant if stay is not granted since they have in their possession copies of overload fees invoices and in the event their appeal is successful, the same can be used to recover the amounts levied. In the contrary, the respondent avers that it will be unfair and prejudicial to her if the applicant is granted stay as they will continue to keep the suit motor vehicle occasioning past, present and future significant economic loss to her. The respondent argues that no substantial loss shall be occasioned on the applicant as execution is a lawful process and no evidence has been presented before the court to show that execution will irreparably affect the essential core of the applicant as the successful party in the appeal.

22. The respondent filed a Further Replying Affidavit dated 4th November 2024 and states that on 22nd October 2024, she received a demand letter from Neno Ndt Sacco Society titled Loan Recovery

whereby they noted that as at 30th September 2024, she had a 3 months arrears of Kenya Shillings One Million, Three Hundred and Sixty Three Thousand and Eighty Six (Kshs. 1,363,086/-). The respondent states that the sacco gave her until 31st October 2024 to remedy the default by paying the arrears and the monthly installment for the month of October totaling to Kenya Shillings One Million, Five Hundred and Sixty Three Thousand, Two Hundred and Fifteen (Kshs. 1,563,215/-) failure to which, they shall repossess the motor vehicle. Additionally, the respondent states that she received another demand letter from Family Bank Limited dated 13th October 2024 whereby the bank expressed its dissatisfaction with her for her failure to repay her loan of Kshs. 238,286.60/-. Thus the respondent states that the suit motor vehicle is an income generating asset for her which enables her to smoothly service her loans.

23. Directions were issued that the application be canvassed by way of written submissions and from the record only the applicant complied on 11th November 2024.

The Applicant's Submissions

24. The applicant relies on Section 78(2) of the *Civil Procedure Act*, Order 42 Rule 6 of the Civil Procedure Rules and the cases of Masisi Mwita vs Damaris Wanjiku Njeri [2016] eKLR and submits that they have met the criteria for stay of execution pending appeal. The applicant submits that the application was filed timeously as the ruling was delivered on 17th September 2024 and they filed the instant application on 19th September 2024.

25. The applicant submits that they are apprehensive that the respondent may execute the order during the pendency of the appeal if the court does not grant the orders of stay. The applicant further submits that it shall suffer irreparable loss to the tune of Kshs. 2,766,221.27/- being overload fees and parking charges due from the respondent as at 20th August 2024.

26. The applicant further relies on the case of Kenafric Matches Ltd vs Match Masters Limited & Another (Civil Application No E092 of 2020) and submits that it has an arguable appeal that raises serious triable issues with high chances of success and that any execution will render the appeal nugatory. The applicant further submits that they are apprehensive that the respondent will not make payment of the overload and parking fees of Kshs. 2,766,221.27/- and if the suit motor vehicle is released in the event the appeal succeeds and execution has already been carried out, the appeal shall be rendered nugatory.

27. On the issue of security, the applicant asserts that it is the one owed money by the respondent in the form of overload and parking fees of Kshs. 2,766,221.27/-

The Law

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

28. 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.

29. 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.

30. 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.

31. The applicant submits that they are apprehensive that the respondent will not make payment of the overload and parking fees of Kshs. 2,766,221.27/- and if the suit motor vehicle is released, the appeal shall be rendered nugatory in the event the appeal succeeds.

32. 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 it or will alter the status quo to its detriment therefore rendering the appeal nugatory. In the instant case, the applicant has not shown how it stands to suffer irreparably if the suit motor vehicle is released. The applicant declined to charge the respondent with any criminal charges but insists that the said amount of Kshs. 2,766,221.27/- be paid. This is an ascertainable amount and in the event the appeal succeeds, the applicant can execute the said amount from the respondent as the applicant has in their possession the weighbridge certificates. Therefore, it is my considered view that the applicant has not demonstrated the substantial loss they stand to suffer.

Has the application has been made without unreasonable delay.

33. The ruling was delivered on 17th September 2024 and the applicant filed the instant application on 19th September 2024. Thus the application has been filed timeously.

Security of costs.

34. 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.

35. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicant has not offered any form of security but argues that the respondent is the one who owes them Kshs. 2,766,221.27/-.

36. 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."

37. The court in granting stay has to carry out a balancing act between the rights of the two parties. The issue herein is whether there is just cause for depriving the respondent of 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. Furthermore, the respondent has demonstrated that she uses the suit motor vehicle to carry on her business which services her loans. Thus by impounding the vehicle the parking fees will continue to accrue and the respondent will risk losing her motor vehicle. In my view, the continued detention of the vehicle is not of any benefit to the applicant or to the respondent. The prolonged detention of the motor vehicle is likely to cause prejudice to the respondent due to loss of business. The loss of the applicant has been quantified and can be compensated by way of damages

38. It is my considered view that the applicant has not met the threshold of granting stay of execution pending appeal. Accordingly, the application dated 18th September 2024 lacks merit and is hereby to be dismissed with costs to the respondent.

39. It is hereby so ordered.

RULING DELIVERED VIRTUALY, DATED AND SIGNED AT THIKA THIS 5TH DAY OF DECEMBER 2024.

F. MUCHEMI

JUDGE