



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 67 OF 2019

GLADYS KARIMI MUSYIMI.....PLAINTIFF/RESPONDENT

VERSUS

FAHARI CARS LTD.....1<sup>ST</sup> DEDEFNDANT / APPLICANT

JESSE WAINAINA T/A EXPRESS AGENCY AUCTIONEERS.....2<sup>ND</sup> DEFENDANT

RULING

1. The Applicant, **Fahari Cars Limited** approached this court vide a **Notice of Motion** application dated **12<sup>th</sup> August, 2021** wherein it is seeking stay of execution in respect of a Judgment delivered by this court on **14<sup>th</sup> July 2021**, pending the hearing of the Applicant's appeal.
2. According to the Applicant, this court entered Judgment in favour of the Respondent against the 1<sup>st</sup> Defendant/Applicant wherein it was ordered that the 1<sup>st</sup> Defendant to refund the Plaintiff the entire sum of Kshs.2,776,900/= together with Kshs.400,000/= as exemplary damages together with costs of the suit.
3. The application is supported by the grounds stated on its face and the depositions made in the **Supporting Affidavit** sworn on **12<sup>th</sup> August, 2021** by its learned counsel **Tricky Chikuro Nzaka**. She deposed that Judgment was delivered in favour of the Respondent and that the Respondent is currently at liberty to execute the said Judgment. Consequently, the Applicant being aggrieved by the said Judgment wishes to appeal and his appeal has high chances of success. She states that the Applicant will suffer irreparably if the stay order is denied.
4. The Respondent filed her **Grounds of Opposition** on **30<sup>th</sup> August, 2021**. In opposition to the application, the Respondent has averred that the application lacks merit; that there is no threat of execution; that the sum of Kshs.2,776,900 is a refund of the money she paid for the motor vehicle which was illegally repossessed by the Applicant; that the Applicant will not suffer any harm; that the application is a ploy to delay the Respondent from enjoying the fruits of the Judgment; that there can be no attachment if payment of the refund is made; that only kshs.400,000/= awarded as damages should be deposited in the joint interest earning account and that the Applicant has not demonstrated evidence of an arguable appeal.
5. The record shows that by consent of counsel for both parties, the application was to be disposed of through written submissions and they filed their respective written submissions reiterating and expounding on the different positions they had taken in support and in opposition to the Motion.
6. In its submissions filed on **15<sup>th</sup> September, 2021**, the Applicant submitted that in determining the application, the court should consider whether the Applicant has an arguable appeal and whether the Applicant has met the conditions for grant of orders of stay as filed under **Order 42 Rule 6** of the **Civil Procedure Rules**.
7. With regard to whether the Applicant has an arguable appeal, relying on the decision in the case of **Lemanken Aramat –vs- Harun Meitamei Lempanka & 2 Others [2014]eKLR**, the Applicant has listed four Grounds of Appeal to show that the appeal would be rendered nugatory if there is no stay.
8. On whether the Applicant has met the conditions for grant of orders of stay, the Applicant has indicated that it is willing to furnish security as a condition set by the rules. Reliance has been placed on the decision in the case of **Lagoon Development Limited –vs- Prime Aluminium Casements Limited [2020]eKLR** in support of its submission.
9. In opposing the application, the Respondent has contended that for an application of stay of execution to succeed, all the requirements provided for under **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** must be met.

10. On proof of substantial loss, the Respondent has submitted that the Applicant cannot suffer any substantial loss reason being that the amount in dispute is a refund. She has relied on the cases of James Wangalwa & Another –vs- Agnes Naliaka Chesoto Misc.App. No.42 of 2011, Victory Construction –vs- BM [2019]eKLR and Kenya Shell Limited –vs- Kibiru [1986]eKLR, to show that substantial loss only occurs if one is using their own resources to settle the decretal sum.

11. On the issue of security, the Respondent has emphasized that the security offered by the Applicant is basically the money she had paid for the car and not their own resources hence it will amount to punishing her further if the same is used as security by the Applicant as such.

12. Finally, the Respondent has gone on to submit that there were no arguable Grounds of Appeal presented by the Applicant before this court.

### **Analysis and Determination**

13. I have considered the application, the affidavits on record and the written submissions filed by both counsel on behalf of the parties together with the law and all the authorities cited by either party. Having done so, I find that the only issue arising for determination is whether to grant or refuse to grant the stay of execution as sought in the application.

14. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 Rule 6(2) of the Civil Procedure Rules, which provides as follows:

**“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.**

15. In the case of Butt –vs- Rent Restriction Tribunal [1979], the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a 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.

16. As to what substantial loss is, it was observed in the case of James Wangalwa & Another –vs- Agnes Naliaka Chesoto [2012]eKLR, that:

**“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.”**

17. This was the position taken by Warsame, J (as he then was) in the case of Samvir Trustee Limited –vs- Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997, where he expressed himself as hereunder:

**“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the Defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...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 the fruits of his Judgment; hence the consequence of a Judgment is that it has defined the rights of a party with definitive conclusion. The Respondent is asserting that matured right against the Applicant/Defendant...For the Applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss... Whereas there is no doubt that the Defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an**

**order of stay with certain conditions.”**

18. On the first principle, **Platt, Ag. JA** (as he then was) in **Kenya Shell Limited –vs- Kibiru [1986] KLR 410**, at page 416 expressed himself as follows:

**“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondents should be kept out of their money”.**

19. In the instant case, the record is clear that the Applicant has not produced any evidence of the loss it is likely to suffer if stay is not granted. In the absence of such evidence, I am not persuaded to find that the Applicant has laid sufficient basis upon which this court can exercise its discretion and grant the stay it seeks. Further, it is worth noting that it is a cardinal principle of the law of evidence that he who alleges must prove. The Applicant has not proved or shown this court what substantive loss it is likely to suffer.

20. Was the application filed without unreasonable delay? I find that no complaint has been made to the effect that there was delay in filing this application. The Judgment sought to be appealed against was delivered on **14<sup>th</sup> July, 2021** and the application filed on **12<sup>th</sup> August, 2021**. In my considered view the application having been filed within 28 days of the delivery of the impugned Judgment, the same was filed a reasonable time.

21. With regard to security for costs, the Applicant has deposed in **Supporting Affidavit** that it is ready and willing to deposit security in a joint interest earning account with the corresponding firm of advocates pending the outcome of the present appeal. The Respondent asserts that what the Applicant is offering as security is the money which she had paid for the car and is the refund she is entitled to, hence not the Applicant’s money.

22. *In considering whether or not to grant stay*, the court must balance the interests of the Applicant with those of the Respondent. From the court records, the Applicant repossessed and sold the subject matter of the contract leaving the Respondent with no money and no car. In my considered view, it would be in the interest of justice for the Applicant to refund the Respondent the monies declared to be a refund. This is because in the event the appeal succeeds, I believe the Respondent is a capable woman and will be able to refund the same since she had already paid Kshs.2,776,900 to the Applicant.

23. Therefore, in view of the findings in regard to the requirements to be satisfied by a party seeking stay of execution as provided for under the provision of **Order 42 Rule 6** of the **Civil Procedure Rules**, I find that the Applicant has failed to meet two of the said grounds which are most pertinent, hence its application is without merit and cannot invoke this court’s discretionary powers to grant the stay. I therefore dismiss the application dated **12<sup>th</sup> August, 2021** with costs to the Respondent.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 4<sup>TH</sup> DAY OF NOVEMBER, 2021**

**D. O. CHEPKWONY**

**JUDGE**