



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CIVIL APPEAL NO. 36 OF 2020**

**TAWAKAL AIRBUS LIMITED.....APPELLANT/OBJECTOR/APPLICANT**

**VERSUS**

**IRENE MUTHONI NJIRATI.....DECREE HOLDER/RESPONDENT**

**TAWAKAL BUS COMPANY LTD.....RESPONDENT/JUDGMENT DEBTOR**

**Coram: Hon. Justice R. Nyakundi**

**Ochieng Kokul & Vel Advocates for the Appellant**

**M. Ananda Advocates for the respondent**

**RULING**

The applicant has brought the instant application dated 20.8.2020 by way of a chamber summons under Section 1A, 1B and 3A of the Civil Procedure Act and Order 51 of the Civil Procedure Rules Articles 50 (1) and 165 of the Constitution seeking an order of stay of execution of the Learned trial Magistrate **Hon. Wasike (SRM)** dated 30.4.2020 pending the disposal of the appeal. the Ruling arises out of an applicant's objection to the attachment of the applicant's properties identified as motor vehicles KCF 256D, KCK 037C, KCR 470W office seats, desks and computer set, to satisfy the decree of the Court dated 14.10.2019.

In support of the application is an affidavit sworn dated 20.8.2020 by **Ahmed Mohammed Abdalla** who describes himself as the director of the applicant company. In the affidavit he avers interalia that the company has never been a party to the decree arising of the proceedings in **CMCC No. 103 of 2019**. That the decree of the Court capable of being enforced is against Tawakal Bus Company Ltd and not Tawakal Air Bus Ltd as the annexed search of records from NTSA establishes ownership of the proclaimed motor vehicles. That the respondent/decree holder nevertheless proceeded to proclaim and attach the scheduled properties which the applicant claimed before the trial Court to be a wrong attachment.

The properties in particular the buses listed in the proclamation have been shown in the annexed copy of records to belong to the objector which evidence was dismissed by the Learned trial Magistrate. The applicant being aggrieved with the Ruling is challenging the dismissal of the objection proceedings on appeal, which necessitated filing of the application.

The respondent, **Irene Muthoni Njirati** opposed the application for stay of execution in her replying affidavit filed in Court on 8.9.2020. In the affidavit she sets out the procedural history of the claim and the entry of Judgment dated 24.2.2020 in her favour which remains unsatisfied to date.

At the hearing both counsels made their respective oral submissions. According to **Mr. Kokul** for the applicant its clear from the record that the applicant was never joined as a party in **CMCC NO. 103 OF 2015**. Whereas on the other hand, counsel **Mr. Wafula** for the respondent submitted that the applicant has not demonstrated substantial loss on execution of the decree. On the challenge to the Ruling counsel argued that if the applicant seeks to preserve the attached properties, it should make an offer to deposit security for due performance of the decree. Having heard the parties and thereafter appraising the record I am of the following determinative view of the matter.

**Determination**

The Law on this nature of application is provided for under Order 42 Rule 6 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act. There is also the relevant case Law by the superior courts. The fundamental question on stay of execution emerges in the case of **Butt v Rent Restriction Tribunal {1982} KLR 417** where **Madan JA** held:

***“It is 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 to prevent the appeal if successful being nugatory. It follows also in Hassan Guyo Wakalo v Straman East Africa Ltd Civil Appeal No. 160 (201) {2013} eKLR the Court held: “In addition, the applicant must prove that if the orders sought are not granted and his appeal, eventually succeeds, then the same shall have been rendered nugatory.”***

These twin principles go hand in hand and failure to prove one dislodges the other. The object of the discretion as stated in the comparative jurisprudence in **Golden Beach Hotels (Ltd) v Pack Plus International Ltd {2012} 1SCGLR 452** is to the effect:

***“Will the appeal be rendered nugatory upon succeeding and if yes, are there any exceptional circumstances to necessitate the suspension of the decision complained of?”***

In **RWW v EKW {2019} eKLR** the following statement by the Court is applicable to the present application:

***“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. 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.”***

Another aspect of Order 42 Rule 6 which requires a closer examination with regard to the instant application is as stated in the value Judgment in **Gia Franco Manenthi & Another v Africa Merchant Assurance Co. Ltd {2019} eKLR**. The Court opined:

***“The applicant must show and meet the conditions 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 decree in order to enjoy the fruits of his Judgment in case the appeal fails.”***

Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a Court which has delivered the matter in his favour.

In the instant case the applicant in its affidavit weighed heavily on the issues which influenced the Learned trial Magistrate findings of fact on the issue of proclamation and attachment.

Its upon that finding the applicant feels aggrieved on two fronts, first, in Law as an objector the seizure and attachment of its property to satisfy a Judgment of the respondent was unlawful. Secondly, to be fair the applicant was never notified of the claim or joined as a party in a Complaint dated 16.5.2019 and subsequently filed in Court by the respondent. In addition to the two conclusions set out above, the applicant also argues that the findings the Learned trial Magistrate stated in her decision in favour of the respondent would greatly prejudice its legal and beneficial interest to the proclaimed property.

At the outset, it must be stated that the movable assets proclaimed by the auctioneer are being claimed by the applicant. The nexus therefore for the trial Court appeared to be the determination whether the properties were acquired or owned by **Tawakal Bus Co. Ltd** the defendant to the claim or the objector **Tawakal Airbus Ltd**.

In so far as the applicant affidavit evidence is concerned there are alleged procedural deficiencies of the order on proclamation and attachment. Its trite that under Order 42 Rule 6 of the Civil Procedure Rules the Courts have traditionally granted stay of execution in three situations; first where the application has been filed without undue delay. Second, the applicant justifying that he would suffer substantial loss. Thirdly, the ability to satisfy the criteria on deposit of security for due performance of the decree.

However, the present case appears to fall on a different factual category, involving a dispute over a wrongful and unlawful attachment of property of person who is a stranger to the suit and subsequent decree.

In this regard, I find it appropriate to cite **Hallsburys Laws of England 4<sup>th</sup> Edition Volume 17 para 455** which states that:

***“The Court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will as a rule, only grant a stay if there are special circumstances, which must be deposed to an affidavit unless the application is made at the hearing.”***

Overall, in this case the foundation of the applicants case before the trial Court and on the intended appeal is on the approach taken at arriving in a decision likely to deprive him of the property to settle a decree supposedly on a wrong presumption that he is the Judgment debtor.

This Court is satisfied, based on the affidavit evidence and submissions of both counsels that the respondent move to execute and enforce the decree by way of seizure and attachment of the applicant’s property would occasion irreparable harm not compensatable in damages. It

bears emphasis to exercise discretion and order for stay of execution in consonance with the balancing act between the rights of the applicant with those of the respondent.

These principles outlined above are clear indicators respecting the exercise of discretion for stay of execution pending an appeal. Moreover, it appears likely that there is a substantial question of Law to be heard and determined on appeal once the Court gets served of it. A brief glance of the impugned Ruling permits me to comment on the perceived merits of the intended appeal. It will be convenient to structure this decision by considering the applicable Law and then advance a case based upon Section 1 (A) of the Civil Procedure Act on overriding objective. The length of time to fairly dispose of the appeal and its effect on the validity of the Judgment are grounds which equally places me at a position to review the facts of this particular case based on the memorandum of appeal the applicant intends to base his appeal against the respondent. On the issue of objection proceeding before the Lower Court it was the applicants contention that the proclaimed inventory of goods aimed at settling the decree was on account of the applicant who was never party to the original claim. In that case it was within the ambit of the trial Magistrate to consider the principles in **Chotabhae M. Patel v Chapraphi Patel {1958} Ed 743** where the Court held as follows:

***“(1). Where an objection is made to the attachment of any property attached in execution of a decree on the ground that such property is not liable to attachment the Court shall proceed to investigate the objection with the live power as regards examination of the objector, and in all other respects as if, he was party to the suit.***

***(2). The objector shall adduce evidence to show that at the date of attachment he had some interests in the property attached.***

***(3). The question to be decided is, whether on the date of attachment, the Judgment debtor or the objector was in possession, or where the court is satisfied that the property was in the possession of the objector, it must be found whether, he held it on his own account or in trust for the Judgment debtor. The sole question to be investigated is, thus, one of possession of and some interest in the property.***

***(4). Questions of Legal right and title are not relevant except so far as they may affect the decision as to whether the possession is on account of or in trust for the Judgment debtor or some other person. To that extent the file may be part of the inquiry.”***

In the instant application, both affidavits filed in support and in opposition to the reliefs sought by the applicant has been considered by the Court. Its clear that in **CMCC NO. 103 OF 2019**, the objector was never joined as a party to the claim filed seeking the damages by the respondent. There is prima facie evidence from the pleadings that the defendant in that suit was **Tawakal Bus Company Limited**. The defendant/decree holder in her replying affidavit has not attempted to show whether the party she sued was **Tawakal Bus Company Ltd** or **Tawakal Air Bus Ltd**.

That is therefore the core question the decree holder is bound to answer before any attachment of the identified proclamation and attachment can be initiated against the objector. In the impugned proceedings, the applicant annexed copy of records from **National Transport and Safety Authority** to demonstrate that the attached motor vehicles proclaimed were properties to the said company **Tawakal Air Bus Ltd**.

The inquiry on appeal as premised in the memorandum of appeal is as to the rights of the parties to the objection proceedings that the objector's property attachment was wrong and unlawful. In that case, the Learned trial Magistrate appeared to have grounded her decision on the averments by the decree holder to the effect that the attachment was against one and the same defendant sued in **CMCC NO. 103 OF 2019**. It seems to me that the Ruling did not determine the question whether **Tawakal Bus Limited (Defendant)** and **Tawakal Air Bus Limited** on the other hand were actually one and the same legal entity to prove title to the attached motor vehicles. Whether having regard to the material and evidence the trial Court was right in construing that the applicant failed to prove a legal or equitable interest in the proclaimed and attached goods and upon that basis dismissed the notice of motion is a moot question. As rightly noted in **Caltex Oil Uganda Ltd v Petrol Uganda Ltd (Misc. Application No. 86 of 2004)**:

***“Execution is said to mean the act of completing or carrying into effect of a Judgment compelling the defendant to do or pay what has been adjudged.”***

So in the instant application aside can one say conclusively from the record that the attachment was in respect of a defendant who had been adjudged in a fair trial and on the merits? The trial Court ought to have answered the question whether the attached property belonged to the objector or the Judgment debtor, and who was in possession of the properties.

On a substantial scale, the threshold of a prima facie case was made by the applicant to warrant a rebuttal from the respondent on ownership. The framework for qualifying the disputed question was one of general importance in giving effect to the objection proceedings thus in **Ida Soman v Najib Mubiru HCCA NO. 234 OF 2005, Kiryabwire J of Uganda High Court** observed inter alia:

***“The question to determine is whether at the date of attachment, the Judgment debtor or objector was in possession of the property. If the Judgment debtor was in possession, the inquiry will proceed no further. It has also to be determined whether the objector held the property on his/her own account or in trust for some other person.”***

The case called for the trial Court to consider what the dictum in **Joseph Mutenga v Photofocus U Ltd {1996} KLR** stated to be:

***“What Court needs to investigate is not ownership of the property being attached. But has to determine that applicant was in possession of the attached property on his own account and not on account of the Judgment debtor or some other person.”***

A further scenario which emerges in the genesis of this matter is a distinction between the parent and subsidiary companies. To bolster this legal proposition, the Court in **Kolaba Enterprises Ltd v Shamshdin Hussein Varrani & Another {2014} eKLR Gikungo J** said:

*“Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the Law provides for the lifting of piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities.....”*

It is also discernible from the principle in **Hannah Maina t/a Taa Fiwer v Rift Valley Bottlers Ltd {2016} eKLR** where the Court held:

*“In the circumstances, the respondent could not be held liable for the debts of its subsidiary company, the two being distance and separate legal entities. We are in agreement with the holding of the Learned Judge in Southard Limited {1979} 3 ALL ER 565 that “a parent company may spawn a number of subsidiary companies, all directly or indirectly contributed by the shareholders of the parent company. If one of the subsidiary companies turns out to be the runt of the litter and declines into insolvency to the dismay of the creditors, the parent company and the subsidiary companies may prosper to the joy of the shareholders without any liability for the debts of the insolvency subsidiary.”*

In my view, the issue of contestation in the objection proceedings as set out in the Ruling of the trial Court hinges on the principle of corporate personality as between **Tawakal Bus Co. Ltd and Tawakal Air Bus Ltd**. There are weighty legal questions which remained unanswered in the impugned Ruling of the Learned trial Magistrate. It is therefore worthy in the present case to emphasize that the application cannot vest solely upon examination of the stay of execution remedies under Order 42 Rule 6 of the Civil Procedure Rules. The heart of the applicant’s case is whether the objection proceedings which were eventually dismissed would be used to order execution and attachment of its properties to satisfy a decree which he was never a party in the first place.

That therefore distinguishes the applicants’ application for stay of execution within Order 42 Rule 6 of the Civil Procedure Rules and the sphere of the illegality and procedural impropriety of the decision to proclaim and attach the movables properties on instructions issued by the respondent. In line with this, the traditional statutory conditional precedent for deposit of security for due performance of the decree under Order 42 Rule 6 of the Civil Procedure cannot be issued in this matter. In this matter although I was asked to deal with interlocutory application on stay as a first appellate Court, I am empowered to subject the whole of the impugned decision into a fresh and exhaustive scrutiny. As I have already pointed out there are some transgressions implicit in the challenged Ruling of the Learned trial Magistrate to the extent stated elsewhere in this analysis.

In my view rightly so, the Court has an inherent jurisdiction pursuant to Section 3 (A) of the Civil Procedure Act to set aside an irregular or incorrect position of the Law taken by an inferior tribunal or Court to advance the interest of justice. Clearly it’s a multifaceted jurisdiction that needs to be invoked at various levels where the requirements of justice demands it. (**See Tringah v Stewardson Stubbs & Collet Ltd {1966} 66 SR NSW 335 – 344**).

Having said so the approach to this task is firmly to grant stay of execution against any movable or immovable properties of the applicant, in respect of any order or arising from the decree of the Court in **CMCC NO. 103 OF 2019 at Malindi**. This also does advance a particular question framed for appeal in the memorandum of appeal whether by its nature proceedings for the enforcement of the decree obtained in the Judgment can be ruled against the applicant whom relief is sought without answering the legal fundamental issues raised herein. In my view, this particular species of execution proceedings against a party outside the ambit of the initial primary suit contemplated in the Civil Procedure Act and Rules reasonably requires the decree holder to meet the bench mark test on legal entity of the two companies. What is clear for purposes of the objection proceedings the decree holder was yet to satisfy the legal criterion for purposes of execution and attachment against the applicant. Consequently, it does lie that in addition to stay of execution, the warrants of proclamation and attachment as of now are set aside with costs to the applicant.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 3<sup>RD</sup> DAY OF NOVEMBER 2020**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Mr. Munguti holding brief for Kokul advocate for the applicant
2. Mr. Wafula holding brief for Ananda advocate for the respondents