



**Al-Husnanin Motors Limited v Michira (Civil Application
13 of 2021) [2021] KECA 169 (KLR) (19 November 2021) (Ruling)**

Neutral citation: [2021] KECA 169 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 13 OF 2021
HM OKWENGU, MSA MAKHANDIA & F SICHALE, JJA
NOVEMBER 19, 2021**

BETWEEN

AL-HUSNANIN MOTORS LIMITED APPLICANT

AND

JOSHUA MATAGARO MICHIRA RESPONDENT

(Application for stay of execution of the judgment of the High Court of Kenya at Busia (Kiarie W. Kiarie, J) delivered on 27th January, 2021 in Busia H.C.C.A. No. 21 of 2018)

RULING

- [1] What is before us is a notice of motion brought by the applicant Al-Husnanin Motors Limited seeking orders of stay of execution of the judgment and decree delivered by the High Court (Kiarie Waweru Kiarie, J.) on 27th January, 2021. Also sought is an order for stay of any further proceedings pursuant to the judgment delivered by the High Court, pending the hearing and determination of an intended appeal against the judgment and decree of the High Court.
- [2] In the judgment of the High Court, the learned Judge sitting on a first appeal, dismissed an appeal that had been lodged by the applicant (who was the defendant in the trial court), against the judgment of the trial court giving judgment in favour of the respondent, Joshua Matagaro Michira (the plaintiff), for Kshs. 2,381,000. The applicant who is dissatisfied with the judgment of the High Court, has filed a notice of appeal against the judgment and now seeks orders under rule 5(2)(b) of the Court of Appeal Rules for stay of execution and or proceedings.
- [3] The applicant's motion is supported by an affidavit sworn by its advocate Collins Orieyo, as well as written submissions. The applicant maintains that it has an arguable appeal and has annexed a copy of the draft memorandum of appeal indicating four grounds that it intends to raise. The applicant also contends that if the orders sought are not granted, his intended appeal will be rendered nugatory as the respondent will proceed to attach his properties in execution of the decree. The applicant contends,



that the decretal sum has been deposited in a joint fixed account and that the motor vehicle which was subject of the suit is in the custody of the respondent and therefore the respondent shall not suffer any prejudice, if the orders sought are granted.

[4] The respondent opposed the motion through grounds of opposition and written submissions in which the respondent argues that the applicant has failed to meet the threshold for granting the orders sought. The respondent submits that there is no positive order capable of execution in the judgment of the High Court delivered on 27th January, 2021, and hence there is no basis for the order of stay of execution that has been sought. Secondly, that the decree is a money decree of a modest amount, and it has not been demonstrated that the respondent will not be able to repay the amount if the applicant is successful in the appeal.

[5] We have considered this application and the contending submissions. Rule 5(2)(b) of this Court's Rules, gives this Court discretionary powers where an appeal has been lodged under Rule 75 of the Court of Appeal Rules to "order a stay of execution, an injunction or a stay of any further proceedings, on such terms as it may think just." Such an appeal can only be lodged against the judgment or order of the High Court and as stated in *Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others [2013] eKLR*, an applicant seeking orders under Rule 5(2)(b) of the Court Rules must satisfy the twin requirements of that rule, which is that he has an arguable appeal, and that if the orders sought are not granted, the intended appeal will be rendered nugatory.

[6] We have perused the draft memorandum of appeal and noted the grounds intended to be raised by the applicant. This being a second appeal, it must be anchored on issues of law and not facts. It is not disputed that there was a contract of sale of a motor vehicle between the applicant and the respondent. The High Court upheld the judgment of the lower court anchored on the finding that the applicant was in breach of the contract. The appellant contests this finding. Breach of contract is an issue of law and it suffices that the applicant has raised at least one issue and it need not necessarily be one that must succeed. As was stated by this Court in

"An arguable appeal need not raise a multiplicity of explorable points, a single one would suffice. That point or points need not be such as must necessarily succeed on full consideration of the appeal – it is enough that it is a point on which there can be a bona fide question to be explored and answered within the context of an appellate adjudication."

[7] As regards the nugatory aspect, the decree subject of the intended appeal is an order of dismissal of the first appeal. This means that the decree is a negative order that is not capable of execution. As was held in *Western College of Arts and Applied Science vs Oranga & Others [1976] KLR 63*, the High Court has merely dismissed the appeal and, therefore, there is nothing to execute except for costs.

[8] As regards the order for stay of the proceedings arising from the decree, again the decree of the High Court being a negative order for dismissal of the appeal, it cannot be subject of any further proceedings. It would appear that the applicant has in mind execution proceedings in the trial court anchored on the judgment of the trial court that was upheld by the High Court. There is no justification for this Court to interfere with the execution proceedings in the trial court. Further, the decree is a monetary decree and no allegation has been made that the respondent will not be able to refund the money.

[9] For all these reasons, we find no merit in the applicant's motion. It is accordingly dismissed.

Dated and delivered at Nairobi this 19th day of November, 2021.

HANNAH OKWENGU

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**JUDGE OF APPEAL
ASIKE MAKHANDIA**

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**JUDGE OF APPEAL
F. SICHALE**

.....

JUDGE OF APPEAL

**I certify that this is a
true copy of the original**

Signed

DEPUTY REGISTRAR

