



**Sunrise Hauliers Limited v Motaroki (Appeal E019 of 2023)
[2024] KEELRC 631 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 631 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
APPEAL E019 OF 2023
JW KELI, J
FEBRUARY 29, 2024**

BETWEEN

SUNRISE HAULIERS LIMITED APPELLANT

AND

ROBERT MOKUA MOTAROKI RESPONDENT

RULING

1. This Ruling determines the Applicant’s Notice of Motion application dated 9th December 2023 and filed on the 10th December 2023 brought under the provisions of Sections 1A, 1B, and 3A of the [Civil Procedure Act](#), Rules 22 and 4 of the [Civil Procedure Rules](#) as well as Article 159(2) of the [Constitution](#).
2. The applicant seeks the following orders:
 - a. Spent
 - b. That there be a temporary stay of execution of the decree in BGM CMCC No 584 of 2016 until this motion is heard and determined.
 - c. That costs of this motion to abide the outcome of this motion.
3. The Applicant’s case is that its Motor vehicle was proclaimed by Remma Auctioneers on 6th December 2023 in Kisumu in the execution of a decree(MJS-9) in BGM CMCC No 584 of 2016, that was determined on 18th October 2023 and, risked being auctioned in the following 10 days.
4. The Applicant states that due to an apparent error on the face of the record, in BGM CMCC No 584 of 2016, the Appellant filed for Review on 31st October 2023 seeking review of the Judgement. Directions were given that the Motion for Review be dispensed through written submissions and a ruling was fixed for 14th December 2023.



5. The Applicant states that the Party and party costs were yet to be taxed as the Respondent was yet to render an itemised Bill of Costs for consideration, yet they proceeded to execute.
6. The Applicant states that the Respondent's suit (MJS-1) was filed out of time and they raised an objection (MJS-4) in their defence (MJS-2) and the objection was canvassed by way of written submissions on 4th October 2017, but a ruling on the same was deferred three times between 18th October 2017 and 13th December 2017 and is still pending.
7. The Applicant states that the Respondent's advocate fixed the suit for mention (MJS-7) on 16th October 2019, during which the same objection was raised on the issue of jurisdiction under WIBA, and parties were directed to file submissions.
8. That on 30th April 2020, the lower court delivered a ruling (MJS-8) on jurisdiction under WIBA upheld the Applicant's objection, and referred the suit to the Director of WIBA and no appeal was filed by the Respondent.
9. The Applicant states that the trial court lacked jurisdiction and could not reopen the matter and render judgment of Kshs. 800,000/-(MJS-9) without an order conferring it jurisdiction and reopening the suit despite the pendency of a ruling on an objection filed on 19th July 2017.
10. The Applicant states that the lower court failed to determine the issue of limitation despite the same being an issue framed for determination (MJS-3). The Applicant states that due to the glaring error on the face of the record, they applied for review (MJS-10) which was coming for ruling on 14 December 2023 after submissions filed on 27th November 2023(MJS-11) and 4th December 2023(MJS-12).
11. That in a bid to defeat the outcome of the motion for review the Respondent irregularly took out execution against the applicant before taxation and assessment of party and party costs and attached the Applicant's motor vehicle Registration No KBM 648 through Remma Auctioneers on 6th December 2023 and unless a stay of execution is granted and in case its motion for review succeeds, then the same would be rendered nugatory and the respondent illegally enriched from judgment based on incompetent proceedings to the detriment of the Applicant.
12. That the Applicant following the irregular execution, filed a motion on 8th December 2023 but the trial court declined to certify it urgent and directed the same be heard on 24th January 2024(MJS-12), yet the moveable assets had been proclaimed and set for auction in the following days. The applicant states that that amounted to condemnation before being heard and their property is in danger of an auction through irregular and incompetent proceedings.
13. The Applicant asserts that unless the stay orders are issued it risks its property being sold irregularly given the incompetent proceedings that form the basis of the execution.
14. The Applicant avers that they are ready and willing to comply with any conditions imposed for a stay of execution including depositing security.
15. Opposing the application for a stay of execution, the Respondent filed a replying affidavit dated 17th January 2024 and a Further Affidavit dated 26th January 2024.
16. The Respondent asserts that the Applicant was served with the Bill of Costs (RM 1 a, b, c) and that the judgment delivered on 8th October 2023 was never challenged through an appeal, and the Trial Magistrate could not entertain an application for review as sought by the applicant.



17. The Respondent asserts that the *WIBA* matter was settled by the Chief Justice vide a gazette Notice Number 5476 of 28th April 2024(RMII) and the Respondent's case was one of those pending before the Honourable magistrate.
18. The Respondent states that the Applicant's application of 31/10/2023(RM III) did not seek any order for a stay of execution and thus stay could not be issued in a vacuum.
19. The Respondent asserts that the orders of Execution are not open to the Applicant for having failed to satisfy the condition under Order 42 Rule 6(2) of the Civil Procure (Amendment) Rules 2020, and the appeal therein is a sham with no chances of success having been filed without leave of the court.
20. The Respondent submits that the Applicant cannot exercise the Right of Review and Appeal at the same time and submits that they have the means and can make good the decretal sum should the appeal succeed.

Written Submissions

21. Parties filed their respective submissions. The Applicant's submissions were dated 23rd January 2024 and filed by Masinde & Company Advocates. While the Respondent's Submissions dated 26th January 2024 were filed on an even date by Omundi Bw' Onchiri Advocates.

Determination

22. The Applicant did not identify issues for determination and submitted generally on the issue of legality and competence of the Trial court's suit and judgment.
23. The Respondent in his submissions addressed the following issues: -
 - a. Whether one can exercise both the Right of Appeal and Review at the same time
 - b. Whether the Appellant has met the conditions for stay of Execution
 - c. Who is to pay costs.
24. The court having perused the pleadings by the parties and their submissions was of the considered opinion that the issue placed before the court by the parties for determination is Whether the applicant has demonstrated that the orders of stay of execution pending appeal are merited.

Issue a). Whether the applicant has demonstrated that the orders of stay of execution pending appeal are merited.

25. In its written submissions, the Applicant submits that its appeal does not require the leave of court to appeal against the court order of 8th December 2023, of the court declining to certify his motion for stay of execution as urgent and granting orders without giving any reason as the trial court exposed the applicant to substantial loss given the imminent auction of its property by failing to exercise its discretion in balancing the parties' interests. The applicant submits that under Order 1A and 1B of the *Civil Procedure Act*, orders of execution proceedings are appealable as of right and no leave is required under Order 43(Rule 1(k) which grants automatic right of appeal.
26. The Applicant submits that there was no delay in filing the appeal as the same was filed a day after the impugned order of 8th October 2023 and denial of the stay will fetter and deny the applicant access to justice relying on the decisions on *Nicholas Stephen Okaka v Alfred Waga Wesonga* [2022] eKLR.



27. The Applicant submits that the interests of the Applicant will be prejudiced if its motor vehicle is sold during the appeal and is willing to provide security for the performance of the decree pending the appeal and that the Respondent has not demonstrated he can refund the decretal sum if the appeal is successful.
28. The Applicant submits that had the court determined the plea of limitation of action, the suit could not have proceeded and consumed judicial time in litigating other issues and relies on the decision in Bungoma HCC No 105 of 2019, Lochab Brother & another v John Njau.
29. The Respondent argues that the Applicant cannot file an appeal when a review exists based on the same grounds raised in the Appeal. The Respondent states that the Applicant confirmed in its application of 31st October 2023 that there exists a review application that is pending determination and one cannot appeal and prefer a review at the same time on the same grounds. The Respondent relies on the decision in *Gab International Construction Co; Ltd v Zachary Kabucho Ndungu* (Civil Appeal E032 of 2022) [2023] KEHC 17549(KLR) (19th May 2023) (Judgment) where the Court held that: - “I believe I have said enough to demonstrate that the Appellant’s appeal is destined to fail for the reasons that I have outlined above. The application for a review operated against the trial court’s ruling on an earlier application meant that the Appellant had opted not to appeal against the ruling in issue as it could not apply for a review and at the same time appeal against the same order. I take cognizance of the fact that the Appellant was for all the time represented by counsel and must therefore have exercised its options consciously. As the Appellant had exercised its option to lodge a review then it cannot again turn around and mount an appeal aimed at achieving the same result that had been sought before the trial court. This is unacceptable and hence the appeal is an abuse of the court process.”
30. The Respondent further argues that the Applicant has not met the Conditions for stay of execution set out under Order 42 Rule 6(2) of the *Civil Procedure (Amendment) Rules 2020* as it has not proved the specific details and particulars of the Kind of loss/damage they are likely to suffer should the order of stay fail. The Respondent relied on decisions in *David Kihara Murage v Jacinta Karuana Nyangi and another* [2015] eKLR, *Mossy Khaemba Muchanga & Davis Wabwile Muchanga v Paul Lutoti Khawanga* [2020] eKLR, *Kenya Shell Ltd v Benjamin Kibiru & another* 1986 KLR 410, *Machira T/A/ Machira & Company Advocates v East African Standard* (No 2) 2002 2 KLR 63 and *Antoine Ndianye v African Virtual University* [2015] eKLR.

Analysis

31. I have considered the application for stay, grounds thereof, supporting affidavit, and annexures. I have also considered the Replying affidavit, Further affidavit, and submissions together with case law cited by both counsel for their respective clients.
32. The main issue for determination is whether the applicant has demonstrated that the orders of stay of execution pending appeal are merited.
33. 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:-

“No order for stay of execution shall be made under subrule (1) unless—

 - i. 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
 - ii. 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.



34. Further to the above, a stay may only be granted for sufficient cause, and the Court in deciding whether or not to grant the stay and 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.
35. Section 1A(2) of the *Civil Procedure Act* provides that “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” while under section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
36. As to what substantial loss is, it was observed in *James Wangalwa & another v Agnes Naliaka Cheseto* [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.”
37. In the instant case, the Applicant avers that they stand to suffer substantial loss if their motor vehicle KBM 648 proclaimed by Remma Auctioneers on 6th December 2023, is sold pending the determination of their motion for review dated 31st October 2023, which if successful will be rendered nugatory and the respondent illegally enriched if stay orders are declined.
38. They further aver that the Respondent has not provided an affidavit of means that he can pay the decretal sum in the event the appeal is successful. The applicant has also pleaded that they can comply with any order as to security of costs.
39. The Respondent on his part states that he is a man of means running his own business worth five million and he can make good the decretal sum, should the appeal succeed.
- Whether the Appeal has an arguable Appeal. – issue of review and appeal same time
40. On its part, the Respondent has argued that the Applicant has not demonstrated the availability of an arguable appeal, as the right to an appeal is not open to a party who has filed for review on the same grounds as raised in the Appeal. The Respondent further avers that the applicant has failed to demonstrate the substantial loss that it may suffer if the order herein is not issued.
41. The Respondent further asserts that the Applicant did not seek any stay of execution orders in its application and thus the said order could not have been granted in a vacuum.
42. The Applicant submits that its appeal is against the trial Magistrate’s decision to decline to certify its application for stay of execution urgent while aware the applicant’s property was in danger of auction after being attached on 6th December 2023 and slated for auction on 14th December 2023 unless such a motion was heard on priority and yet the court was still seized with the motion for review coming for



ruling on 14th December 2023. The Applicant submits that for the court to order that the motion be served and be heard inter partes 48 days later on 24th January 2024 would render the outcome of the review nugatory if it was successful, which informed the filing of the appeal on 11th December 2023 against the order of 8th December 2023.

Analysis

43. On perusing the parties' pleadings, there is no copy of the application for stay of execution that was filed by the Applicant under Certificate of Urgency allegedly dated 8th December. There is no annexure under Paragraph 20 of the Supporting Affidavit of Masinde Johnson, Advocate dated 9th December 2023. The order issued by Hon. Tom Mark Orlando (PM) on 8th December 2023, refers to directions on the Notice of Motion dated 31st October 2023. The Application on the court file dated 31st October 2023 is the Applicant's application for review by the Applicant where it sought for orders that: -
- a. This motion be heard ex parte in the first instance due to its urgency to avoid any hardship and loss to the applicant.
 - b. This Honourable Court be pleased to review its Judgement made on 18th October 2023 based on an error apparent on the record and the fact that there was no suit pending in court for hearing.
 - c. This court be further pleased to review the said order based on the fact that this suit was time-barred and there was a mistake in not dealing with it as an issue as a preliminary objection had been raised and argued and was pending for ruling,
 - d. This court was functus officio.
 - e. The costs of this motion be granted to the Applicant.
44. The Hon. Magistrate issued orders on 8th December 2023 that: -
- a. That The application is not urgent.
 - b. That The application be served.
 - c. That inter parties hearing on 24th January 2024....
45. The Applicant's Memorandum of appeal dated 9th December 2023 states that: -a. The Learned Trial Magistrate erred in law and fact in refusing to certify the Appellant's applicants application for stay of execution as urgent when there was clear evidence that its property had been proclaimed on 6th December 2023, in execution of an incompetent and irregular decree in Bungoma CMCC No 584 of 2016 and was under challenge by way of review due to an apparent error on the face of record which motion for review has been prosecuted by way of written submission and is pending for determination on 14th December 2023 and in event of success the same would be rendered nugatory.
- a. That the Trial Magistrate erred in exercising his discretion judicially by declining to entertain the Appellant's motion for stay timeously and fixing the same for hearing on 24th January 2024 in the face of the execution in the process hence fettering the Applicant's access to timely justice and shutting the door to it hence prejudicing its access to timely justice in view of transgression met upon it.



- b. That the trial magistrate failed in balancing the interests of the parties herein to access to justice as contemplated by Section 1A and 1B of the Civil Procedure Act and prejudicing the interest of the applicant herein.
 - c. That the trial magistrate erred in law and fact by failing to consider that a successful outcome of the motion for review would be rendered nugatory as it is clearly evident from proceedings that the respondent's suit in the lower court was time-barred and incompetent and having failed to make a determination of the same in his judgment though pleaded and argued as a preliminary point of law the court failed to determine the same and hence the applicant's interest were gravely prejudiced due to selective determination of the suit before the lower court and hence failing the suit that was filed out of time without any extension of time.
 - d. That the trial magistrate also failed to recognize that the suit before him had been determined by Hon. P. Omondi on 30th April 2020 who declined jurisdiction and referred the dispute to the Director of WIBA and consequently the lower court had no jurisdiction *suo moto* to revive the suit and render a judgment on it as the court Functus office.
46. There appears to be no application of stay of execution filed by the Applicant, rather what the Applicant produced is the application dated 31st October 2023 seeking review of the judgment of 18th October 2023.
47. The Trial Magistrate declined to certify the application dated 31st October 2023 as urgent. The Grounds of appeal No 1 to 3 (above), all relate to an application for an application for stay of execution which is not before the court, but the orders appealed against which were issued by the Magistrate relate to the application dated 31st October 2023 that were issued on 8th December 2023. There is no other order issued on 8th December 2023.
48. The exercise of granting of orders by a judicial officer is issued on a discretionary basis and what the Applicant appeals against is the nature of the extent of the said exercise of the discretionary power. There is no application relating to the stay of execution.
49. The orders of the Magistrate of 8th December 2023 relate to the application for review pending before the trial magistrate. The parties have not informed the court whether the Review motion which was coming up for ruling on 14th December 2023 was determined in light of the directions that the same would be heard inter partes on 24th January 2024.
50. The Applicant has approached this court for a stay of execution nonetheless.
51. The other grounds of appeal number 4 and 5 relate to issues raised by the Applicant in its application for review before the Trial Magistrate. As rightly held by the Respondent, where a party files for review, the same party has no legal basis to file an appeal based on the very same grounds raised in the Review as cited in Gab International Construction Co; Ltd v Zachary Kabucho Ndungu (*supra*);
52. I uphold the position taken by Odunga, J. , in HA v LB [2022] eKLR in stating that a party who seeks review cannot appeal on the same grounds held that: -
- 13. In this case, the Appellant having sought to review the order made on 27th May 2021 cannot now purport to appeal against the same. He can only appeal against the decision made on 4th November 2021.
53. As to whether the last two grounds of the Memorandum of Appeal which relate to issues pending under review before the Trial magistrate can be appealed, is in the negative and the Applicant can not



seek both review and appeal. The Applicant choose review on the two last grounds of Appeal and he cannot then appeal on the same grounds for the court to consider in granting stay of execution.

54. The first, second, and third grounds for the appeal relate to the trial magistrate's exercise of his discretion to certify matters urgent. As to whether the trial magistrate exercised his discretion judiciously is what the Applicant has appealed against and which are grounds that may proceed for appeal as the other two grounds relate to matters pending the ruling on review before the Trial Magistrate.
55. The Court of Appeal has settled the principles for stay of execution in the case cited by Justice Ongudi in *MFI Document Solutions Ltd v Paretto Printing Works Limited* [2021] eKLR of *Butt v Rent Restriction Tribunal* [1982] KLR 417 where the Court of Appeal gave guidance on how a court should exercise discretion in an application for stay of execution and held that: -
- “ 1. the power of the court to grant or refusal an application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle is 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 that appeal court reverse the judge's discretion. (sic) (trial court judgement).
 3. A judge should not refuse a stay if there is a good ground for granting it merely because in his opinion a better remedy may be available to the applicant at the end of the proceedings.
 4. The court in exercising its powers under order XLI rule 4 (2) (b) of the civil procedure Rules can order security upon application by either party or on its own motion. Failure to put security of costs as ordered with cause the order for stay of execution to lapse”.
56. The Respondent has pleaded that he is a man of means with a business worth five million and capable of repaying the decretal sum in case the appeal succeeds. No accounts as proof of this means as pleaded were provided and in light of the depositions by the Applicant that they shall suffer substantial loss on the sale of their attached Motor vehicle if the stay is not granted and considering that the application for review is still pending ruling before the Trial Magistrate. I am persuaded that substantial loss has been proved.
57. There was no inordinate delay in bringing the instant appeal as the order appealed against was delivered on the 8th December 2023 and the Memorandum of Appeal was filed two days later on 10th December 2023.
58. As to security of costs, the Applicant is able and willing to comply with that condition on security for the due performance of the decree appealed from.
59. Taking all the above factors into account and in order not to render the intended review nugatory as well as to give effect to the overriding objective of the *Civil Procedure Act*, I find and hold that the Applicant has fulfilled the requirements for grant of stay of execution pending the review ruling.
60. Additionally the stay shall operate pending the appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules on grounds 1 to 3 of the Memorandum of Appeal, conditional on which of the two, either the Review or appeal will be determined earlier, as the determination of the application of the



review dated 31st October 2023 shall determine the effect of the execution of the decree and not the appeal on the Grounds 1 to 3 that relate to exercise of the discretionary power of the Magistrate and that do not relate to the execution of the decree.

61. In the upshot, in the interest of justice, the Applicant's application dated 9th December 2023 is allowed, and a grant of stay of execution of the decree pending the determination of the application of the review application dated 31st October 2023 or the appeal 9th December 2023 whichever is determined first, as the determination of the review application shall determine the execution of the decree made on the following conditions:-

- a. The Applicant/ Appellant shall deposit the entire decretal sum in court, within 15 days of this ruling.
- b. No Order as to Costs.

62. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 29TH DAY OF FEBRUARY 2024.

J.W. KELI

JUDGE

In the presence of: -

Court Assistant: Lucy Macheso

Applicant: - Mutoka h/b Masinde

Respondent:-Absent

