



Voks Fashions Limited v Baraza (Employment and Labour Relations Appeal E006 of 2024) [2024] KEELRC 2851 (KLR) (18 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 2851 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E006 OF 2024**

**JW KELI, J
NOVEMBER 18, 2024**

BETWEEN

VOKS FASHIONS LIMITED APPLICANT

AND

MAKENJI BARAZA RESPONDENT

RULING

1. Before the Court for determination was an application dated 23rd February 2024 by the Appellant for stay of execution of Judgment and Decree in Milimani CMEL Cause No. 196 of 2022 in favour of the applicant pending hearing and determination of appeal against the ruling of Hon. Lucy Ambasi (CM) delivered on the 1st December 2023 in the matter. The Applicant sought the following Orders from the Court:-
 - a. Spent
 - b. Spent
 - c. That a mandatory interlocutory injunction be issued forthwith directed at the respondent herein to release to the appellant/applicant forthwith the Motor Vehicle Registration No. KDB 757C which the respondent's auctioneers illegally and arbitrarily attached for sale on the 22nd February 2024 without issuing and serving the appellant/applicant with a proclamation of attachment contrary to the directives given by the Magistrate's Court in the warrants of attachment dated 14th February 2024.
 - d. That pending the hearing and determination of the applicant's/ appellant's appeal herein, unconditional orders staying execution proceedings of the Magistrate's Court in Milimani CMEL Case No. 196 of 2022 be given in favour of the appellant/applicant.



2. The application was based on the grounds stated therein and in the supporting affidavit of Vijay Kanjibhai Chawda sworn on the 23rd February 2024.
3. In brief the applicant contended that its Memorandum of Appeal raised weighty and serious triable issues of law with overwhelming chance of success stating that the appellant was denied the opportunity to attend Court for a hearing and to produce a defence to debunk the respondents' case. That the auctioneer lacked jurisdiction under the [Auctioneers Act](#) and Rules to illegally attach for sale the applicant's Motor Vehicle Registration No. KDB 757C on the 22nd February 2024 without first issuing and serving the Applicant with a proclamation attachment as directed by the Magistrate Court in the warrants of attachment dated 14th February 2024. That the acts by the Respondent qualified the Applicant for unconditional orders of stay of execution of proceedings of the Magistrate Court pending the hearing and determination of the appeal. The respondent had not demonstrated he was a man of means capable of restoring the attached motor vehicle in the event the appeal succeeds.
4. Chawda further averred that on the 22nd February 2024, the Respondent's auctioneers served him with warrants of attachment of Court dated 14th February 2014 together with notification of the sale of even date before towing away the MV Reg. No. KDB 757C for the execution of the impugned decree (annexure marked as VKC1). He stated that before taking away the MV Reg. No. KDB 757C he had not been served with the proclamation notice
5. Chawda further stated without prejudice his then advocates on record Asembo & Co Advocates failed to notify him to attend Court to defend the case. That he would suffer irreparable loss if the appeal was allowed and the MV Reg. No. KDB 757C was already sold as the respondent had not demonstrated financial ability. The Applicant annexed vide the affidavit of Chawda as VKC2 copies of the Judgment and Decree of 29th June 2023 and the impugned ruling dated 1st December 2023.
6. The application was opposed vide replying affidavit of the respondent of 29th February 2024 filed together with a notice of preliminary objection. The Respondent averred that the application was based on falsehoods as the Applicant was served with a proclamation notice and refused to sign. The Respondent stated that the Applicant relied on the said Proclamation Notice of 7th September 2023 to obtain Exparte Orders which were later set aside following the ruling of 1st December 2023. That following the ruling the Respondent further instructed another auctioneer who proclaimed the MV Reg. No. KDB 757C in question on the 14th of February 2024 but the Applicant refused to sign on the proclamation and on expiry of the 7 days, the auctioneers picked the car without notice. The Respondent annexed as MBI the supporting affidavit of Vijay Kanjibhai Chawda dated 11th September 2023 filed in Milimani Commercial Courts CMEL No. E196 OF 2022 where at paragraph 6 Chawda annexed the Proclamation Notice of 7th September 2023. MB3 was the subsequent Proclamation Notice for MV Reg. KDB 717C of 14th February 2024. The Respondent stated that Chawda for the Applicant refused to sign the Proclamation Notice.
7. The Respondent contended the application was based on falsehoods and concealment of relevant facts and was designed to mislead the Court of justice. The Applicant failed to participate in the proceedings before the lower Court even where served directly and was relying on the conduct of their previous advocate to defeat justice. The Respondent pleaded that in the event the Court granted the application then the decretal amount be deposited in Court or in a joint interest-earning account of the advocates.
8. The Notice of Preliminary Objection dated 29th February 2024 raised 3 grounds of law namely;-



- a. That the ruling appealed against was delivered on the 1st of December 2023 while the appeal was filed on the 9th of January 2024 after the expiry of the 30-day statutory period of appeal offending section 79 G of the *Civil Procedure Act*.
 - b. That no leave had been sought to lodge the time-barred appeal hence no competent appeal to cloth the Court with jurisdiction to entertain the application for stay of execution pending appeal therefore the application affronts Order 42 of the Civil Procedure Rules.
 - c. That the absence of such leave renders the appeal incompetent and the Court cannot exercise its discretion to grant a stay of execution pending the appeal as there is no appeal.
9. The respondent vide the Notice of Preliminary Objection sought for the Court to strike out the Application for want of jurisdiction.

Written submissions

10. The application was canvassed by way of written submissions. The applicant's written submissions drawn O.P Ngoge & Associates and dated 10th June 2024 were received in Court on the 10th June 2024. The Respondent's written submissions drawn by Ajulu & Associates were dated 26th June 2024 and received in Court on the 26th June 2024.
11. The Court finds that the Notice of Preliminary Objection raised a point of law that the Court finds if valid would dispense with further consideration of the application. The issue is whether the appeal dated 9th January 2024 was time-barred, the impugned ruling having been delivered on the 1st December 2024. The applicant in response to the issue relied on the provisions of Order 50 Rule 4 of the Civil Procedure Rules to wit:-' 4. When time does not run [Order 50, rule 4.]

Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction."

12. The Respondent in submissions conceded that the Court could exercise its discretion under Order 50 Sub-rule 4 of the Civil Procedure Rules to admit the appeal as filed.

13. Section 79 G of the *Civil Procedure Act* states:-'79G. Time for filing appeals from subordinate courts

Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time."

14. The ruling appealed against was delivered on the 1st of December 2023 by Hon. L Ambasi (CM). Applying the provisions of Order 50 Rule 4 Civil Procedure Rules(supra) the Court returns that the appeal was filed within time as the period of twenty-first day of December in any year and the thirteenth



day of January in the year next following, both days included, shall be omitted from any computation of time. The appeal filed on 9th January 2024 is held as not time-barred.

15. On the other grounds of lack of notice of proclamation of the MV Reg. No. KDB 717C, on a balance of probabilities, the Court holds there was a proclamation notice (VCK-1 of respondent annexures) and believes the position of the Respondent that the Applicant refused to sign the same. The Court found the Applicant was also not candid with the Court having relied on the said Proclamation Notices to seek orders of stay under the affidavit of Vijay Kanjibhai Chawda dated 11th September 2023 (MB1 by the Respondent).
16. The Court finds that triable issues have been raised in the appeal, being, whether the Applicant had the opportunity to defend the suit before the trial Court and whether there was a mistake of the advocate that could be excused. The Court of Appeal has settled the principles for a stay of execution in the case cited by Justice Ongudi in *MFI Document Solutions Ltd v Paretto Printing Works Limited* (2021) eKLR of Butt -vs 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 reusing 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". The Court upholds the decision to apply in the instant application.
17. The Applicant seeks unconditional Orders. The Court found the issue of jurisdiction of the Magistrate Court was raised in the written submissions of the Applicant. The issue of jurisdiction of the Magistrate Court was not a ground of appeal or the application. Submissions are not pleadings and the Court treated those submissions by Counsel as unfounded. The Court is obliged to balance between the interest of the Judgment Holder and the Applicant. Applying the Court of Appeal decision in *Butt -vs Rent Restriction Tribunal* (1982) KLR 417 and Order 42 Rule 6 of the Civil Procedure Rules to wit: "(2) 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 ." The Court finds that the conditions under Order 42 Rule 6 of the Civil Procedure Rules balance the interest of the Applicant and that of the Judgment Debtor. The Court is then obliged to ensure the conditions are met by the Applicant for Orders stay of execution to be issued.
18. The Applicant expressed fear of the financial ability of the Respondent to refund monies for the value of the attached motor vehicle if successful on appeal. On the other hand, the Respondent in his response did not demonstrate his financial ability to refund the value of the said attached MV Reg. No. KDB 717C. The Court returns that the Applicant has demonstrated a risk of substantial loss being



the value of his attached Motor Vehicle. The impugned ruling was delivered on 1st December 2023 and the application was filed on 23rd February 2024. The Court returns that the delay was not inordinate and takes into account the computation of time under Order 50 Rule 4 of the Civil Procedure Rules.

19. The last condition under Order 42 Rule 6 of the Civil Procedure Rules that must be fulfilled by the Applicant is of security for the due performance of the decree. The Applicant contended they ought to be granted unconditional stay stating the impugned judgment was irregular. The regularity of the judgment of the lower Court is the question for the Court to consider on appeal and cannot be used to defeat the mandatory condition of stay in Order 42 Rule 6 of the Civil Procedure Rules and as emphasized in the Court of Appeal decision in Butt -vs Rent Restriction Tribunal (1982) KLR 417. The Court already held there was a proclamation notice before the attachment of the motor vehicle. The Respondent submitted, in the alternative, that the decretal amount be deposited in Court together with storage costs of the Motor Vehicle Reg. No. KDB 717C and auctioneer fees.
 - a. Taking into consideration the foregoing, the Court grants an Order of stay of execution of Judgment and Decree in Milimani CMEL Cause No. 196 of 2022 of 29th June 2023 pending hearing and determination of the appeal against the Ruling of Hon. Lucy Ambasi (CM) delivered on the 1st December 2023 on condition the decretal amount be deposited in Court within 30 days of this Order. Failure to deposit security of the decretal as ordered the Order for stay of execution to lapse. The MV Reg. No. KDB 717C be released to the Applicant on payment of storage fees if any and auctioneer fees.
20. Mention on the 25th of November 2024 for directions on the appeal.
21. It is so Ordered.

DATED, SIGNED, AND DELIVERED THIS 18TH NOVEMBER 2024 IN OPEN COURT AT NAIROBI.

JEMIMAH KELI

JUDGE

In the presence of

C/A Caleb

For Applicant/ Appellant:- Ngoge

For Respondent :- Ajulu

