



Mombasa Khushi Motors Company Limited v Mbuthia & another (Civil Application E019 of 2023) [2024] KEHC 804 (KLR) (30 January 2024) (Ruling)

Neutral citation: [2024] KEHC 804 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPLICATION E019 OF 2023
F GIKONYO, J
JANUARY 30, 2024**

BETWEEN

MOMBASA KHUSHI MOTORS COMPANY LIMITED APPELLANT

AND

DAVID KINYANJUI MBUTHIA 1ST RESPONDENT

GEOFFREY LONGISA 2ND RESPONDENT

(Being an application for stay of execution pending appeal and leave to appeal out of time against the judgment dated 14.07.2018 Narok CMCC no. 275B OF 2015.)

RULING

Enlargement of Time and stay of execution

1. The Notice of Motion dated 25.05.2023, seeks the following orders.
 - i. Leave to appeal out of time and the annexed memorandum of appeal be deemed as filed upon payment of the court's requisite court fees.
 - ii. Stay of execution of the judgment made on 14.07.2021 pending the hearing and determination of the intended appeal.
 - iii. Costs of the application to abide by the outcome of the intended appeal.
2. The application is premised upon the grounds set out in the application and supporting affidavit sworn by Mehmood Shahid. The Applicant averred that judgment was entered against the Applicant on 16.07.2018. The 1st Respondent has obtained warrants of attachment of movable property in the execution of a decree against the Applicant. On 23.05.2023 the 1st Respondent proclaimed the property through Lysajoy auctioneers and may attach and advertise the same for sale by public auction. If a stay of execution pending appeal is not granted and the execution process set aside the applicant will



suffer substantial loss. The properties proclaimed are tools of trade for a different company therefore its operation would be paralyzed.

3. The Applicant intends to file an appeal setting aside the judgment. If a stay of execution is not granted pending an appeal the Applicant will be prejudiced as it may be forced to pay the Respondent the decretal sum which money may not be recoverable from the Respondent in the event of the success of the appeal. The appeal has a reasonable chance of success and if execution is allowed to proceed the appeal may be rendered nugatory.
4. The 1st Respondent filed a replying affidavit sworn on 09.08.2023. The 1st respondent averred that the application is frivolous vexatious and an abuse of the court process. The supporting affidavit is sworn by counsel for the Applicant whereas the said application is factually based and not limited to only points of law without disclosing the source of the factual information. The applicant has sought to file a notice of appeal out of time whereas- a notice of appeal is not necessary while appealing from the lower court to the high court.
5. The memorandum of appeal referred to in paragraph 5 of the supporting affidavit has neither been annexed- under the said paragraph nor marked as an annexure. Even if the applicant sought to appeal out of time by filing a memorandum of appeal and the record out of time then the same would be inordinate as it has taken the applicant 5 years- the lower court judgment was delivered on 14.07.2018. Though the Applicant has stated that he has moved to this court promptly in paragraph 8 of the supporting affidavit. The said application is aimed at frustrating the Respondents' efforts to realize the outcome of the judgment delivered in their favor in the lower court. The Applicant was aware of the said judgment and has since filed a plethora of applications every time the 1st Respondent attempts to execute the judgment. On 17.09.2018- 5 months after the delivery of the judgment, the applicant filed an application seeking to review and set aside the judgment. The application was dismissed on 10.07.2019 for non-attendance. On 11.06.2019, the Applicant filed a second application seeking to review the dismissal orders. The said application was also dismissed on 17.12.2019. On 06.02.2020 the Applicant filed a third application. The said application was also dismissed. They again filed two applications dated 23.05.2023 seeking a stay of execution and the instant application before this court on 25.05.2023. The application filed in the lower court on 23.05.2023 was dismissed. The Applicant has turned into a habitual litigant with schemes to deny the 1st Respondent realization of his judgment. The options to appeal and review are not availed simultaneously to the applicant. The Applicant having failed to review the lower court judgment cannot now turn to appeal.

Directions of the court

6. On 29.05.2023, this court ordered that there shall be a stay of execution pending the hearing of the application herein subject to a deposit of Kshs. 1,000,000/= in a joint interest-earning account in the names of legal counsel for the parties within 30 days.
7. The application was canvassed by way of written submissions.

The Applicant's Submissions

8. The Applicant submitted that it has an arguable appeal by the draft memorandum of appeal which constitutes very valid and strong grounds that the Applicant is ready to expound on at the hearing of the appeal. The Applicant relied on Order 42 Rule 6(2) of the Civil Procedure Rules, Carter & Sons Ltd Vs Deposit Protection Fund Board & Two Others (Civil Appeal No. 291 Of 1997), Butt Vs Rent Restriction Tribunal [1977] eKLR cited with approval in Congress Rental South Africa V Kenyatta



- International Convention Centre; Co-Operative Bank Of Kenya Limited & Another (Garnishee) [2019] eKLR, Global Tours and Travel Ltd Vs Five Continents Travel Ltd [2015] eKLR.
9. The Applicant submitted that the properties proclaimed by Lysajoy Auctioneers are tools of the trade of a different company that possesses true ownership of the aforementioned assets. The operations of the different companies would be paralyzed should their tools of trade be wrongly repossessed or sold by the 1st respondent. The Applicant was a vendor of the subject motor vehicle in the suit while the 2nd Respondent to whom liability lies was the beneficial owner in possession of the motor vehicle during the accident an integral part of the law that was not addressed by the court. If a stay of execution is not granted the applicant will be forced to pay the 1st Respondent the decretal sum which money may not be recoverable from the 1st Respondent in the event of the success of the appeal as their means of income is unknown by the applicant. The Applicant argued that they were only informed of these proceedings at the tail end when he was served with a proclamation from the 1st Respondent's auctioneers. The applicant maintains that the mistakes of his former counsel should not be visited upon an innocent litigant. The applicant relied on James Wangalwa & Another Vs Agnes Naliaka Cheseto Misc. App. No. 42 Of 2011 eKLR., National Industrial Credit Bank Ltd V Aquinas Francis Wasike & Another [2006] eKLR As Quoted In New Nairobi United Services Ltd & Another V Simon Mburu Kiiru [2021] eKLR, Congress Rental South Africa V Kenyatta International Convention Centre; Co-Operative Bank of Kenya Limited & Another (Garnishee) [2019] eKLR
 10. The Applicant submitted that the orders the court may only order security for costs if it considers such security necessary in the interest of justice.
 11. The Applicant submitted that the 1st Respondent has not given any material as to his ability to repay the decretal sum in case the appeal succeeds. The applicant has relied on the case of Nicholas Stephen Okaka & Another V Afred Waga Wesonga [2022] eKLR.
 12. The Applicant submitted that there has been no inordinate delay in bringing the instant application. The applicant's application was filed on 25.05.2023 having received the proclamation notice on 23.05.2023. The Applicant was not aware of the lower court judgment as their advocate on record never updated the Applicant or brought to its attention the delivery of the judgment or the outcome of the various applications he filed in the lower court. The mistake of the former advocate of the Applicant should not be visited by the applicant. The Applicant has relied on Belinda Muras & 6 Others Vs Amos Wainaina [1978] KLR as quoted in Bank of Africa Kenya Limited V Put Sarajevo General Engineering Co. Ltd & 2 Others [2018] eKLR, Phillip Chemwolo & Another Vs Augustine Kubende [1982-88] KLR 103 at 1040, Lee G Muthoga V Habib Zurich Finance (K) Ltd & Another, Civil Application No. Nai 236 of 2009 as was quoted in Geoffrey Oguna & Another V Mohamed Yusuf Osman & 2 Others [2022] eKLR.
 13. The Applicant submitted that it is willing to abide by any conditions and terms as to security and as the court may deem fit to impose for the due performance of the decree appealed from. The Applicant contends that it has previously deposited security of Kshs. 741,585 to the judiciary account through a banker's cheque 807211 pursuant to a court order issued by Narok Law Court. The said amount is still in the judiciary account. Further, the applicant vide a letter to the deputy registrar filed and delivered on 30.05.2023 sought to issue a bank guarantee as security for the appeal. The Applicant relied on Nduhiu Gitahi Vs Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2KAR 100
 14. The Applicant urged this court to give due consideration to the issue of delay by the applicants and the prejudice that may be occasioned by the respondents. The delay though inordinate has been explained by the Applicants and more specifically in the affidavit of Mercy Segal the advocate. The Applicant relied on the case of Leo Sila Mutiso Vs Rose Hellen Wangari Mwangi Civil Application No. Nai 255



Of 1997(Unreported) as quoted in Geoffrey Oguna & Another V Mohamed Yusuf Osman & 2 Others [2022] eKLR, Nicholas Kiptoo Korir Arap Salat Vs IEBC & 7 Others [2014] eKLR

15. The Applicant prayed that this court allow the present application and order that the costs of the application abide by the outcome of the appeal. The Applicant relied on Section 27 of the *Civil Procedure Act*, costs follow the cause/event as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th edition, 2011 reprint 2012 at 540, Reid, Hewitt & Co V Joseph, AIR 1918 Cal 717 and Myres V Defries(1880) 5 Ex D 180 as quoted in DGM V EWG [2021] eKLR, Morgan Air Cargo Limited V Everest Enterprises Limited [2014] eKLR, the Halsbury's laws of England, 4th edition (re-issue), [2010], Vol. 10. Para 16.
16. The Applicant submitted that it is entitled to the orders sought. No document has been brought to court to show that the 1st Respondent is in a position to repay the decretal sum in the event the appeal is successful. Further, the Applicant sold the motor vehicle to the 2nd respondent who is a beneficial owner and all liability lies with him. The applicant argued that it has fulfilled the requirements for the grant of stay of execution pending appeal as stipulated under order 42 rule 6 of the civil procedure rules. The delay in filing the appeal was caused by the advocate on record and his mistake should not be visited on the Applicant. The Applicant relied on Global Tours & Travels Ltd Nairobi HC Winding Up Cause No. 43 Of 2000, Butt Vs Rent Restriction Tribunal [1982] KLR 417.

The 1st Respondent's Submissions

17. The 1st Respondent submitted that the Applicant has not stated the provisions under which the motion is brought as such the application falls short of form as provided in law. The 1st Respondent urged this court to frown on this laxity. The 1st Respondent has relied on Order 51 Rule 10 of the Civil Procedure Rules.
18. The 1st Respondent submitted that the Applicant ought to have sought time to file an appeal out of time and not file a notice of appeal. The 1st Respondent urged this court to be guided by the legal foundation that parties are bound by their own pleadings and not grant that which is not prayed for. The 1st Respondent relied on section 79G of the *Civil Procedure Act*, Order 42(1) of the Civil Procedure Rules, Independent Electoral and Boundaries Commission & Ano. Vs Stephen Mutanda Mule & 3 Others [2014] eKLR which is cited with the approval of the decision of the supreme court of Nigeria in Adetoun Oladeji (NIG) vs Nigeria breweries PLC SC 91/2002, and Raila Amolo Odinga & Another Vs IEBC & 2 Others [2017] eKLR.
19. The 1st respondent submitted that the delay is inordinate and inexcusable. The Applicant seeks to appeal from a decree issued on 14/06/2018. The current application comes 5 years after the lower court judgment.
20. The 1st respondent submitted that the applicant has not adduced a good and sufficient reason for the delay. The applicant alleges that the delay was occasioned by a lack of communication between the Applicant and his counsel formerly on record. Whereas the case belongs to the client and not the advocate the client bears the responsibility of driving their case by constantly instructing their advocates. The 1st Respondent argues that the Applicant was all along aware of the proceedings and happenings of this case from inception. The Applicant has been in the habit of filing multiple applications and only when the 1st Respondent moves to execute. Further, the reasons for the delay have been deposed by the advocate and not the applicant's personnel which are matters of fact without disclosing the source of such information thereby rendering the averments as hearsay. The 1st Respondent has relied on the case of Equatorial Commercial Bank Limited V Pickwel And Deal Limited & 2 others [2019] eKLR, Savings & Loan Limited Vs Susan Wanjiru Nairobi (Milimani) HC



CC NO. 397 of 2002, Duale Mary Ann Gurre Vs Amina Mohamed Mahamood & Another [2014] eKLR.

21. The 1st Respondent submitted that the question of arguability of the appeal does not arise as no appeal lies whatsoever after the applicant chooses review the Applicant cannot have a second bite of the cherry by now preferring an appeal. The 1st Respondent relied on the case of Serephen Nyasani Menge Vs Rispah Onsase [2018] eKLR
22. The 1st Respondent submitted that he continues to suffer prejudice as he is denied the fruits of his judgment. There is no prejudice on the part of the applicant should execution issue.
23. In the end, the 1st Respondent submitted that he has demonstrated that the orders sought have no legal foundation, and as such the application is devoid of merit. He prays that the application be dismissed in its entirety with costs to the 1st Respondent being borne by the Applicant.

Analysis And Determination

Duty of court

24. This court has considered the application for stay and leave to appeal out of time, grounds thereof, supporting affidavit, and annexures. This court has also considered the Replying affidavit, and submissions together with case law cited by both counsel for the parties herein.

Issues for determination

- i. Whether the applicant should be granted leave to appeal out of time.
- ii. Whether the applicant has demonstrated that the orders of stay of execution pending appeal are merited.

Of leave to appeal out of time

25. Under Section 79G of the *Civil Procedure Act*, the court may admit an appeal out of time where good and sufficient cause has been shown.
26. Extension of time to file appeal is, therefore, a matter of judicial discretion. In the exercise of the discretion, the court considers such factors as; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, and the degree of prejudice to the respondent if the application is granted. (Leo Sila Mutiso –v- Rose Hellen Wangari Mwangi - Civil Application No. NAI 255 of 1997 (unreported) and Thuita Mwangi –vs- Kenya Airways Limited [2003] eKLR.
27. The length of the delay is discerned from the record. The court has perused the trial court record, and the judgment of the trial court which was delivered on 21/12/2016. The application herein was filed on 25/05/2023 which is about 6 ½ years from the date of the judgment.
28. However, the Applicant deposed that they became aware of the judgment on 23/05/2023 when they were served with the proclamation notice. What does the record speak about this averment?
29. According to the applicant, it was not aware of the delivery of judgment and only came to learn of the same when they were served with a proclamation notice after which discovery, they swiftly filed the instant application.



30. The 1st Respondent is of a different view; it deposed that the Applicant was well aware of the proceedings and happenings in this matter from inception and even filed multiple applications in respect of the matter.
31. Again, help comes from the record.
32. The court has perused the trial court record which and the following emerges.
33. The Applicant filed a plethora of applications every time the 1st Respondent attempted to execute the judgment. The Applicant filed an application dated 17/09/2018 seeking to review and set aside the judgment. The application was dismissed on 19/02/2019.
34. On 11/06/2019, the applicant filed a second application seeking a stay of execution and set aside the judgment of the trial court and/or for the matter to start de novo. The said application was also dismissed on 17.12.2019.
35. On 07/02/2020 the applicant filed a third application seeking a stay of execution and lifting of warrant of attachment of goods. The said application was also dismissed.
36. Again, on 25.05.23, the Applicant filed two applications dated 23.05.2023 seeking a stay of execution; one before the trial court and the instant application before this court. The application filed in the lower court was dismissed.
37. The above recapitulation of events brings the court to the conclusion that the Applicant was aware of the said judgment for the longest period. These events also makes the court to agree with the 1st Respondent's evaluation of the Applicant; turned into a habitual litigant with schemes to deny the 1st respondent realization of his judgment.
38. The prejudice that the parties might suffer, is also important element. Actions taken by the applicants in these proceedings is not to vindicate the law or to exercise right of appeal, but to impede realization of right to fruit of judgment by the 1st respondent.
39. For the above reasons, the applicant herein has not shown good and sufficient reason for the court to admit the appeal out of time. Accordingly, leave to appeal out of time is denied.

Of stay of execution pending intended appeal

40. In the circumstances, it may not be feasible to grant stay of execution pending appeal.
41. In any event, the applicant has not shown that it will suffer substantial loss.
42. The history of the case and the offensive actions by the Applicant in total abuse of court process, denies the applicant remedy of stay of execution. The applicant has not come to court with clean hands.
43. Notably also, the argument that the attached properties are tools of trade of another company is not ingenious whatsoever because the Applicant did not bring itself within the exception to the rule in *Foss V Harbottle*¹: that it can lawfully sue on behalf of the other company or file a derivative action, or it qualifies for oppression remedies under the *Companies Act*.
44. In sum, the applicant's application dated 25/05/2023 is without merit and is dismissed with costs to the 1st Respondent. The orders issued on 29/05/2023 are hereby vacated.
45. Orders accordingly.

¹ [1843] 67 ER 189/2 Hare 461



**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
30TH DAY OF JANUARY, 2024.**

.....

HON. F. GIKONYO M

JUDGE

In the presence of:

1. C/A. Tonny Otolo
2. M/S. Otieno holding brief for M/S. Segal for Applicant – Present.
3. Macharia for 1st Respondent – Absent.

