



**Mogo Auto Limited v Thon & another (Civil Appeal 290 of 2023)
[2024] KEHC 2053 (KLR) (28 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 2053 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 290 OF 2023
HM NYAGA, J
FEBRUARY 28, 2024**

BETWEEN

MOGO AUTO LIMITED APPELLANT

AND

JAMES MAJOK THON 1ST RESPONDENT

HESPON MOGUSU NYANDEGE 2ND RESPONDENT

RULING

1. The application before me is a Notice of Motion dated 4th October, 2023 filed by the Appellant herein on 17th October, 2023. It is expressed to be brought under Article 159 of *the Constitution*, Order 42 Rule 6(1) and (2), Order 50 Rule 6 of the *Civil Procedure Rules*, Sections 1A, 1B, 3A of the *Civil Procedure Act*.
2. The application has four prayers but prayers a & b are now spent, leaving prayers c, d, e and f for consideration at this stage. The prayers are as follows:
 - c. That pending hearing and determination of the Appeal, this court be pleased to order stay of execution of the order preventing the plaintiff either by himself or through his agents, representatives or assigns from causing transfer, selling or otherwise dealing with Motor Vehicle Registration Number KDD 629D Honda Fit.
 - d. That the order issued on 2nd October, 2023 be set aside and the matter be set down for hearing of the main suit.
 - e. That this honourable court orders release of the subject motor vehicle to the appellant/applicant herein being a co-registered owner for purposes of securing its financial interests.
 - f. That costs of this Application be provided for.



3. The application is anchored on grounds on its face and supported by an affidavit of the Erick Omondi Onditi who is the legal officer of the Applicant herein sworn on 4th October, 2023.
4. The applicant's case is that the subordinate court on 2nd October 2023 issued final orders for the release and transfer of a motor vehicle Registration Number KDD 629 Honda Fit to the 1st Respondent which had been offered as a security for a loan by it and which is yet to be repaid. According to the applicant the 1st respondent is an alien with no single ownership document to the subject Motor vehicle. The applicant was aggrieved by the decision of the lower court and has lodged an appeal against the same which it believes is arguable with a high chances of success, and will be defeated and rendered nugatory should the 1st respondent proceeds with the execution of the impugned ruling.
5. The applicant avers that it has financial interest over the subject motor vehicle while the 2nd respondent is the registered co-owner of the said motor vehicle and as such they will be prejudiced if the subject motor vehicle is sold.
6. The applicant prays that the orders sought be granted in the interest of justice.
7. In opposition to the Application, the 1st Respondent swore a replying affidavit on 1st November,2023.
8. It is his case that he is the legal owner of the said motor vehicle and the 2nd respondent fraudulently secured a loan using his motor vehicle from the applicant. He avers that the 2nd respondent was never in possession of the motor vehicle but he fraudulently procured a log book of the same behind his back and submitted it as security to the loan that was advanced by the Applicant. He therefore believes that the summary judgement by the trial court is in order as the Applicant never raised any triable issue in its defence to warrant a main hearing.
9. It is the 2nd Respondent's case that the Applicant has not met the threshold for grant of stay of execution in accordance with Order 42 Rule 6 of the *Civil Procedure Rules*, and that the Applicant's prayer to have the suit motor vehicle back at its disposal is already overtaken by events as the motor vehicle was released to him on 4th October, 2023.
10. He states that the application is bad in law, lacks merit, brought in bad faith and is only meant to stop him from realizing the fruits of his ruling. He prayed that the same be dismissed with costs.
11. The Applicant's aforesaid deponent swore a further affidavit on 7th November,2023 wherein he avers that the matter having been summarily determined ,the Applicant stands to suffer substantial loss given that the court's ruling ordered a transfer and release of the motor vehicle within 15 days which was used as security to secure a loan facility and as such the applicant cannot effect transfer to the 1st Respondent ,who at the time of the agreement was not the owner of the subject motor vehicle.
12. He deposed that the 1st Respondent's fraud allegations are unknown to them and that if the same existed the 2nd respondent should be held accountable and the matter ought to have proceeded to a full hearing for such an issue to be established.
13. The application was canvassed through written submissions.

Applicants Submissions

14. The Applicant submitted that the only issue for determination is whether it has met the prerequisite for grant of stay of execution.



15. On the issue of substantial loss, the applicant submitted that it is the co-registered owner of the subject motor vehicle and has a registered financial interest in it and that it will suffer a substantial loss and the appeal rendered nugatory if the subject motor vehicle is transferred in favour of the 1st respondent.
16. On whether the Application has been made without unreasonable delay, the Applicant submitted that the application was filed within the stipulated time as the ruling was delivered on 2nd October 2023 and the instant application was filed on 19th October, 2023.
17. The Applicant posited that unlike the 1st respondent, it will be greatly prejudiced if stay sought is denied and the appeal succeeds.
18. In bolstering its submissions, reliance was placed on the following cases *Butt v Rent Restriction Tribunal* (1979) eKLR *Sbell Ltd v Kibiru & Another* [1986] KLR 410 *RRW v EKW* [2019] eKLR

1st Respondent's Submissions

19. The 1st Respondent framed four issues of determination. Namely;
 - i. Whether the Applicant ought to have sought for the prayers herein from the trial court.
 - ii. Whether the Applicant will suffer substantial loss if the orders sought are not granted
 - iii. Whether the 1st respondent is an alien and not entitled to possession of the said vehicle because he lacks ownership documents.
 - iv. Whether the court misdirected itself in summarily determining the suit.
20. The last two issues in my view are irrelevant and they cannot be canvassed at this stage as that will be tantamount to delving into the merits of the Appeal. I will therefore proceed to summarize his submissions with regard to the other issues.
21. In regards to the first issue, the 1st respondent citing Order 42 Rule 6 of the Civil Procedure Rules submitted that the application for stay ought to have been filed before the trial court. He posited that the appellant court can only grant the orders sought upon refusal by the trial court and therefore urged this court to either transfer this suit to the trial court for determination or to dismiss it forthwith.
22. With respect to the second issue, the 1st respondent submitted that the applicant has not sufficiently demonstrated what loss it will suffer if stay is not granted. He posited that the fact that he has already commenced execution is not an automatic proof of substantial loss.
23. He contended that it will be in the interest of justice to have the Applicant furnish some security for due performance of the order if this application was to succeed. To support this proposition reliance was placed on the case of *Mukoma v Abuoga* [1988] KLR 645.

Analysis & determination

24. Having considered the application, affidavits and the submissions on record, it is my considered view that the following issues fall for determination: -
 - i. Whether the application is incompetently before this Court.
 - ii. Whether the Applicant has met the threshold for grant of stay pending appeal.



Whether the Application is incompetently before this Court

25. The 1st Respondent averred that the orders sought herein ought to have been sought first before the subordinate court and upon refusal the same can be granted by the Appellate court.
26. The applicant is mainly seeking for orders for stay of execution pending appeal. Order 42 Rule 6 of the [Civil Procedure Rules](#) stipulates as follows:
- “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.”
27. The wording of the said Rule is very clear. An Applicant may make an application before the court that issued the order but can also opt to directly file an application for stay before this Court. There is nothing that bars him/her from exercising the latter option Therefore the application is rightly before this Court.

Whether the Applicant has met the threshold for grant of stay pending appeal

28. Order 42 Rule 6(2) of the [Civil Procedure Rules](#) provides:
- “(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.”
29. In the case of [Butt v Rent Restriction Tribunal](#) (*supra*) the Court of Appeal gave guidance on how a Court should exercise discretion in an application of stay of execution and held that:
- “The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- The general principle in 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.
- A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
- The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special



circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

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 for costs as ordered will cause the order for stay of execution to lapse.”

30. In Visbram Ravji Halai v Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.

31. Under the head of substantial loss, an applicant must clearly state what loss, if any, it stands to suffer. This principle was enunciated in the case of Shell Ltd v Kibiru and Another (*supra*). Platt, JA set out two different circumstances when substantial loss could arise as follows: -

“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages....It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts....”

32. The learned judge continued to observe that: -

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”

33. In Mukoma v Abuoga (*supra*) the Court of Appeal in referring to the exercise by the Superior court of their discretion in granting stay of execution under Order 42 Civil Procedure Rules 52 (b) of the Court of Appeal Rules respectively, emphasized the centrality of substantial loss as follows –

“..... the issue of substantial loss is the corner stone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”

34. With the above in mind, the Court must then determine what substantial loss the Applicant will suffer if stay of enforcement of the ruling of the Subordinate Court is not made in its favour.

35. The Applicant in this matter contends that it is the co-registered owner of the subject motor vehicle and has financial interest over it, and that if the same is sold it shall suffer significant loss and its appeal rendered nugatory. I note the Applicant has not annexed any document to prove the said ownership and financial interest over the subject Motor Vehicle. However, from the ruling of the lower court, it can be deduced that the applicant was registered as a co-owner of the vehicle when it advanced the 1st



- Respondent a loan against it as security. The 1st respondent has also confirmed in his affidavit that the applicant advanced loan to the 2nd respondent after he presented the subject motor vehicle as security.
36. The Applicant was aggrieved by the subordinate court's order for release and transfer of the subject motor vehicle to the 1st Respondent and it has filed an appeal which it believes is arguable.
37. At this stage, a court ought to be very cautious not to look into the merits or otherwise of the appeal as that is under the purview of the appellate court after hearing the merits of the same. The court should therefore only be concerned with the question of whether or not the appeal will be rendered nugatory.
38. A cursory look at the Memorandum of Appeal shows that the grounds raised therein are triable. The essence of considering whether the appeal raises triable issues is to avoid the same being rendered nugatory should the decision of the appellate court overturn that of the trial court.
39. One of the grounds adduced on appeal is that the trial court summarily determined the suit without giving the parties an opportunity to heard. The appellant is also aggrieved by the order to have the motor vehicle transferred to the 1st Respondent.
40. The ruling was in respect to the application dated 23rd June 2023, which sought the following prayers;
- i. That the Honourable court be pleased to order the release of the Applicant's motor vehicle registration number KDD 629 D Honda Fit currently held at Mogo Auto Limited car yard, Nakuru and or any other authority, to the applicant.
 - ii. That the honourable court be pleased to grant a stay of sale of motor vehicle registration number KDD 629 D Honda Fit pending hearing and determination of the application herein.
41. The trial court then went ahead to grant the said orders and in addition, ordered that the motor be transferred to the 1st Respondent. She also proceeded to find that the orders sought summarily determined the entire suit as the orders sought were those in the plaint.
42. Clearly, the trial court granted orders that were not sought by the applicant and ended up summarily granting prayers that were over and above those prayed for in the suit at an interlocutory stage
43. On the above findings, I find that the applicant has an arguable appeal.
44. On whether the application has been made without unreasonable delay, it is undisputed that the impugned ruling was delivered on 2nd October,2023 and the Applicant thereafter filed the instant application 4th October,2023. It is thus clear that the present application was filed timeously.
45. Regarding the issue of security for costs, the applicant has not offered any security.
46. I have noted from the lower court record that in the ruling sought to be appealed against, save for payment of costs of the application and the unconditional release of the subject motor vehicle to the 1st Respondent herein no other obligation was placed upon the shoulders of the Applicant to do in performance of the ruling. Thus there is nothing to warrant the furnishing of security.
47. It is also my considered view that the application is not rendered fatally defective for want of offer of security. The court can, on its own motion make such an order. I'm guided by the persuasive authority of *Obed Readon Onyango v Florence Juma Nabiswa & Sarah Chepkemobi Nabiswa* Kitale ELC No. 93 of 1997 where the court stated as follows: -

“Looking at the provisions of Order 42 rule 6 (1) (b) this court's interpretation is that it is not fatal for an applicant not to offer any security in an application since the court may itself impose such security on the applicants. I do note that none was offered by the applicants and



the respondent demands security in the form of a cash sum sufficient to compensate him for loss of use of the premises. It would be expected that the appeal filed by the applicants would take some time to conclude and therefore the respondent would be kept out of land which this court has already proclaimed to be his for much longer, indeed an indefinite period dependent on the vagaries of litigation.”

48. In the circumstances I will grant the following orders;

- a. That pending hearing and determination of the Appeal, there shall be stay of execution of the order preventing the 1st respondent either by himself or through his agents, representatives or assigns from causing transfer, selling or otherwise dealing with Motor Vehicle Registration Number KDD 629D Honda Fit. A caveat to that effect is to issue at the NTSA.
- b. The applicant shall continue to hold possession of the said vehicle as earlier ordered by the court.
- c. The Applicant do file and serve the record of appeal within 21 days from the date of this ruling.
- d. The appeal will be expedited owing to the nature of the subject matter.
- e. The costs of this application shall abide by the outcome of the appeal.

49. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU 28TH DAY OF FEBRUARY, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Oleperon

Mr. Mekenye for Appellant/Applicant

Ms Achieng for Nyaga for 1st Respondent

No appearance for 2nd Respondent

