



REPUBLIC OF KENYA



**Stackelberg & another v Obst; Boko Boko Investments Limited (Objector)
(Civil Case 133 of 2007) [2024] KEHC 1731 (KLR) (27 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1731 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 133 OF 2007
OA SEWE, J
FEBRUARY 27, 2024**

BETWEEN

JOACHIM VON STACKELBERG 1ST PLAINTIFF

YOLANDA FIRTH 2ND PLAINTIFF

AND

SYLKE OBST DEFENDANT

AND

BOKO BOKO INVESTMENTS LIMITED OBJECTOR

RULING

1. Before the Court for determination is the Notice of Motion dated 14th March 2023. It was brought by the objector, Boko Boko Investment Limited, pursuant to Sections 3A, 63(e) and 95 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 22 Rules 22 and 25, Order 42 Rule 6 and Order 51 Rules 1 and 3 of the *Civil Procedure Rules*, 2010, among other provisions of the law, for orders that:
 - (a) Spent;
 - (b) There be an order of stay of execution of the ruling and orders made herein on 8th March 2023 pending the hearing and determination of the appeal;
 - (c) The costs of the application be in the cause.
2. The application was premised on the grounds that Ndutumi Auctioneers have attached the objector's property pursuant to Warrants of Attachment and Sale issued on 18th February 2022; and that the objector, being dissatisfied with the ruling and orders of the Court made herein on 8th March 2023, has already filed a Notice of Appeal dated 14th March 2023. The objector further averred that this is



the only avenue available to the Court to grant orders for stay of execution pending the hearing and determination of the appeal.

3. The application was supported by the affidavit of Cynthia Patricia Sicobo, sworn on 13th March 2023 to which the objector annexed copies of the ruling, the decree as well as the Notice of Appeal dated 14th March 2023. The objector averred that unless the orders for stay are granted as prayed, the intended appeal will be rendered nugatory as the respondent may proceed with execution in the interim. The objector also averred that no prejudice will be suffered by the respondent if the stay orders are granted.
4. The defendant was opposed to the application. She relied on her Replying Affidavit sworn on the 17th May 2023 and averred that, since the impugned decision resulted in a negative order, it is incapable of any form of execution as provided for in the *Civil Procedure Rules*. She further asserted that, in view of the finding of the Court that the attached property did not belong to the objector, she stands to suffer substantial loss if stay orders are given; granted that judgment was entered in her favour way back on 6th November 2014 and since then she has been denied the chance to enjoy the fruits of her judgment. Accordingly, the defendant proposed that, should the Court feel inclined to grant stay of execution as sought, then it should be on condition that such security for the due performance of the decree or orders that may ultimately be binding on the plaintiff be furnished.
5. In a Supplementary Affidavit sworn by Ms. Sicobo on 6th July 2023, the objector respondent to the proposal for security contending that the judgment was passed against the plaintiff; and that the instant application is limited to the Warrants of Attachment and Sale issued on 18th February 2022. The affiant therefore urged that the application be allowed as prayed.
6. The application was canvassed by way of written submissions, pursuant to the directions given herein on 19th April 2023. In the objector's written submissions dated 6th July 2023, it was submitted that the appeal is arguable and that unless the order for stay of execution is granted, the defendant will proceed to execute against the objector, thus rendering the appeal nugatory. It was further asserted that the objector stands to suffer damage, disrepute, embarrassment and loss of its investments unless the orders sought are granted.
7. On her part, the defendant proposed the following issues for determination vide her written submissions dated 19th May 2023:
 - (a) Whether the orders in the ruling dated 8th March 2023 are capable of being stayed;
 - (b) Whether the objector will suffer any loss if the orders sought are not granted.
8. The defendant reiterated her stance that the ruling dated 3rd March 2023 resulted in a negative order and is therefore incapable of enforcement as the Court did not require the parties to do anything or to refrain from doing anything. She submitted that negative orders cannot be executed in any of the ways provided for in the *Civil Procedure Rules*; and therefore are incapable of stay. Thus, the defendant prayed for the dismissal of the application. She relied on *Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v Milimo, Muthomi & Company Advocates & 2 Others* [2022] eKLR; *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others* [2016] eKLR and *Joseph Paul Mwangovya v Kewal Contractors Limited* [2012] eKLR to buttress her submissions.
9. On substantial loss, the defendant submitted that, in view of the fact that the ruling of 8th March 2023 is not capable of execution, the objector does not stand to suffer any loss as there is nothing for the defendant to execute in the first place. She relied on *Joseph Mwangovya v Kewal Contractors Limited* (*supra*) and *Kenya Shell Ltd v Benjamin Karuga & Another* [1986] eKLR on what amounts to substantial loss. Consequently, the defendant prayed for the dismissal of the application; and in the



alternative, she proposed that, if the Court is minded to grant stay, it should be on terms as to security. She pointed out that as at 28th September 2020 the judgment debt stood at Kshs. 19,320,000/=.

10. I have given careful consideration to the application, the averments set out in the parties' respective affidavits as well as the written submissions filed on their behalf by learned counsel. The application was expressed to have been brought under Order 42 Rule 1, Civil Procedure Rules, among other provisions of the law. It provides:

“(1) 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.

(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.

11. The provision presupposes that the application for stay be in direct correlation with either a decree or order in respect of which precipitate action is looming. In this case the ruling in respect of which the objector filed the Notice of Appeal dated 14th March 2023 is the ruling dated 8th March 2023; a copy whereof was annexed to the objector's Supporting Affidavit and marked Annexure “SO-7”. There is no dispute that the outcome was a negative order in that the objector's application was dismissed with costs to the defendant.

12. It is now trite that a negative order is incapable of execution and therefore not amenable to stay for purposes of Order 42 Rule 6 of the Civil Procedure Rules. Thus, in *Raymond M. Omboga v Austine Pyan Maranga*, Kisii HCCA No. 15 of 2010, Hon. Makhandia, J. (as he then was) held:

“...The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise...”



13. Similarly, in *Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v Millimo, Muthomi & Co. Advocates & 2 others* (*supra*), it was held:

“...the position taken by this Court in respect of applications for stay of execution in respect of negative orders is clear. Negative orders cannot be stayed. We reiterate the sentiments of the predecessor of this Court in its decision in *Western College of Arts and Applied Sciences v Oranga & Others* (1976-80) 1 KLR, where the Court stated in respect of stay of execution as follows:

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In *Wilson v Church*, the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case, the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in and application for stay, it is so ordered.”

14. And in *Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union (Kenya)* [2015] eKLR, the Court of Appeal (per Hon. Kantai, JA) had occasion to restate that:

‘An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in *Mugenyi & Co. Advocates v National Insurance Corporation* (Civil Appeal No. 13 of 1984) where it was stated:

‘...an order for stay of execution must be intended to serve a purpose ...’ (emphasis supplied).

15. In the premises, it is my finding that the objector’s application is incompetent; and that no useful purpose would be served by engaging in a merit consideration thereof from the standpoint of Order 42 Rule 6 of the *Civil Procedure Rules*. Accordingly, the appellant’s Notice of Motion dated 14th March 2023 is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 27TH DAY OF FEBRUARY 2024

OLGA SEWE

JUDGE

