



**Mwananchi Credit Limited & another v Obonyo (Civil Appeal
E099 of 2023) [2024] KEHC 3989 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3989 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E099 OF 2023
MS SHARIFF, J
MARCH 20, 2024**

BETWEEN

MWANANCHI CREDIT LIMITED 1ST APPELLANT

NYALUOYO AUCTIONEERS 2ND APPELLANT

AND

BERNARD NAMUTU OBONYO RESPONDENT

RULING

1. On 8th June 2023 Hon. Cheruiyot issued orders compelling the Appellants to release motor vehicle registration No. KCK xxxx on a running attachment and an order committing the Appellants to civil jail for a period of 6 months and/or impose a fine. The Appellants were aggrieved and thus filed this appeal and simultaneously filed a notice of motion seeking stay of execution pending appeal.
2. The Appellants case was that the motor vehicle under attachment was offered as collateral by the Respondent and the order for its release will occasion them substantial loss as the Respondent will continue to use it and it will depreciate in value and there is a high risk of their appeal being rendered nugatory.
3. The Appellants also posit that the order for their committal to civil jail will infringe on the right to liberty and to appeal.
4. The application was resisted by the Respondent by way of a replying affidavit.
5. The Respondent deposes that the Appellants have not demonstrated how they will incur substantial loss and he maintains that the user of a motor vehicle in its ordinary course will lead to depreciation and further that the vehicle is currently depreciating due to want of service and maintenance as it lays in the 2nd Appellant's yard.



6. This application was canvassed by way of written submissions. Both parties complied and their rival submissions have been considered.

7. A court seized of a stay pending appeal application is guided by the operative Order 42 Rule 6 of the *Civil Procedure Rules* which provides thus:

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with”.

8. There exists a plethora of precedents that pronounce the purpose of an application for stay of execution pending appeal to be the preservation of the subject matter in dispute so as to safeguard the interest of a party who is exercising at his in doubted right of appeal lest the appeal be rendered nugatory in the event of a positive decision. In the case of *RWW vs EKW (2019)* eKLR the court rendered itself on this issue as follows:-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9) Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

9. It is thus incumbent upon the Appellant to meet the following criteria:

- i) Establish sufficient cause
- ii) Substantial loss
- iii). Offer security
- iv). Approach the court without delay
- v). Overriding objective of the court ought to be in their favour
- a. Sufficient Cause:

10. When considering whether to grant or decline stay orders of stay of execution pending appeal, this court exercises a discretionary jurisdiction. This court must undertake a delicate balance of the interests of a successful party viz avis an aggrieved party who intends to exercise its right of appeal.

11. The motor vehicle, that is the subject matter of the attachment was offered by the Respondent as a collateral to the 1st Appellant and was subsequently attached by the 2nd Appellant on account of default by the Respondent to service the loan facility. The Appellants have deposed in their supporting affidavit that the subject motor vehicle will be subject to depreciation due to user by the Respondent if released to him and the collateral will thus dissipate and their appeal will thus be rendered nugatory. Further that their committal to civil jail will infringe on their constitutional right to liberty and their right to a fair hearing.



12. I am thus persuaded that the Appellants have shown sufficient cause and their incarceration and diminished value of the collateral amounts to substantial loss. It is not in dispute that whereas the trial court made orders for the release of the subject motor vehicle on a running attachment, it did not make any order for the furnishing of security by the Respondent. The scale of justice thus tilts in favour of the Appellants. I find guidance in the case of *Salome Naliaka Wabwile –vs- Alfred Musinako (2021)*eKLR where the court rendered itself as follows:

“Whether or not to grant the remedy of stay of execution pending appeal is a matter of judicial discretion. Such discretion must therefore be exercised on sound basis, rationally and not capriciously or whimsically. In so doing, the court must bear in mind the need to balance between the two competing interests of a party who has a judgment in his favour and another who is desirous of exercising his right of appeal. The onus is however on the party seeking a stay to prove that he has met the threshold set out in Order 42 of the Civil Procedure Rules.”

13. The Appellants approached this court without delay and the overriding objective of courts is to do justice to both parties.

14. On the balance I do find that the application herein is meritorious and I thus allow it and I proceed to make the following orders:-

1. An order of stay of execution of the ruling of Hon. K. Cheruiyot SPM delivered on 8.6.2023 in Kisumu is hereby granted until this appeal is heard and determined.
2. An order or stay of proceedings in Kisumu CMCC No. E093 of 2023 is hereby granted until this appeal is heard and determined.
3. The Appellants are directed to file their record of appeal within 40 days from the date hereof.
4. The costs of this application shall abide the outcome of the appeal.
5. Mention on 19th June, 2024 to confirm compliance.

DELIVERED, DATED AND SIGNED AT KISUMU THIS 20TH DAY OF MARCH, 2024.

MWANAISHA. S. SHARIFF

JUDGE

