



Mutiga t/a Kimathi Booksellers v ICEA Lion General Insurance Company Limited (Civil Case 75 of 2014) [2024] KEHC 3304 (KLR) (Commercial and Tax) (18 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3304 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 75 OF 2014
JWW MONG'ARE, J
MARCH 18, 2024**

BETWEEN

LAWRENCE MUTIGA T/A KIMATHI BOOKSELLERS PLAINTIFF

AND

ICEA LION GENERAL INSURANCE COMPANY LIMITED DEFENDANT

RULING

1. On 3rd July 2023 this court rendered its judgment in this matter in favour of the Plaintiff against the Defendant for the total sum of Kshs 9,242,900/=. Subsequently on 13th July 2023, the Defendant, being dissatisfied with the said decision, filed a Notice of Appeal signaling its intention to challenge the said judgment at the court of appeal. Subsequently and on 9th October 2023, the present Notice of Motion application was filed seeking the following orders:-
 1. Spent
 2. Spent
 3. That the Honourable Court be pleased to issue an order for stay of execution of the Judgment delivered on 3rd July 2023 in the High Court of Kenya, Commercial and Tax Division, at Nairobi in Civil Suit No.75 of 2014 by Honourable Justice J. W. W. Mong'are, and any consequential orders arising therefrom, pending the hearing and determination of the intended appeal.
 4. That the proclamation of Attachment of Movable property, dated 6th October 2023 be set aside for wanton breach of procedural safeguards of execution of decrees.
 5. That the costs of this application be provided for.



2. The application was supported by the grounds set on its face and the supporting affidavit of Roselyn Kihara. The application is opposed and the Plaintiff, Lawrence Muthiga, filed a replying affidavit sworn on 12th October 2023.
3. It is the Applicant position that the Plaintiff has violated the provisions of Section 94 of the Civil Procedure Act, in seeking to execute the decree before taxation of the party and party costs and that the said execution process, which has already been commenced by way a proclamation of attachment of warrants, is premature and should be stopped to await the proper process, to avoid visiting an injustice upon the Defendant. The Applicant has also sought to stay the process of execution of the decree herein and urges the court to allow the intended appeal to be determined by the Court of Appeal, where it seeks to overturn the judgment previously issued by this court.
4. The Plaintiff on his part has opposed the application. The Plaintiff argues that it has taken him ten years to conclude the case against the Defendant and that any continued delay on the same will cause him great harm. In any event, the Plaintiff argues, the Defendant is yet to file a Memorandum of Appeal to allow the court to determine if the Defendant has a prima facie arguable appeal before the courts. The Plaintiff finds nothing wrong with the execution process and holds the view that the same should be allowed to proceed since there is no appeal pending before any court and nor are there any orders to stop the execution process.
5. This matter was canvassed by way of written submissions pursuant to the directions of the court. Both parties have filed written submission which I have carefully considered.

Analysis and Determination

6. Upon careful consideration of the pleadings herein, two issues arise for determination, to wit:-
 1. Whether the Defendant is deserving of an order for stay of execution pending appeal, and
 2. Whether the intended execution complies with the statutory procedures.
7. As to Whether the Defendant is deserving of an order for stay of execution pending appeal, Order 42 Rule 6(2) of the Civil Procedure Rules lays the threshold for order of Stay of execution to issue. The said order 42 Rule 6(2) provides as follows:-

“No order for stay of execution shall be made under sub rule (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.
8. This position was echoed by the court in the case of James Wangalwa & another v Agnes Naliaka Cheseto (2012)eKLR where the court stated:-

“...it is evident that the power to grant stay of execution pending appeal is an exercise of the discretion of the court on sufficient cause being shown by an Applicant that substantial loss may result to the Applicant if the order is denied; the application is made without inordinate delay and on provision of such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant.



9. From the pleadings the record reflects that a Notice of Appeal was issued within 10 days of the Judgment being rendered and this application filed subsequent thereto. The application before this court seeks to stay the execution of the decision of this court pending the intended appeal. Order 42 Rule 1 of the [Civil Procedure Rules](#) defines an appeal as follows:-

“Form of appeal [Order 42, rule 1]

- (1) Every appeal to the High Court shall be in the form of a Memorandum of Appeal signed in the same manner as a pleading.
- (2) The Memorandum of Appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

The Applicant has urged the court to stay the execution of the decree from the decision of the court await the determination of the intended appeal. What the Applicant has placed before the court is a Notice of Appeal and not the intended appeal as required under Order 42(1) cited above. This therefore means the Applicant is yet to file any appeal before the court of appeal for determination.

10. Order 42 Rule 6 requires an Applicant to demonstrate that its stands to suffer irreparable loss if the order of stay is not granted. The Applicant has argued that if the decretal amount is paid to the Plaintiff, there is a likelihood of the same not being recoverable, in the event that the intended Appeal is successful. No material has been placed before this court to demonstrate that the Plaintiff will be incapable of repaying the decretal amount, if he loses the appeal. Mere averments by a party are not sufficient for a court to rely on to deny a party its rights. It is trite that it is incumbent upon a party seeking to rely on a set of facts to prove their existence. To my mind, the Applicant has not demonstrated the incapability of the Respondent to refund the decretal amount should the appeal be successful.
11. The final limb upon which an order for stay can be granted is the party seeking the orders of the court must be willing to place sufficient security for the ultimate performance of the decree. The Applicant has offered a bank guarantee to cover the decretal amount. The Applicant is yet to file the intended appeal. I am therefore not satisfied that the Applicant has laid sufficient grounds for this court to exercise its discretion and order a stay of execution of its own judgment. This limb of the application therefore fails. Once the Applicant has filed a proper appeal before the Court of Appeal, the Applicant can renew the application before the said court for the stay of execution orders.
12. The second issue for determination before this court is “Whether the intended execution complies with the statutory procedures. The Applicant has argued that the move to proclaim and attach goods belonging to the Defendant by the Plaintiff in execution of the decree violates the provisions of Section 94 of the [Civil Procedure Act](#). Section 94 provides as follows:-

“where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.”



13. This provision was reinforced by the Court of Appeal in the case of *Lakeland Motors Ltd v embi*(1998) eKLR where the court noted:-

“the exercise of discretion by the superior court under section 94 of the Act necessarily requires that parties to a decree passed by that court in the exercise of its original civil jurisdiction should be availed an opportunity to be heard before making an order for execution of that decree before taxation.”

This was further clarified by the court in *Kartar Singh Dhupar & Co. Ltdv. Lianard Holdings Limited*(2017) eKLR the court stated that:-

“the mischief sought to be addressed by section 94 of the *Civil Procedure Act* is to protect a judgment debtor from suffering multiple executions, one in respect of the principal sum and the other for costs after ascertainment in respect of the same suit.”

14. I agree with the Applicant that taxation after judgment is a necessary step preceding execution. The import of Section 94 of the *Civil Procedure Act* is that a party wishing to forego its costs must move the court appropriately. The Respondent in his replying affidavit confirms that upon obtaining the decree, the process of execution commenced. It is his argument that there being no appeal filed, there was nothing to stop the process. I note that no application was made to the court for the Plaintiff to execute before taxation. I find therefore the proclamation for attachment is premature. The Plaintiff should first and foremost move the court appropriately for determination and ascertainment of costs before proceeding to execution. This limb of the application therefore succeeds.

Final Disposition

15. The application before this court is partly successful. The court has found that there are no sufficient grounds to grant an order of stay pending appeal and has disallowed that limb of the application. The second limb on the premature nature of the execution warrants before taxation is successful. The Plaintiff is directed to first and foremost move the court to have a certificate of taxation issued before moving ahead with the attachment. The proclamation warrants against the goods of the Defendant are hereby lifted and or vacated.
16. Costs follow the event. The Application herein is partly successful. It is only appropriate that each party bears their own costs of this application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF MARCH, 2024

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Mukunyi for the Plaintiff.

Ms. Chepngeno holding brief for Mr. Rono for the Defendant/Applicant

Amos - Court Assistant

