



**Guardian Coach Ltd v Terer & 2 others (Civil Appeal
E044 of 2022) [2024] KEHC 6387 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6387 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E044 OF 2022
RL KORIR, J
MAY 30, 2024**

BETWEEN

THE GUARDIAN COACH LTD APPLICANT

AND

WILLIAM KIMUTAI TERER 1ST RESPONDENT

NYAMIRA LUXURY EXPRESS COMPANY 2ND RESPONDENT

SIMON KIPCHIRCHIR SINGOR 3RD RESPONDENT

RULING

1. The Applicant filed a Notice of Motion Application dated 22nd November 2022 which sought the following Orders:-
 - I. Spent.
 - II. Spent.
 - III. Spent.
 - IV. That there be a stay of execution of the sale of Motor Vehicle KBX 343L registered in the name of the Objector/Applicant herein and or stay of the Ruling delivered on the 9th November 2022 and all consequential orders emanating therefrom pending the hearing and determination of this Appeal.
 - V. That this Honourable Court be pleased to order the unconditional release of the Objector's/Applicant's Motor Vehicle Registration Number KBX 343L proclaimed and carted away on the 11th February 2022 by Indomitable Auctioneers pending the hearing and determination of this Appeal.
 - VI. That costs of this application be provided for.



2. The Application was brought under section 1A, 1B, 3, 3A, 63(e) and 79G of the *Civil Procedure Act*, Order 42 Rule 6 (1), (2), Order 51 Rules 1 and 13(2) of the Civil Procedure Rules and it was based on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Julius Mokaya Ong'era on 22nd November 2022.

The Applicant's Case.

3. The Applicant stated that it was appealing against Hon. K. Kibellion's (Principal Magistrate) Ruling dated 9th November 2022 in Bomet Magistrate's Civil Suit Number 31 of 2015. That it's Appeal raised triable issues of law and facts and had an overwhelming chance of success. It further stated that if the prayer for stay is not granted, then the Appeal would be rendered nugatory.
4. It was the Applicant's case that it was apprehensive that the 1st Respondent was financially incapable of reimbursing any money that may be incurred in the execution of the Judgement if it succeeds on Appeal. It was the Applicant's further case that the 1st Respondent was about to commence execution and will offer the Applicant's property for sale.
5. The Applicant stated that it had brought the present Application without delay and that it was in the interest of justice and fairness that the prayer for stay is granted.

The Response

6. Through his Replying Affidavit dated 8th December 2022, the 1st Respondent stated that he sued the Applicant for damages that resulted from a road traffic accident and Judgement was delivered on 12th June 2019 in his favour. That he thereafter instructed an Auctioneer to proceed with execution.
7. It was the 1st Respondent's case that the Applicant then filed an Application for stay of execution in the trial court and the same was dismissed via a Ruling dated 9th November 2022. It was the 1st Respondent's further case that the subject Motor Vehicle has not been sold and he was sceptical that if it was released to the Applicant then he would not be able to proceed with the execution process.
8. The 1st Respondent stated that the Applicant had not filed the Appeal hence there was no way the court would determine its chances of success. The 1st Respondent further stated that the Applicant had not demonstrated how it would be prejudiced if the order for stay was denied.
9. It was the 1st Respondent's case that the present Application was meant to deny him the fruits of his Judgement. That if the court was inclined to grant the stay order, then it grants the prayer on condition that the Applicant pays him half the Decretal sum and the other half be deposited in a joint interest earning account. He further stated that the Auctioneer's fees be assessed by the court.
10. On 8th December 2022, I directed that the Application be canvassed by way of written submissions.

Applicant's submissions.

11. Through its written submissions dated 24th April 2023, the Applicant submitted that the conditions to be satisfied before a stay of execution is granted were contained in the case of Butt vs Rent Restriction Tribunal (1982) KLR 417.
12. It was the Applicant's submission that if it's Motor Vehicle Registration Number KBX 343L is sold, it would suffer substantial loss. That the 1st Respondent had not demonstrated that he would be able to refund the Decretal amount if the Motor Vehicle was sold and it (Applicant) succeeded on Appeal. It was the Applicant's further submission that the subject Motor Vehicle was parked at the Auctioneer's



- yard and was exposed to vandalism and wastage through depreciation. That it had suffered loss of user from the day it was carted away.
13. It was the Applicant's submission that it had brought the present Application without unreasonable delay as it filed the Appeal within 14 days.
 14. On the issue of security, the Applicant submitted that even if furnishing of security was mandatory under Order 42 Rule 6 of the Civil Procedure Rules, the court should exercise discretion while taking into account the circumstances of this case. That its Motor Vehicle had been carted away yet it was not a party to the suit in the trial court. It was the Applicant's further submission that the decree was directed to the Judgement Debtor and not itself hence it was not liable to the attachment and retention of its motor vehicle. It relied on *Kephar Kisiangani Lumukanda vs Mash Bus Services; Mash East Africa Limited* (2016) eKLR and *Michira Messah & Company Advocates vs Katana Kalume Ndurya; Kalume Kenga Katana (Objector)* (2021) eKLR.
 15. It was the Applicant's submission that it had met the threshold for the prayers sought in the present Application and prayed that it be allowed.

1st Respondent's submissions

16. The 1st Respondent submitted that if the Applicant wanted the prayer for stay granted, it had to satisfy the conditions set in Order 42 Rule 6 of the Civil Procedure Rules which were; that substantial loss may result to the Applicant unless the order for stay is granted; that the Application has been brought without unreasonable delay and that such security for the performance of the decree be given.
17. The 1st Respondent submitted that the Applicant had not demonstrated how it would suffer substantial loss. He relied on *James Wangalwa & another vs Agnes Naliaka Cheseto* (2012) eKLR and *Kenya Shell Ltd vs Kibiru* (1986) KLR 410.
18. It was the 1st Respondent's submission that despite the lack of evidence to show that he was unable to refund the Decretal sum, he should not be denied the fruits of his Judgement. That the general rule was that a court ought not deny a successful litigant the fruits of his Judgement save in exceptional circumstances where to decline to do so may amount to stifling the right of the unsuccessful party to challenge the decision in a higher court. He relied on *Machira T/A Machira & Co. Advocates vs East African Standard (No 2)* (2002) KLR 63. It was the 1st Respondent's further submission that poverty was not a ground for denying one the fruits of his Judgement.
19. The 1st Respondent submitted that the Applicant was required to offer security for the performance of the Decree. That no such security had been offered by the Applicant. He relied on *Mwaura Karuga T/A Limit Enterprises vs Kenya Bus Services Ltd & 4 others* (2015) eKLR and *Gianfranco Manenthi & another vs African Merchant Assurance Company Limited* (2019) eKLR. He further submitted that the payment of security was meant to ensure that courts do not assist litigants to delay execution through vexatious and frivolous Appeals
20. It was the 1st Respondent's submission that in the interest of justice, the stay order can be granted on condition that the Applicant pays him half the Decretal sum and the other half be deposited in an interest earning account in the joint names of the advocates on record.
21. I have read through and carefully considered the Notice of Motion Application dated 22nd November 2022, the 1st Respondent's Replying Affidavit dated 8th December 2022, the Applicant's written submissions dated 24th April 2023 and the 1st Respondent's written submissions dated 11th October 2023. The only issue for my determination was whether the Applicant had satisfied the requirements for the grant of the Order of Stay of Execution.



22. The principles that relate to Stay of Execution Orders are well settled. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-
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 orders set aside.
 2. 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”.
23. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, the Applicant should satisfy the court that:-
- i. Substantial loss may result to it unless the order is granted.
 - ii. That the Application has been made without unreasonable delay.
 - iii. The Applicant gives such security as the court orders for the due performance of such Decree or order as may ultimately be binding to them.
24. Regarding the issue of substantial loss, the Court of Appeal in the case of Kenya Shell Limited vs Benjamin Karuga Kibiru & another (1986) eKLR, held that:-
- “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.”
25. Similarly in James Wangalwa & Another vs Agnes Naliaka Cheseto (2012) eKLR, Gikonyo J held that:-
- “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
26. The Applicant stated that it would suffer substantial loss unless the execution of the Decree was stayed. The Applicant further stated that such loss would be occasioned by the sale of its Motor Vehicle Registration Number KBX 343L. As demonstrated by James Wangalwa (supra) above, execution



proceedings were a lawful process and the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss.

27. It was the Applicant's contention that the 1st Respondent would not be able to refund the Decretal sum in the event that its Appeal succeeded. In my view, the burden is on the Applicant to prove that the 1st Respondent would not be able to refund the Decretal sum. Shifting that burden to the 1st Respondent who is the judgement holder is unjust. In the case of *ABN AMRO Bank vs Lemond Foods Limited* Civil Application No.15 of 2002 the Court of Appeal held that:-

“The burden is on the applicant to show that the appeal shall be rendered nugatory say by swearing upon reasonable grounds that the respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. . . .”

28. The Applicant, other than alleging that the 1st Respondent was a person of straw, did not adduce any evidence or set out factual circumstances to demonstrate that it would suffer substantial loss if the execution was not stayed. It is my finding that the Applicant has not proved the substantial loss that it would suffer.

29. On the issue of unreasonable delay, the Ruling that it the subject of the Appeal was delivered on 9th November 2022 and the present Application for stay was filed on 23rd November 2022. The 13 day difference in my view is reasonable. It is my finding therefore that the present Application was brought without undue delay.

30. Regarding security for the performance of the Decree, Gikonyo J in the persuasive case of *Arun C Sharma vs. Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* (2014) eKLR held that: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.

Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

31. Similarly in *Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd* (2019) eKLR Nyakundi J. observed:-

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree.



The court would order for the release of the deposited decretal amount to the respondent in the appeal....

Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine.....”

32. The Applicant has not offered to deposit the security but instead implored this court to use its discretion and factor in the circumstances of the case. On the other hand, the 1st Respondent although stating the Applicant had not satisfied the conditions precedent for the award of the stay order, was amenable to the stay order being granted on the condition that he is paid half the Decretal sum and the other half be deposited in an interest earning account in the joint names of their advocates.

33. It is salient to note that the power of the court in deciding whether or not to grant a stay of execution is discretionary. In the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 the Court of Appeal held that

- “ 1. 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.
2. 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.
3. 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.
4. 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.
5. 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.”

34. Also in the case of *Samvir Trustee Limited vs Guardian Bank Limited (UR)*, Warsame J (as he then was), held that:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to



the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion”.

35. I have noted that the Applicant’s main reason for the prayer of stay of execution is that it was apprehensive that the 1st Respondent would be unable to refund it the Decretal sum if the Appeal succeeded. I have also noted that the 1st Respondent was the decree holder who should be enjoying the fruits of the Judgment. This Court while balancing these two interests, must satisfy itself that that no party would suffer undue prejudice.
36. This principle was enunciated in the decision of Gikonyo J. in Absalom Dova vs. Tarbo Transporters (2013) eKLR, where he stated: -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”
37. I have found that the Applicant failed to satisfy the conditions precedent for the grant of the stay order. The Applicant failed to demonstrate the substantial loss it would suffer if the order was granted and it further failed to offer security for the performance of the Decree. Having found that and having considered the circumstances of the suit in the trial court up to the present Application, it is my finding that the Applicant does not merit a stay order.
38. Before I pen off, I must state that the court at this stage cannot consider the issue of ownership of the Motor Vehicle Registration Number KBX 343L as the same would be dealt with in the Appeal. At this stage, the court is only concerned with the prayer for stay and if the Applicant had satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules.
39. In the end, the Notice of Motion Application dated 22nd November 2022 is dismissed with costs to the 1st Respondent.
40. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 30TH DAY OF MAY, 2024.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the absence of parties. In the presence of Siele(Court Assistant)

