



Trinity Transporters & Logistics Ltd v Munguti (Suing as the Legal Representative of the Estate of Kelvin Maingi Leornard) (Civil Appeal E162 of 2021) [2024] KEHC 6523 (KLR) (27 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6523 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E162 OF 2021
MW MUIGAI, J
MAY 27, 2024**

BETWEEN

TRINITY TRANSPORTERS & LOGISTICS LTD APPLICANT

AND

CATHERINE NDUKU MUNGUTI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KELVIN MAINGI LEORNARD) RESPONDENT

(Being an appeal from the Ruling of the Senior Principal Magistrate, the Honorable Caroline A. Ocharo Delivered at Machakos Chief Magistrate's Civil case No. 462 of 2018 on the 28.9. 2021)

RULING

Notice of Motion

1. Vide an application dated 12.10.2023 filed under Article 50 of *the Constitution* of Kenya, Section 1A,3A,78 and 80 of the *Civil Procedure Act* and Order 12 rule 6 (1), Order 17 rule 2(6), order 42 Rule 6, Order 50 rule 6, Order 51 Rule 1 and 3 of the Civil Procedure Rules, the Applicant sought the following orders, that;
 - a. Spent
 - b. That pending the hearing and determination of this application interparties, an order does issue restraining the respondent either by herself, her advocates, agents, auctioneers and/ court bailiffs from any manner whatsoever executing and or proceeding to execute the cost aspect of the negative order of dismissal made on 11.3.2021 pursuant to ruling of Honourable Caroline Ocharo



- c. That as an alternative to prayer (1) above and pending the hearing and determination of this application, the honourable court be pleased to issue an order of stay of execution and or enforcement of the warrants of attachment and or sale dated 28.9.2023 as well as the decree
 - d. That a mandatory order does issue directing the lifting and or raising of any attachment and or proclamation of the appellant's motorvehicle registration numbers KCH 695M, KCD 517Q, KCV032P, KDA 643T and KDH 981N and releasing the same to the appellant.
 - e. That the Honourable Court be pleased to review and or set aside its orders made on 12.6.23 dismissing the present appeal and to reinstate and /or readmit the present appeal for merit hearing and determination and the stay orders that were then subsisting on the terms already met by the appellant
 - f. The costs of this Application abide the outcome of the Appeal.
2. The Application is supported by the Affidavit of Grace Kyalo deposed on 12.10.2023 that the appellant's public transport service and /or matatu registration numbers KCH 695M, KCD 517Q, KCV 032P, KDA643T and KDH 981N were on the verge of being sold the same having been attached in pursuance of the ruling/decree subject of the current appeal and that the auctioneers had seized the said vehicles.
 3. That the decree sought to be executed was itself issued and or passed more than one year ago on 11.3.2023 requiring the issuance of a notice to show cause to the appellant before any process of execution can be issued by the trial court
 4. The appellant prior to the orders of the court had been shielded from any execution pursuant to the stay orders earlier issued and for which the appellant deposited security in form of money amounting to half of the decretal sum which security has never been released to the appellant.
 5. The auctioneer has attached vehicles whose values he estimates to be Kshs 4,650,000 whereas the sum claimed is only kshs 265,908 putting into question the actual purpose of this multiple attachments.
 6. According to the applicant, the orders of the court made on 12.6.2023 dismissing the appeal were made on a mention date without any prior notice to show cause served upon the appellants and or its advocates and the said orders were made in the absence of the appellant
 7. It was deposed that the court had no jurisdiction and or business making a mention date without prior notice to show cause having been duly served upon the appellant and or its advocate on record.
 8. According to the Appellants allowing the orders of 12.6.2023 to stand would be repugnant to justice and against the well-trodden path that a court of law has no jurisdiction making substantive orders against a party on a mention date except after hearing any representations that such a party may have.

Response

9. In opposition the Application, the Respondent filed a replying affidavit deposed on 24.10.2023 in which it was opined that the Appellant's application was made in bad faith and meant to deny her the cost of the objection that was dismissed
10. Further that the Appellant's appeal was dismissed with no orders as to costs on 12.6.2023 and on 1.9.2023 the applicant was notified of the dismissal orders and no step was taken until the proclamation was issued on 2/10/2023 and then rushed to court to seek for stay/review and that the present application was thus an afterthought



11. According to the Respondent, the appellant has not satisfied the conditions for review.
12. The application was canvassed by way of written submissions.

Applicant's Submissions Dated 24.10.2023

13. The Applicant submitted that the issues that arise for determination are what is the nature of the application before court and is the applicant entitled to the orders sought in the substantive prayers.
14. It was submitted that the application before court is seeking the exercise of discretion of the court in terms of the very many provisions of the law cited including order 17 Rule 2 (6) and 35.
15. Reliance was made to the case of Floriculture international Limited v Central Kenya Limited & 3 others [1995] eKLR to buttress the fact that a court ordinarily has no jurisdiction to make substantive orders on a mention date except in the circumstances outlined in the judgement
16. It was submitted that the appellants have submitted enough to warrant the court granting application in terms of all the pending prayers

Respondent Submissions Dated 02.11.2023

17. The Respondent submitted that the prayer for stay was res judicata for the court gave conditions for stay both on 6/12/2021 and on 12/5/2022 and the applicant refused to comply.
18. On review reliance was made 45 rule 1 of the Civil Procedure Rules, the principles governing review are discovery of new evidence, an account of mistake or error apparent on face of record and that the appellant failed any of the above principles to warrant review

Determination

19. The court has considered the Application, the Response thereto and the submissions on record and the issue for determination is whether the Applicant should be granted an order of stay of execution.
20. Stay of Execution is provided by the proviso under Order 42 Rule 6 of the Civil Procedure Rules 2010 as follows;

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.”

21. The three conditions to be fulfilled can therefore be summarized as follows;
- a. that substantial loss may result to the applicant unless the order is made
 - b. application has been made without unreasonable delay
 - c. security as the court orders for the due performance
22. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-
- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 - b. Secondly, 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 the appeal court reverse the judge’s discretion.
 - c. Thirdly, 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.
 - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order for stay of execution to lapse.

Substantial Loss

23. On the issue of substantial loss, Ogolla, J gave stated as follows in *Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 that:

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.’

24. In the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR the court expressed itself as hereunder:

“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.”

Arguable Appeal

25. The Appellant submitted that the appeal was dismissed without any notice to show cause. According to the applicant, the orders of the court made on 12.6.2023 dismissing the appeal were made on a mention date without any prior notice to show cause served upon the appellants and or its advocates and the said orders were made in the absence of the appellant
26. In the case of Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63 it was held that:

“To be obsessed with the protection of an appellant or intending appellant in total disregard or fitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

Undue Delay

27. As to whether the Application has been filed without undue delay, The court finds that the Application has not been filed without undue delay

Security

28. As regards deposit of security, the court observed in the case of Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd [2019] eKLR it was held that:-

“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. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

29. The appellant averred prior to the orders of the court had been shielded from any execution pursuant to the stay orders earlier issued and for which the appellant deposited security in form of money amounting to half of the decretal sum which security has never been released to the appellant.

Review

30. Section 80 of the *Civil Procedure Act* Cap 21 provides as follows: -

“ Any person who considers himself aggrieved—

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

31. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -

“ 1.

(1) Any person considering himself aggrieved—

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

32. in *Republic v Public Procurement Administrative Review Board & 2 others* [2018] e KLR it was held: -

“ Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other



sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

33. In *Tokesi Mambili and others vs Simion Litsanga* the Court held as follows: -
- i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.
 - ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.
34. In this case, there is no discovery of new evidence. According to the applicant, the orders of the court made on 12.6.2023 dismissing the appeal were made on a mention date without any prior notice to show cause served upon the appellants and or its advocates and the said orders were made in the absence of the appellant
35. I find that the applicant has not met the threshold to warrant for review as sought.
36. The Court record confirms the appeal was filed on 6/10/2021 and this Court granted stay of execution on condition the Appellant deposited 1/2/decretal amount within 30 days in an interest earning account and the matter was for mention on 9/11/2021. Proceedings from the Lower Court were to be availed. Matter was mentioned on 20/9/2022 there was no appearance by Appellant but a Notice for mention was stamped received by advocate for Appellant on record on 24/8/2022. A further mention date was on 17/11/2022 LCF was not availed. On 15/12/2023 the LCF was availed in the High Court.
37. On 8/2/2023 the Appellant sought directions on how proceedings and judgment would be obtained yet file was in the High Court. This Court directed parties /Counsel to liaise with DR MHC to obtain copies for typed proceedings.
38. On 12/6/2023 the Appellant did not attend Court no representation, explanation filing of any communication or document for the Court to consider.
39. The Court record confirms terms for stay of execution were complied with. This is a 2021 matter on appeal and stay was granted 4 years later no progress was made and any challenges were not disclosed to the Court to consider. The Court discretion cannot be exercised in the circumstances in favour of the Appellant.

Disposition

- 40 The order for review is hereby dismissed
- Stay vacated and the deposit released to the depositor.
- There is no appeal on record.

RULING DELIVERED DATED & SIGNED IN OPEN COURT ON 27/5/2024 IN MACHAKOS HIGH COURT VIRTUALLY/PHYSICALLY

M.W. MUIGAI

JUDGE

