



REPUBLIC OF KENYA



**Momentum Credit Limited v Santram Hardware Wholesalers Ltd & another
(Civil Appeal E020 of 2023) [2024] KEHC 5894 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5894 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E020 OF 2023
JRA WANANDA, J
MAY 24, 2024**

BETWEEN

MOMENTUM CREDIT LIMITED APPELLANT

AND

SANTRAM HARDWARE WHOLESALERS LTD 1ST RESPONDENT

RICHARD WAINAINA KIARIE T/A SEVENTY SEVEN

AUCTIONEERS 2ND RESPONDENT

RULING

1. The Application before the Court is the Notice of Motion dated 7/02/2023 and filed by the Appellant on 21/02/2023. The same is filed through Messrs Nyambegera & Co. Advocates and seeks the following orders:
 - i. [.....] Spent
 - ii. [.....] Spent
 - iii. Pending the hearing and determination of the appeal there be an order restraining the Respondents from selling, disposing or in any way dealing with motor vehicle registration number KCD 073H
 - iv. Costs of the application be in the appeal.
2. The Application is expressed to be brought under Order 42 Rule 6(6) of the Civil Procedure Rules and Section 63(e) of the *Civil Procedure Act*. The grounds of the Application are as set out on the face thereon and it is supported by the Affidavit sworn by one Sheila Imali.
3. In the Affidavit, the Appellant deponed that she is the Legal Officer of the Appellant, that the Appellant's objection to attachment of the said motor vehicle in the subordinate Court was



unsuccessful, that the motor vehicle had been attached by the 2nd Respondent Auctioneers to satisfy a decree against Harmo Engineering and Building Contractors which is indebted to the 1st Respondent, that the motor vehicle which is registered in the joint names of the Appellant and Harmo Engineering and Building Contractors was not available for attachment, that for reasons that the Appellant considers untenable and unjust, the objection to attachment was dismissed, and that aggrieved with the decision, this Appeal has been filed.

4. The Appellant contended further that there is a real likelihood that the Respondents will proceed to dispose, sell and/or adversely deal with the motor vehicle to the detriment of the Appellant, that there is need to preserve the motor vehicle as the appeal is heard, that in the event the motor vehicle is sold, the Appeal will be rendered useless and the Appellant's only security for the repayment of a loan rendered unavailable thereby causing it irreparable harm, and that the Appellant has demonstrated that it has an appeal with high chances of success.

1st Respondent's Replying Affidavit

5. The 1st Respondent opposed the Application vide the Replying Affidavit filed on 14/12/2023 through Messrs RGO Advocates LLP and sworn by one Jignesh Patel who described himself as a Director of the 1st Respondent. He deponed that there is no Appeal upon which the Application is hinged, that the motor vehicle is in the custody of the Appellant and the Respondent is therefore not in a position to act against the interests of the Appellant, that he followed due procedure in enforcing execution, that the case began in 1996, that it does not make sense that the Appellant has not added Harmo Engineering and Building Contractors as a party herein having been a party at the trial Court, that the motor vehicle is owned by the Judgment Debtor, and that the motor vehicle was registered in the name of the Appellant irregularly and as a means to defeat enforcement of the Judgment.
6. He reiterated that he has no means to sell or deal with the motor vehicle as it is not in the Respondent's possession and Courts do not issue orders in vain, that the Appellant has not annexed the Memorandum of Appeal filed in this Appeal and that therefore this Court is unable to determine the aguability of the Appeal, that in any case, the Appeal is flimsy and has no chance of success, the Appellant has not demonstrated its readiness to comply with orders of stay of execution, that the Appellant has not annexed any documents to show the nature of its interest, the Appellant should deposit the value of the motor vehicle pending outcome of the Appeal, and that the balance of convenience tilts in favour of the 1st Respondent.

Hearing of the Application

7. It was agreed, and I directed, that the Application be canvassed by way of written Submissions. Pursuant thereto, the Appellant filed its Submissions on 9/07/2023 while the Appellant filed on 15/12/2023.

Appellant's Submissions

8. Counsel for the Appellant submitted that the Appellant has a chattel mortgage on the said motor vehicle, that the motor vehicle had been used to secure a loan advanced to Harmo Engineering and Building Contractor, that there was a judgment between the 1st Respondent and Harmo Engineering in Eldoret CMCC No. 656 of 2014 and which culminated in the attachment of the motor vehicle. He submitted further that the Appellant's objection to attachment was dismissed despite evidence having been tendered showing the Appellant's interest in the motor vehicle. He then basically reiterated the matters set out in the Supporting Affidavit.



1st-Respondent's Submissions

9. On his part, Counsel for the 1st Respondent submitted that under Section 107-109 of the *Evidence Act*, whoever alleges bears the burden of proving the existence of facts that he propound to exist, that the motor vehicle was released to the Appellant on 17/02/2023 yet the Appellant still proceeded to file the instant Application without any legal basis, that the Application primarily seeks to prevent the 1st Respondent from enjoying its right as a Decree-holder which has crystallized, and that the motor vehicle had been attached by the 2nd Respondent before being repossessed by the Applicant on 17/02/2023, and that the Application therefore seeks to obtain orders that have no meaningful purpose. He cited various authorities and submitted further that the interest of the Appellant can be adequately compensated by damages, and that the decretal sum is more than Kshs 4,203,314/- yet the motor vehicle was assessed at Kshs 2,000,000/-.

Determination

10. Before I delve into identifying or determining the issues herein, I note that the 1st Respondent has argued that there is no Memorandum of Appeal annexed to the Application. However, the Court file has such Memorandum of Appeal dated 8/02/2023 and filed on 9/02/2023. It may be that the 1st Respondent has not been served with the same but that would be a different issue not placed before this Court for determination.
11. The issue in this Application is therefore “whether the Appellant ought to be granted stay of execution pending the hearing and determination of this Appeal”.
12. The Court’s power to grant stay of execution pending Appeal is provided under Order 42 Rule 6(2) of the Civil Procedure Rules as follows:

“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.
13. Therefore, an Applicant for stay of execution of a decree or order pending Appeal is required to satisfy the conditions set out above. The first one is whether the Application has been made without unreasonable delay, the second is to demonstrate that “substantial loss” may result to the Applicant unless the order is granted, and the third is the Applicant’s willingness or its readiness to deposit security for due performance of the decree or order.
14. The first condition that I need to consider is therefore whether the Application has been made without unreasonable delay. In determining this limb, I note from the Memorandum of Appeal that the Ruling the subject of this Appeal is stated to have been delivered on 3/02/2023. This has not been denied by the Respondents. Although the Ruling or the Order emanating therefrom has not been exhibited, it is clear that, if the stated date of the Ruling is correct, then the instant Application was filed timeously and without delay.



15. The second condition is whether the application would suffer “substantial loss” should the order not be granted. As to what constitutes “substantial loss”, F. Gikonyo J in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, stated as follows:

“ 11. 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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“... 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.”

With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion under order 42 Rule 6 of the CPR only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above.”

16. Further, Platt, Ag. JA (as he then was) in *Kenya Shell Limited vs. Kibiru* [1986] KLR, expressed himself as follows:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a 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”.

17. On his part, Gachuhi, Ag. JA (as he then was) in the same case, stated as follows:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it



were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

18. On the merits of the Appeal, although a copy of the Ruling has not been exhibited to enable the Court make its own independent assessment on the arguability of the Appeal, from the Affidavits and Submissions presented herein, it is clear the issues raised in the Appeal cannot be termed frivolous or with no chances of success.
19. The 1st Respondent has observed that that it does not make sense that the Appellant has not joined the Judgment Debtor in the trial Court suit, Harmo Engineering and Building Contractors, as a party herein yet it was a party before the trial Court. While this may be a valid point, I do not think that it is a weighty issue at this stage. The same may be a proper issue at the hearing of the Appeal but may not necessarily be a significant matter at this interlocutory stage of hearing the Application for stay pending Appeal.
20. Regarding “substantial loss”, although the Appellant has inexplicably not exhibited copies of supporting documents, the Appellant’s contention that it has a chattels mortgage on the motor vehicle as the motor vehicle serves as the only security for a loan advanced to the Judgment Debtor (Harmo Engineering and Building Contractors) has not been challenged. The Appellant’s further statement that loan is yet to be liquidated has also not been challenged. Further, the Appellant has exhibited a copy of the Registration Certificate (commonly referred to as Log-book) demonstrating that the motor vehicle is registered in the joint names of the Appellant and the Judgment Debtor – “Harmo Engineering and Building Contractors Limited”. To this end, I find that the Appellant has sufficiently demonstrated its interest in the motor vehicle.
21. If it is therefore true that the motor vehicle stands as security for the said loan, then disposal or sale thereof in execution of the decree will evidently dissipate the Appellant’s only security for repayment of the loan before the Appeal is determined. In my view, this will amount to “substantial loss” to the Appellant and will have decimated the substratum of the Appeal thus rendering the Appeal nugatory.
22. It is also to be recalled that the Appellant was not a party to the suit before the trial Court but only came in at the point of execution as an Objector to the attachment of the motor vehicle in which the Appellant claims to be a co-owner. The Appellant has not therefore sought stay of execution as a Judgment Debtor but only as an Objector. The Appeal herein is therefore not against the Judgment of the trial Court but only against the subsequent Ruling allowing attachment of the specific motor vehicle. In the circumstances, I am satisfied that it will cause a great deal of inconvenience and hardship to the Appellant were the motor vehicle to be attached and sold before the Appeal is determined. In my view, this further reason bolsters the finding that disposal of the motor vehicle will amount to “substantial loss” to the Appellant. I do not believe that in the circumstances, it will be just to simply argue that the loss can be compensation by way damages.
23. The 1st Respondent has contended that the Application is of no meaningful purpose because after the initial attachment and seizure of the motor vehicle, the Appellant has since reclaimed possession thereof. While that may be correct, in the absence of an order of stay, nothing stops the 1st Respondent from re-attaching and re-proclaiming the motor vehicle and then disposing of it on the strength of the decree. Although the prayer No. (3) of the Application could have been better drafted to accurately bring out the correct state of affairs that the Appellant wishes to be protected from, I am not persuaded with the argument that the 1st Respondent cannot in any way use the decree to adversely affect or interfere with the Appellant’s interests simply because the 1st Respondent does not at present have the physical custody or possession of the motor vehicle.



24. On the third condition - deposit of security - I note that the decretal sum is said to be in excess of Kshs 4.2 Million and the value of the motor vehicle is itself said to be about Kshs 2 Million. The 1st Respondent contends that if the stay is to be granted, then the Appellant should deposit an amount securing this value of the motor vehicle. I however reiterate that the Appellant has not sought stay of execution as a Judgment Debtor but only as an Objector challenging the post-Judgment Ruling allowing attachment of the said motor vehicle in execution of the decree. As already stated, the Appeal is therefore not as against the Judgment of the trial Court but only against the subsequent Ruling allowing attachment of the specific motor vehicle. For the purposes of depositing security therefore, it will be unjust to treat the Appellant in the same way as a Judgment Debtor challenging a Judgment.
25. Having carefully considered the matter therefore, I am satisfied that the Appellant has met the criteria for grant of stay of execution pending Appeal and I do grant the same. Since however the interests of the parties have to be balanced, and since I find it also unjust to grant the Appellant an unconditional stay of execution, I will order the Appellant to deposit or guarantee payment of a reasonable and lesser amount as security.

Final Orders

26. The upshot of my findings above is that the Appellant's Notice of Motion dated 7/02/2023 is hereby allowed in the following terms:
- i. Pending the hearing and determination of the appeal herein, an order of stay of execution is hereby issued restraining the Respondents from attaching or proclaiming the motor vehicle registration number KCD 073H for the purposes of execution of the Judgment entered in Eldoret Chief Magistrate Civil Case No. 656 of 2014.
 - ii. As a condition for the above order, the Appellant shall, within a period of thirty (30) days, provide security for the stay of execution issued or granted in (i) above in either of the following two options:
 - a. execute or deposit a Bank Guarantee for an amount of Kshs 600,000/-.
 - b. Deposit a sum of Kshs 400,000/- in an interest earning bank account to be opened in the joint names of the respective Advocates' firms on record herein, in a bank to be agreed upon by the parties.
 - iii. Costs of the Application shall be in the Cause.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 24TH DAY OF MAY 2024

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WANANDA J.R. ANURO

JUDGE

Delivered in the Presence of:

Mr. Ogongo for 1st Defendant

Mr. Momanyi for Appellant

