



Mutulili v Kyengo (Civil Appeal E116 of 2024) [2024] KEHC 9745 (KLR) (30 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9745 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E116 OF 2024**

FR OLEL, J

JULY 30, 2024

18.

TAKING ALL RELEVANT FACTORS INTO CONSIDERATION I DO FIND THAT BOTH APPLICATIONS UNDER CONSIDERATION ARE BEREFT OF MERIT AND DISMISS THE SAME WITH COSTS TO THE RESPONDENT.

19.

IT IS SO ORDERED.

BETWEEN

STEPHEN KIMEU MUTULILI APPELLANT

AND

BEATRICE MUSWII KYENGO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF NICHOLAS MUSWII KYENGO) RESPONDENT

RULING

A. Introduction

1. The applications before this court for determination are the Notice of Motion applications dated 2nd February 2024 and that dated 7th June 2024 both filed by the Appellant/Applicant. Both applications are opposed by the respondent who filed her replying affidavits dated 22nd May 2024 and 12th June 2024 respectively.

The Application dated 2nd April 2024

2. The applicant under this Application seeks for an order of stay of execution of the Judgement/decree delivered on 17th October, 2023 and the Ruling/Order delivered on 26th March 2024 in MCCC No 217 of 2022 Kangundo pending the hearing and determination of this Appeal. The cause of action



arose on 08.06.20213 when an accident occurred involving two motor vehicles and resulted in one Mr. Nicholas Muswii Kyengo sustaining serious injuries and later succumbed to his injuries.

3. His estate had filed the primary suit and on 7th October 2023, judgment had been entered in their favour. The applicant forwarded the same to his insurer Xplico Insurance Company limited to settle the claim, but they had failed to do so resulting in the applicant filing a declaratory suit as against his insurer. He had also filed an application for stay of execution in the primary suit, which vide its ruling dated 26th March 2025 the trial court had dismissed, hence this Appeal. If enforcement of the decree was allowed, it would render the Appeal filed to be nugatory and an exercise in futility. On the other hand, the respondent would not be prejudiced if stay orders were granted and therefore it was in the interest of justice to grant the prayers sought.
4. The respondent opposed this Application through her replying affidavit dated 22nd May, 2024 and averred that she had a decree of Kshs.4,461,622.68/= plus interest and had instructed Faith Agencies Auctioneer to proclaim the Applicants goods. Prior to the proclamation, on 15th January 2024, the applicant had willingly entered into a pledge agreement where he deposited the original title deed of Mavoko Town Block 2/28065 with her advocate and it was agreed under the said agreement, that the applicant had up to 15th February 2024 to look for a purchaser. He had failed to do so and she was therefore justified to enforce the judgment to be able to enjoy the fruits thereof.
5. The applicant had filed an application for stay of execution in the primary suit and the same had been dismissed on 26th March 2024 as the primary judgement delivered on 17th October 2023 had not been appealed against and she was not privy to the contract between the applicant and his insurer. She had waited for a long period of time before the deceased estate got judgment in its favour and they would suffer irreparable harm and damage if further stay was granted. Further this court had directed the applicant to at least pay her Kshs.500,000/= by 20th May 2024 or stay order issued would lapse. This order had not been complied with and hence the applicant was in court with unclean hands in equity and was undeserving of the orders sought.

B. The Application dated 7th June 2024.

6. Through this application, the applicant sought for extension of time for a further sixty (60) days within which to comply with the conditions of stay placed by the order dated 23rd April,2024 ordering him to pay the respondent a sum of Kshs.500,000/= by 20th May, 2024. He stated that he was a 75 years old citizen, with no constant source of income and was seeking to dispose off his property to raise the sum ordered by court to be released to the respondent. He was therefore making a passionate appeal based on grounds of humanity to be allowed sixty (60) more days to comply.
7. This Application was opposed by the respondent vide her replying Affidavit dated 12th June 2024, where she reiterated that she held a valid decree, which had not been appealed against and the applicant had pledged his title deed, which he was to sell to pay her, but he had failed to do so. No good reason has been advanced as to why the extension of time orders ought to be granted and thus prayed that the same application be dismissed.

Analysis & Determination

8. I have carefully considered both Applications, the Supporting Affidavits, and the Respondent's Replying Affidavit's and discern that the issues which arise for determination is whether;
 - a. Whether this court should grant stay of execution of the Judgment/Decree issued in Kangundo CMCC No 217 of 2022.



- b. Whether this court should extent time within which the applicant is to comply with the orders issued on 23rd April, 2024 giving the applicant until 20th May, 2024 to pay a deposit of Kshs.500,000/= to the respondent as a condition of stay of execution.

Stay Pending Appeal

9. Stay of Execution is provided 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.”

10. 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

11. These principles were enunciated in *Butt v 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.

12. The Appellant seeks to stay execution of the Judgement/ decree issued in Kangundo CMCC No 217 of 2022 dated 17.10.2023. There is no Appeal filed challenging the said decree and that being so, it is obvious that this court is divested of jurisdiction to further consider the other parameters as to whether stay of execution should be granted with respect to the said decree. Further the applicant did file an application dated 17.01.2024 in the primary suit seeking to compel the respondent to peruse Xplico Insurance Co ltd for satisfaction of the primary decree. That application too was dismissed on 26th March 2024, hence this appeal. With regard to the same, the applicant is free to peruse this Appeal but the order issued on 26th March 2024, was negative order and there is nothing to stay therein.

Extension of time.

13. Order 50 rule 6 of the civil procedure Rules does provides that;

“where a limited time has been fixed for doing any act or taking any proceedings under these rules or by summary notice or by order of the court, the court shall have powers to enlarge time upon such terms (if any) as the justice of the case may require, and such enlargement maybe ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”

14. The basis for applying for extension of time was discussed in the Court of Appeal case of Susan Ogutu Oloo & 2 Others v Doris Odindo Omolo (2019) eKLR where it was held:-

“In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the Supreme Court in Nicholas Kiptoo Arap Korir Salat v IEBC (2014) eKLR Sup Ct Application No 16 of 2014.

The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted”.

15. In Imperial Bank ltd (in receivership) & Ano Vs Alnasir popat and 18 others the court observed that;

“some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercised its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a parties opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; public interest issues implicated in the appeal or intended appeal and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration it must be born in mind that it is not really the role of a single judge to



detriment definitely the merits of the appeal. That is for the full court if and when it is ultimately presented with the appeal.”

16. The applicant seeks to be added a further sixty (60) days to comply with the orders issued on 23rd April 2024 directing him to pay Ksh.500,000/= to the applicant. The reason of delay is that he is an elderly man aged 75 years and needed more time to source for the funds and comply with the said order. While the court honestly sympathizes with the applicant, he has not provided any sufficient reason why more time should be granted to him especially having pledged his property and sought for time until 15th February 2024 to sell the same.
17. The court is a neutral arbiter and has to consider the interest of the respondent too and under the circumstances she will be prejudiced if more time was given to the applicant as requested. The applicant also did not disclose the pledge agreement already entered into between him and the respondent as at the time of filing his initial application for stay of execution. This lack of disclosure was not in good faith and it can be said that he has dirty hands in equity and that disentitles him from getting equitable orders before this court.

Disposition

18. Taking all relevant factors into consideration I do find that both applications under consideration are bereft of merit and dismiss the same with costs to the respondent.
19. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF JULY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 30TH DAY OF JULY, 2024

In the presence of;

Mr. Mbuvi for Appellant

Ms Ngulukyo Respondent

Susan /Sam Court Assistant

