Wanainchi Group Limited v Trentec Limited (Civil Appeal E676 of 2024)
[2024] KEHC 13067 (KLR) (Civ) (31 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13067 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E676 OF 2024

CW MEOLI, J

OCTOBER 31, 2024

BETWEEN

WANAINCHI GROUP LIMITED ..... APPLICANT

AND

TRENTEC LIMITED ..... DEFENDANT

RULING

1. Contemporaneously filed with the memorandum of appeal was the motion dated 04.06.2024 by Wanainchi Group Limited (hereafter the Applicant). Seeking inter alia that the Applicant be allowed to deposit the decretal sum into Court or into a joint interest earning account in the name of the advocates for the parties in the appeal within thirty (30) days from the date of the order of stay of execution; that the Court be pleased to admit the subject appeal out of time; and that pending hearing and determination of the appeal the Court be pleased to issue an order to stay execution directed at Trentec Limited (hereafter the Respondent) concerning the judgment delivered on 26.03.2024 which is the subject of the memorandum of appeal. The motion is expressed to be brought among others pursuant to Section 1A, 1B, 3A & 79G of the *Civil Procedure Act* (CPA) and Order 42 of the Civil Procedure Rules (CPR), on grounds on the face of the motion, as amplified in the supporting affidavit sworn by Richard Osamba Otieno, counsel on record for the Applicant.

2. To the effect that the claim before the Small Claims Court was determined by way of Section 30 of the *Small Claims Court Act* and judgment scheduled for 15.03.2024. That on said date, the judgment was not ready for delivery, the Court directing that it would be delivered on notice. Counsel further deposes that because no notice was forthcoming, he caused the Court file to be perused on 04.06.2024 when it was discovered judgment had purportedly been delivered on 26.03.2024 via email. That however no such judgment via email was received by his office on 26.03.2024 or any date thereafter and that upon

becoming aware of the judgment, he promptly sought instructions to file an appeal against the said decision.

3. He asserted that upon receipt of instructions, he expeditiously filed the instant motion and appeal without delay and that no prejudice will be suffered by the Respondent should the motion be allowed. He goes on to state that the appeal is arguable, as it raises serious legal and constitutional issues and that if execution were to proceed, the Applicant will suffer substantial loss rendering the appeal nugatory. In summation, he deposes that the Applicant having offered security for the performance of the decree, it is in the interest of justice that motion be allowed as prayed.

4. The Respondent opposes the motion by way of a replying affidavit sworn by Walter Trenk Mukinginyi dated 11.07.2024. Admitting that the impugned judgment was not delivered on 15.03.2024, but rather on 26.03.2024, the deponent however insists that on said date, the court communicated in the presence of the Applicant's counsel that the judgment would be delivered via email and judiciary portal due to the Magistrate's unavailability. He states that the judgment was uploaded on the judiciary portal. Further that, in its decision, the trial Court granted the Applicant a generous forty-five (45) days stay of execution which was ample time for the Applicant to access the judgment and file an appeal, if it so desired. He asserts that the Applicant's counsel failed to exercise prudence by following despite being aware of the mode in which the impugned decision was to be delivered.

5. Therefore, he views the Applicant's claim that he learnt of the impugned decision on 04.06.2024 as implausible and demonstrative of the Applicant's advocate lack of diligence. In conclusion, he asserts by concealing the events leadings up to delivery of the impugned decision, the Applicant intends to mislead the Court. In addition, contending that the intended appeal lacks merit, hence allowing the motion would prejudice the Respondent, who has since commenced execution proceedings.

6. On 25.09.2024, it was agreed that the Applicant's motion be determined on the basis of the parties' respective affidavit material on record.

7. The Court has considered the affidavit material canvassed in respect of the motion. Alongside the prayer for admission of the instant appeal out of time, the Applicant has equally sought for an order of stay of execution pending hearing and determination of the instant appeal. It is evident on a plain reading of Order 42 Rule 6(1) of the CPR, that an order to stay execution pending hearing and determination of an appeal presupposes the existence of an appeal with the filing of an appeal being a condition precedent to the exercise of this Court's appellate jurisdiction under Order 42 Rule 6 (1) of the CPR. Thus, the Court will first address itself to the question of leave to admit the appeal out of time.

8. The Applicant's prayer seeking the admission of the appeal out of time is anchored on Section 79G of the CPA, which provides that:

> " Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
>
> Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

9. The words "an appeal may be admitted out of time" in Section 79G, appears to admit both retrospective and prospective applications. So that leave under this Section may be sought before or after a memorandum of appeal is filed. Here, a memorandum of appeal has been filed, albeit late, and

the Applicant seeks to regularize it. It is trite that a successful applicant, must demonstrate "good and sufficient cause" for not filing the appeal in time.

10. In Thuita Mwangi v Kenya Airways [2003] eKLR, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with Section 79G of the CPA, reiterated its decision in Mutiso v Mwangi [1997] KLR 630 as follows:

> "It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that the general matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent of the application is granted."

11. While the discretion of the Court is unfettered, a successful applicant is obligated to adduce material upon which the Court should exercise its discretion, or in other words, the factual basis for the exercise of the Court's discretion in his or her favor. In Nicholas Kiptoo Korir Arap Salat v IEBC & 7 Others [2014] eKLR , the Supreme Court enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

> "(T)he underlying principles a court should consider in exercise of such discretion include;
>
> 1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
> 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
> 3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case- to-case basis;
> 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
> 5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
> 6. Whether the application has been brought without undue delay.
> 7. ....."
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> See also County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] eKLR.

12. From the parties' conflicting assertions regarding events and directions regarding mode of delivery of the judgment adjourned on 15.03.2024 and eventual delivery and mode thereof, on 26.03.2024, it is it is impossible to tell whether any notice was issued or was to be issued in respect of the judgement delivery date of 26.03.2024. Nevertheless, a perusal of the impugned decision, exhibited in the Applicant's affidavit and marked as annexure ROO2 (the document was not appropriately marked and annexed as required by rules of procedure), it appears that the impugned decision was delivered on 26.03.2024 and dispatched via email to the parties and or their counsel on record.

13. Be that as it may, Section 79G of the CPA, obligates an applicant to demonstrate 'good and sufficient cause' for the Court to exercise its discretion. The delay herein since delivery of the impugned decision

and filing of the present motion appears to be slightly in excess of two (2) months. It is settled that the period of delay as well as explanation thereof are key considerations in an application of this nature. The Court of Appeal in Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others [2019] eKLR addressed itself on the question of delay as follows; -

> " The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable....."

14. Here, the period of delay does not seem to be inordinate, and the Applicant has attempted an explanation for it, albeit feeble. The failure by the lower court in any event to issue notice as asserted by the Applicant, may well be a plausible reason for the Applicant's late discovery of the judgment. In addition, the Respondent has not demonstrated that he is likely to suffer undue prejudice if leave to appeal out of time is granted. It would appear that an award of costs would be adequate compensation for the Respondent.

15. Regarding the merits of the appeal, the language employed in Mutiso (supra), suggests that the requirement is neither mandatory nor stringently applied in an application of this nature. The memorandum of appeal before the Court appears to raise issues serious enough to require the Court's consideration on appeal or that are prima facie arguable. The Court of Appeal in Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited [2020] eKLR stated that an arguable appeal "...need not succeed so long as it raises a bona fide issue for determination by the Court." Further, the Court emphasized the right of appeal in the following terms:

> " Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystalized .... in the case of Richard Ncharpi Leiyagu vs. IEBC & 2 Others (supra); Mbaki & Others vs. Macharia & Another [2005] 2EA 206; and the Tanzanian case of Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003; for the holding inter alia that:
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> (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
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> (ii) the right to be heard is a valued right; and
>
> (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice..."

16. Considering all the foregoing, it is the Court's view that despite the delay involved, the Applicant has tendered sufficient reason to warrant the exercise of the Court's discretion in his favour. Accordingly, the prayer for leave on late admission of the appeal is allowed.

17. Moving on to the prayer seeking stay of execution of the judgment delivered on 26.03.2024, it is settled that the power of this Court to grant stay of execution of a decree pending appeal is discretionary, however the discretion should be exercised judicially. See Butt v Rent Restriction Tribunal [1982] KLR

417. The Applicants' prayer for stay of execution pending appeal, is brought specifically pursuant to Order 42 Rule 6 of the CPR which provides that:

> "(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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—
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> (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
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> (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".

18. The cornerstone consideration in a motion to stay execution is whether the Applicant has demonstrated the likelihood of suffering substantial loss if stay is denied. One of the most enduring legal authorities on the issue of substantial loss is the case of Kenya Shell Ltd v Kibiru & Another [1986] KLR 410. The principles enunciated in this authority have been applied in countless decisions of superior Courts. Holdings 2, 3 and 4 of the Shell Case are especially pertinent. These are that: -

> "1. .....
>
> 2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
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> 3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
>
> 4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid."

19. The decision of Platt Ag JA, in the Shell case, in my humble view sets out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. Platt Ag JA (as he then was) stated inter alia that:

> "The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. <u>There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty</u>

to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts... (emphasis added)".

20. The learned Judge continued to observe that: -

> "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 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." (Emphasis added).

21. Earlier on, Hancox JA in his ruling observed that: -

> "It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would, ...render the appeal nugatory. This is shown by the following passage of Cotton L J in Wilson -Vs- Church (No 2) (1879) 12ChD 454 at page 458 where he said: -
>
> "I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory."
>
> As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause."

22. Here, Applicant contends that if execution, which the Respondent admits having commenced, were to proceed, it shall suffer substantial loss, thereby rendering the appeal nugatory. An Applicant seeking to stay execution pending appeal is duty bound to demonstrate through affidavit evidence how substantial loss would arise, if the stay were declined. The appeal relates to a money decree, and hence the Applicant is obligated to demonstrate, either that the Respondent would be unable to refund any monies paid out in satisfaction of the decree, or that payments in satisfaction of the decree would occasion difficulty to the Applicant. In the instant case, the Applicant has not addressed this question beyond the bare assertion of likely substantial loss.

23. As stated in the Shell case, without a demonstration of substantial loss, it would be rare that any other event would render the appeal nugatory and to justify keeping the decree holder out of its money. It is not enough for the Applicant to causally aver that execution will result in substantial loss and thereby render the appeal nugatory. Execution is a lawful process by which a decree holder seeks to reap the fruits of his judgment. Unless an applicant demonstrates the grounds in Order 42 Rule 6 of the CPR, on the granting of stay, the execution will not be stayed. Therefore, substantial loss in its various forms, is the cornerstone of the jurisdiction for granting stay. That is what must be prevented. Without this evidence, it is difficult to see why the execution process should be stayed.

24. Further, the court notes from the record that at interim stage, the court (Ongeri. J) on 10.06.2024 granted ex parte interim orders of stay of execution on condition that the entire decretal sum is deposited in Court within thirty (30) days of the said date. Between that date and the last Court appearance on 25.09.2024, the Applicant had moved the court seeking reinstatement and extension of this Court's orders issued on 10.06.2024. While on his part, the Respondent had sought for the lifting of the ex parte orders, which had been severally extended. On 25.09.2023, upon this Court hearing

representations by counsel concerning the Applicant's prayer for extension of the interim orders stated: -

> " The Applicant has not complied with orders of 10/06/2024 for deposit of security despite extension of orders. The Court declines to extend time for compliance. Stay of execution granted in the interim has lapsed for non-compliance with order for deposit"

25. This conduct puts to doubt the Applicant's pledge to deposit the decretal sum into a joint interest earning account if granted stay of execution. Consequently, in the Court's view, the Applicant has failed to demonstrate substantial loss, and to persuade the court as to its asserted willingness to furnish security. On that account, the prayer seeking stay of execution pending determination of the appeal must fail. In the result, the Applicant's motion has partially succeeded. The costs of the motion are awarded to the Respondent in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31st DAY OF OCTOBER 2024.

C.MEOLI

JUDGE

In the presence of

Mr. Osambo for the Appellant/Applicant

Respondent present in person

C/A: Erick