Njagi v Kaigongi (Suing as the Administratix of the Estate of Jacob Maitima – Deceased) (Miscellaneous Civil Application E059 of 2024) [2024] KEHC 15094 (KLR) (28 November 2024) (Ruling)

Neutral citation: [2024] KEHC 15094 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

MISCELLANEOUS CIVIL APPLICATION E059 OF 2024

HM NYAGA, J

NOVEMBER 28, 2024

BETWEEN

ROSEMARY WAWIRA NJAGI ..... APPLICANT

AND

JERUSHA KAIGONGI (SUING AS THE ADMINISTRATIX OF THE ESTATE OF JACOB MAITIMA – DECEASED) ..... RESPONDENT

RULING

1. The Application for determination is the Notice of Motion dated 24th May, 2024 which seeks the following orders:-

    a. Spent.

    b. That the Honourable Court be pleased to issue an order of stay of Judgment delivered on 4th December 2023, decree issued on the 8th March, 2024 and sub sequential orders pending hearing and determination of this application and the main appeal inter partes.

    c. That the Honourable Court be pleaded to issue an order of stay of attachment of the proclaimed items and belonging to the Applicant herein as per the Proclamation list served upon the Applicant on 20th May, 2024 pending the hearing and determination of this application and the main suit.

    d. That the Honourable Court be pleased to issue an order allowing the Applicant to file Appeal out of time and do issue an order deeming the annexed Draft Memorandum of Appeal as having been properly filed.

    e. That the Honourable Court be pleased to make any other order as shall meet the ends of justice.

    f. That costs of this application be borne by the Respondent.

2. The Application is propped by the grounds set out on its face and is supported by the affidavit Rosemary Wawira Njagi.

3. In a nutshell, the Applicant's case is that she was sued by the Respondent in the Lower Court in Tigania Principal Magistrate's Court *Civil Case Number E087 of 2022*. That the Applicants duly entered appearance and filed defence, both dated 08/11/2022, and 11/11/2022. That before the Applicant could file her defence, the Respondent requested for interlocutory Judgement on 31/10/2022.

4. The applicant further states that upon filing of her appearance and defence, the same were served upon the Respondent who acknowledged receipt and even filed a reply to the defence on 21/11/2022. That the Respondent was never served with a date for pre-trial and the case proceeded without directions being given. That on 20/05/2024, the Applicant was served with a notice of proclamation/attachment of her goods, upon a judgement of the court.

5. The Applicant further avers that her counsel perused the lower court file and noted that there is no indication of the date that the interlocutory judgement was entered.

6. It is further averred that the hearing proceeded Ex-parte on 28/11/2023 despite the fact that she had already entered appearance and filed her defence.

7. It is also averred that no judgment notice or taxation notice was issued to her prior to the attachment.

8. The Respondent opposed the application through the replying affidavit sworn on 12/06/2024.

9. In a nutshell, it is the Respondent's case that summons were served upon the Applicant personally but she declined to accept service that she applied for interlocutory Judgment on 28/10/2024, which was endorsed by the court on 31/10/2024. That the Applicant, through her advocates, subsequently entered appearance and filed defence and when the matter came up for hearing the Applicant was represented in court by an advocate who cross examined her witnesses. That the matter came up for filing of submissions and the Applicant was again represented by an advocate. That the court delivered a judgment on 04/12/2023 after giving parties an opportunity to present their cases.

10. It is further averred that the Respondent's advocates then served their bill of costs which was assessed on 07/03/2024.

11. It is the Respondent's contention that once the advocates for the Applicant came on record, it was not necessary to serve her with pleadings or notices personally.

12. It is argued that the Applicant has not given sufficient explanation as to why she failed to file an appeal on time. She urged the court to dismiss the application.

13. Directions were given that the application be canvassed by way of written submissions. Only the Respondent's advocate filed their submissions which I have considered and will incorporate them herein.

14. As correctly submitted by the Respondent, a party seeking stay of execution pending appeal or intended appeal must bring itself under the provision of Order 42 Rule 6 of the *Civil Procedure Rules*, which provide that;

> " 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 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 of stay 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 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."

15. Thus under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:

1. Substantial loss may result to him/her unless the order is made;

2. That the application has been made without unreasonable delay; and

3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

16. These principles were enunciated in *Butt v Rent Restriction Tribunal* [1979] eKLR 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: -

> 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.
>
> 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.
>
> 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.
>
> 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.

17. The impact and purpose of this court granting or denying a stay of execution was also set out in *HEE v SMM* .(2020) eKLR cited by the Respondent.

18. Thus the Applicant must satisfy all the 3 conditions before stay of execution is granted. This was the position stated in *Trust Bank Limited v Ajay Shah and 3 Others* (2012) eKLR, where the court held as follows;

> " The conditions set out in Order 42 Rule 6(2) (a) and (b) are cumulative. All the three must be satisfied before a stay can be granted. The Applicant only satisfied one condition and failed to satisfy the others. For the foregoing reasons, I find that the Plaintiff's Notice of Motion dated 24th April, 2012 it without merit."

19. All these considerations would be applicable where there is a regular judgment and decree.

20. In the instant case, it is the Applicant's case that the Judgement was irregular as they did not participate in the proceedings, yet their advocate had entered appearance and filed defence.

21. It is thus the duty of the court to establish if the judgement was regular or not. Thereafter, other considerations will be dealt with.

22. I called for the original court record from Tigania Principal Magistrate's court in *PMCC E087 of 2022* in order to establish the correct position in the file. I noted that;

    a. On 31/08/2022, the suit was filed in court. Summons to enter appearance were issued on the same date.

    b. On 31/10/2022, the Respondent filed a request for interlocutory judgment dated 28/10/2022 against the Applicant who had failed to enter appearance despite service of summons, plaint, and other documents set out in the Affidavit of the process server sworn on 09/09/2022.

    c. Interlocutory judgment was entered as an unknown date and for unspecified reason.

    d. On 11/11/2022, the Applicant entered appearance and filed a statement of defence.

    e. On 21/11/2022, the Respondent filed a reply to the defence, the pre-trial questionnaire and statement of issues.

    f. That on the same date of 21/11/2023, the case was fixed for directions on 02/02/2023.

    g. There is no record of any proceedings on 02/02/2023. On 31/07/2023, the case was fixed for hearing by the court in the absence of the parties for 12/09/2023.

    h. On 12/09/2023, the matter was listed before the Hon. J. Macharia SPM and the Advocate for the Respondent appeared. There was no appearance for the Applicant. The advocate for the Respondent stated that he was ready to proceed with 3 witnesses. An affidavit of service was duly filed that day, stating that a hearing notice was duly served upon the Applicant's their advocates, Maina Rogai & Co. Advocate through their listed email. The matter was ordered to proceed.

    i. Although it is not very clear who it was, the record shows that an advocate subsequently appeared for the Defendant on that day. The case proceeded for trial. The 3 witnesses for the Plaintiff testified and were subjected to cross – examination. The Defence counsel closed the Defendant's case on the same day. The court gave a date for submissions on 28/11/2023.

    j. The record shows that on 28/11/2023, both advocates were present and a judgment date of 04/12/2023 was set. The same was duly delivered on the said date.

k. On 07/03/2024, the Respondent's party and party costs were assessed at Kshs. 143,826/-. An affidavit of service filed on 16/02/2024 was to the effect that the Bill of Costs had been served upon the Advocates for the Applicant. A decree was issued on 08/03/2024.

23. Although the date of the entry of the Interlocutory Judgment was not indicated, there is ample proof that on the hearing date, the advocate for the Applicant appeared and participated in the trial. The Advocate cross examined the witnesses and closed the Defendant's case.

24. In my view the impugned Interlocutory Judgment's lack of a date cannot be a ground to set it aside. It would have mattered if the case went on without the participation of the Applicant, but she did through an advocate. Having not adduced any evidence, the court only had the defence to look at, and it considered it.

25. Having stated the above, I would add that it is good practice that an entry of such ex-parte Judgments is dated on the court record and the reasons for entry of such judgment are clearly shown.

26. There are other issues that also arise in the matter.

27. Applicant moved the trial court with an application dated 20/05/2024 in which she sought several prayers including the setting aside of the ex-parte Judgment, decree and all other subsequent orders. She also sought to have the Defendant's case reopened to allow her tender her evidence. This application was still pending determination when the Applicant moved the court with the present application.

28. As can be seen the Applicant has two applications, one in the lower court seeking to re-open the case, and this one, where she seeks leave to appeal against the Judgment of the lower court out of time.

29. Clearly, the Applicant is clutching at anything that will stall the execution process. However, she has to decide what she wants, either to proceed with the intended appeal or the application still pending in the lower court. She cannot have it both ways.

30. Therefore, I find that the filing of the application herein, with another pending before the trial court was an abuse of the court process. Even though the Applicant has a right to lodge an appeal against the judgment of the lower court, she cannot at the same time move the lower court to set aside the same judgment.

31. For the foregoing reasons, I am of the view that the application herein, filed after the one in the trial court, ought to be stayed as provided by Section 6 of the *Civil Procedure Act* (C.P.A). I do so with no orders as to costs. The Applicant should just deal with the earlier application.

32. I have also looked at the manner in which the decree and warrants of attachment were extracted.

33. The Respondent filed the suit as an unliquidated claim and paid Kshs. 2,000/- as court fees vide receipt No. FSAO-0005647 issued on 31/08/2022. Upon conclusion of the trial, the Plaintiff/Respondent was awarded Kshs. 2,365,050/- as General and Special Damages, plus costs and interest.

34. Therefore before extracting the decree and warrants for execution, the Respondent ought to have paid further court fees on the award that was made by the court. This should have been assessed by the court and the Respondent had to pay as required.

35. A perusal of the court file shows that the Applicant only paid Kshs. 1,000/- for the application for execution vide receipt No. FSAO-0009132, Kshs. 500/- for assessment of costs, vide receipt No. FSAO-0008692.

36. It follows that there was underpayment of the requisite fees upon execution. In the circumstances, the warrants of attachment and sale were irregularly obtained and they are hereby revoked, with orders that they should only issue once the Respondent has paid the further court fees as required or shows that the same have been fully.

37. On the issue of further court fees, it has been noted by this court that this is not an isolated case. The practice of issuance of decrees and warrants of attachment and sale without payment of the stipulated fees has become a loophole that denies the Judiciary funds that it is entitled to.

38. It behaves all Heads of Stations, the Station Administrators and Station Accountants to ensure that all fees are properly assessed and collected. Failure to do so undermines the administration of justice. I believe that this requires further action by the Judiciary.

39. In the end, I give the following orders:-

    a. The Application dated 24/05/2024 is hereby stayed.

    b. The warrants of attachment and sale issued by the Principal Magistrate's court at Tigania on 9th May, 2024 are hereby revoked and set aside. They are to re-issue only if the Respondent pays the full fees thereof or shows that she has paid the same.

    c. The Applicant is at liberty to pursue the pending application in the lower court.

    d. There shall be no orders as to costs.

H.M. NYAGA

JUDGE

SIGNED, DATED AND DELIVERED AT MERU THIS 28TH DAY OF NOVEMBER 2024.

H. M. NYAGA

JUDGE

In the presence of :-