Kamau & another v Karengo and Opasi (Suing as Administrators of the Estate of the Late Felix Odhiambo Opasi) & another (Civil Appeal E692 of 2024) [2024] KEHC 16130 (KLR) (Civ) (20 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16130 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E692 OF 2024

CW MEOLI, J

DECEMBER 20, 2024

BETWEEN

STEPHEN KAMOTHO KAMAU ..... 1ST APPLICANT

JOHN KANGARA KINYANJUI ..... 2ND APPLICANT

AND

MARARET ATIENO KARENGO AND WALTER GEKE OPASI (SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE FELIX ODHIAMBO OPASI) ..... 1ST RESPONDENT

JOHN KAMAU MUTHONI ..... 2ND RESPONDENT

RULING

1. The Notice of Motion dated 25.09.2024 (the Motion) was brought by Stephen Kamotho Kamau and John Kangara Kinyanjui (hereafter the 1st and 2nd Applicant (s)) seeking inter alia leave to file an appeal out of time against the judgment delivered by the lower court on 9.05.2024 in Nairobi CMCC No. E11417 of 2021; and stay of execution of the said judgment pending the hearing and determination of the appeal. The Motion is expressed to be brought under Sections 1A, 3A and 79G of the *Civil Procedure Act* (CPA); Order 22, Rule 22; Order 42, Rule 6; and Order 51, Rule 1 of the Civil Procedure Rules (CPR).

2. The grounds on the face of the Motion are amplified in the supporting affidavit sworn by the 1st Applicant, who averred that the Applicants are aggrieved by the judgment, and hence lodged the present appeal. On the first prayer, the 1st Applicant averred that the delay in lodging the appeal was unintentional and was occasioned by the time taken in obtaining a certified copy of the impugned

judgment. The 1st Applicant also stated that the appeal raises arguable points of law, requiring consideration.

3. Regarding the prayer seeking to stay execution pending appeal, the 1st Applicant asserted that the lower court originally granted an order for stay which lapsed on 9.06.2024; that unless the stay order now sought is granted, the appeal will be rendered nugatory since the possibility of recovering the decretal sum once paid, is doubtful; that no prejudice will be suffered by Margaret Atieno Karengo and Walter Geke Opasi (Suing as administrators of the estate of the late Felix Odhiambo Opasi) (hereafter the 1st Respondent) beyond compensation through an award of costs, if a stay is granted; and finally that the Applicants herein have already deposited half the decretal sum (Kshs. 989,649/-) in court pursuant to the condition given by Ongeri, J. on 12.06.2024 for granting an interim order for stay. On the foregoing premises the court was urged to allow the Motion as prayed.

4. From the record, when the matter came up in court on 31.10.2024 counsel for the 1st Respondent raised oral objections on the competency of the appeal and the Motion. Consequently, the court directed that the said counsel to file a response in that regard. Directions were also given for the Motion to be canvassed by way of written submissions. Nevertheless, at the time of writing this ruling, the 1st Respondent had not complied with the directions for the filing of a response, while filing written submissions. On their part, the Applicants equally filed written submissions.

5. Counsel for the Applicants anchored his submissions on the decision in James Kanyiita Nderitu & Hellen Njeri Nderitu v Marios Philotas Ghikas & Mohammed Swaleh Athman [2016] KECA 470 (KLR) on the overriding objective of the CPA as well as the applicability of Article 159 of *the Constitution* in upholding substantive justice without undue regard to technicalities and procedure. Counsel further relied on Order 50, Rule 3 of the CPR which sets out the manner of computing time where the time stipulated for the performance of an action is set to expire on a Sunday or other day when offices remain closed. Asserting that the judgment herein impugned was delivered on 9.05.2024 and hence the statutory period for lodging an appeal was set to lapse on 8.06.2024 which day fell on a Saturday. That pursuant to Order 50, Rule 3 of the CPR the last proper day for filing the appeal fell on 10.06.2024, when the present appeal was filed. Counsel argued that in the circumstances, the appeal was timeously filed.

6. On his part, counsel for the 1st Respondent argued that the appeal was filed, without leave of the court, on 11.06.2024 which fell outside the statutory. Counsel citing the Supreme Court decision in Nicholas Salat v IEBC & 7 others, Supreme Court Application 16 of 2014 [2014] eKLR on the principle of extension of time for filing an appeal asserted that the appeal herein is incompetent for having been filed out of time and without leave of the court, hence it ought to be struck out with costs.

7. John Kamau Muthoni (hereafter the 2nd Respondent) did not participate in the proceedings.

8. The court has considered the Motion together with the supporting affidavit, and the rival submissions. However, before considering the merits thereof, the court will first address the following preliminary issue.

9. As earlier mentioned, when the matter came up in court on 31.10.2024, counsel for the 1st Respondent purported to raise oral objections regarding the competency of the appeal and the Motion. The court directed that him to file a response outlining his objections. However, the record reveals that the 1st Respondent's counsel did not comply with the said directions but subsequently purported to address the very issues by way of his written submissions.

10. . Order 51, rule 14 of the CPR provides as follows:-

"(1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents —

(a) a notice preliminary objection: and/or;

(b) replying affidavit; and/or

(c) a statement of grounds of opposition;

(2) the said documents in subrule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing.

(3) Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under subrule (1) may, with the leave of the court, file a supplementary affidavit.

(4) If a respondent fails to file to comply with subrule (1) and (2), the application may be heard ex parte."

10. The 1st Respondent opted not to file any response while pressing what was essentially a legal objection to the appeal and motion by his submissions. That said, the date of filing of the appeal can be determined from a perusal of the electronic record of the Judiciary Case Tracking System (CTS). There is no dispute that the judgment of the lower court was delivered on 9.05.2024. The CTS record shows that the memorandum of appeal was lodged electronically on 10.06.2024 at 15.31hrs. Thus, the court agrees entirely with the assertion by the Applicant's counsel that the appeal was filed on time as computed under the provisions of Order 51 Rule 8 of the CPR. The 1st Respondent's objection that the appeal was time barred is therefore without merit.

11. Besides, even if the appeal had indeed been filed out of time, it is the court's further view that the words that "an appeal may be admitted out of time" in Section 79G, appear to admit both retrospective and prospective application. So that leave under the Section may be sought before or after a memorandum of appeal is filed. However, it may be more prudent for a party who also seeks an order for stay of execution pending appeal in the same motion for leave to appeal out of time, to have filed the memorandum of appeal in advance. Here however, the latter prayer was unnecessary.

13. On the merits, of the remaining prayer in the motion, and despite the absence of grounds of opposition or replying affidavit filed by the 1st Respondent, the court is obligated to consider whether the Applicants have satisfied the conditions stipulated in Order 42 Rule 6 of the CPR regarding the granting of stay of execution pending appeal. Here, it is trite that the court has discretionary power to grant an order for a stay of execution of a decree or order pending appeal and which discretion ought to be exercised judicially. See Butt v Rent Restriction Tribunal (supra). The applicable provision surrounding a stay of execution is Order 42, Rule 6 of the CPR which stipulates 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—

(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".

14. The key consideration here is whether the Applicants have demonstrated the likelihood of suffering substantial loss if stay is denied. The importance of substantial loss in any application seeking stay of execution was aptly addressed by the Court of Appeal case in the renowned case of Kenya Shell Ltd v Kibiru & Another [1986] KLR 410 when it held that:

> " Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented..."

15. The Court went on to state 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.
>
> 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."

16. The decision of Platt Ag JA, in the Shell case, in the court's humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The 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. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty 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."

17. 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."

18. 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."

19. On the one hand, a successful is entitled to enjoy the fruits of his or her judgment, as is the case with the 1st Respondent and the right will not be curtailed unless the party appealing the judgment demonstrates the likelihood of substantial loss. As stated in the Shell case (supra), "If there is no evidence of substantial loss to the Applicant, it would be a rare case that an appeal would be rendered nugatory by some other event. ...without this evidence (of substantial loss) ,it is difficult to see why the Respondents should be kept out of their money."

20. The court considered the averments by the Applicants on the manner in which they stand to suffer substantial loss, namely the likelihood that the 1st Respondent may not be able to refund the decretal sums paid over , if the appeal succeeds. The 1st Respondent did not offer any answer to this apprehension by demonstrating their means to refund any monies paid in satisfaction of the decree were the appeal to succeed. The Court of Appeal in the case of National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR held that:

> " Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge..."

21. In the absence of a rebuttal from the 1st Respondent by way of proof of their financial means, the court finds that the Applicants have reasonably demonstrated the likelihood of substantial loss, thereby rendering the appeal nugatory, if stay of execution is denied.

22. On the condition of provision of security, it is apparent from the record that the Applicants have already deposited half of the decretal sum (being Kshs.989,149/-) pursuant to the order made by Ongeri, J. on 12.06.2024, as a condition for granting an interim order of stay. Equally, given the fact that the initial stay application withdrawn on 25.09.2024 and replaced immediately with the present application, had been timeously filed on 10.06.2024, the court is satisfied that the present motion was timeously filed, and that in all circumstances therefore, the motion dated 25.09.2024 is merited.

23. Consequently, the Notice of Motion dated 25.09.2024 is allowed in terms of prayer (2) as follows:

    a. There shall be an order to stay execution of the judgment delivered on 9.05.2024 in Nairobi CMCC No. E11417 of 2021, pending appeal, subject to the condition that the sum of Kshs. 989,149/- already deposited in court shall be retained as security for the eventual performance of the decree.

    b. In the circumstances, the costs of the Motion shall abide by the outcome of the appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 20TH DAY OF DECEMBER 2024.

C. MEOLI

JUDGE

In the presence of

Mr. Omwagwa for the Applicants

N/A for the 1st Respondent:

C/A: Erick