



Super Animal Feeds (K) Ltd v Mutua & Mulandi (Suing as the personal representatives of the Estate of John Mulandi Mutua) & another (Miscellaneous Application E038 of 2022) [2023] KEHC 1368 (KLR) (27 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1368 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS APPLICATION E038 OF 2022
LN MUGAMBI, J
FEBRUARY 27, 2023**

BETWEEN

SUPER ANIMAL FEEDS (K) LTD APPLICANT

AND

**ROSE NDINDA MUTUA & SCHOLAR MUTUNGE MULANDI (SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF JOHN MULANDI MUTUA) 1ST PROPOSED RESPONDENT
ATTORNEY GENERAL 2ND PROPOSED RESPONDENT**

RULING

1. By a notice of motion application dated November 16, 2022 brought under sections 1A, 1B, 3A, 79G, 80 and 95 of the *Civil Procedure Act* and order 50 rule 6, order 51 rule 1 of the *Civil Procedure Rules* the applicant sought the following orders:
 - a. Spent.
 - b. That this Honourable Court be pleased to review, vary and/or set aside its orders of October 26, 2022.
 - c. That the application dated August 18, 2022 be reinstated for hearing.
 - d. That pending inter-partes hearing of the applicant's notice of motion dated August 18, 2022, the Honourable Court be pleased to grant prayer 2 of the said application which reads as follows: -

That a stay of execution of decree issued in Runyenjes SPMCC No 3 of 2020 be granted pending the hearing and determination of this application.



- e. That urgent directions do issue to the notice of motion dated August 18, 2022 and the same be set down for hearing on a priority basis.
 - f. That the costs of this application be provided for.
2. The application was based on the grounds shown on the face of the application as follows:
- i. This honourable court has inherent powers to review, vary and/or set aside its orders of October 26, 2022 as sought in this application in order to preserve the ends of justice and prevent miscarriage of justice.
 - ii. The said non-attendance by counsel was inadvertent as it was caused by an honest mistake on their part as there was an inadvertent failure by Counsel's chamber staff to diarize the hearing date of October 26, 2022 upon receipt of Notice of the same via email from the court registry.
 - iii. The Applicant did not actively participate in proceedings before the trial court and initial enforcement of the decree hence its prejudice and delay in obtaining requisite proceedings and documents.
 - iv. The Applicant faces spectre of business collapse unless this Honourable Court intervenes to give relief pending hearing and determination of the application dated August 18, 2022
 - v. That the application has been made without unreasonable and/or undue delay. It is still possible to hear and determine it substantively and it is therefore just, fair and in the interest of justice that the orders sought therein are granted.
3. In addition to the grounds set out above, the applicant through its Director, Patrick Murimi Macharia swore the supporting affidavit dated November 16, 2022 in which he explained that the application of August 18, 2022 which was dismissed was meant to seek leave to appeal out of time and also included an order to stay the decree dated February 8, 2022 issued in Runjenjes SPMCC No 3 of 2020 Rose Ndida & another v Super Animal Feeds.
4. The Respondents filed their Replying Affidavit on November 30, 2022 sworn by Rose Ndinda Mutua who deposed that this application is already overtaken by events by virtue of part payments by the insurance company of Kshs 3,000,000/= and Kshs 500,000/= paid personally by the applicant himself. She said that the outstanding sum is Kshs 6,827,678/=. She further deposed that applicant had also filed an application on April 26, 2022 before the trial court where he had sought to pay the decretal sum in instalments which was dismissed by the trial court. She stated that the ruling by the trial court was never appealed by the applicant and it beats logic why the applicant never found it necessary to seek leave to appeal the judgment out of time the way back on 26.4.2022.
5. She stated that there is manifest admission by the applicant that he knew that judgment had been delivered on 8.2.2022 hence he is the author of his own misfortune and should thus not blame his advocate but only himself.
6. She informed the court that as at the time of filing and responding to the application, they had not been served with the application dated 18.8.2022. She stated further that even after becoming aware of the judgment, the applicant never sought to obtain a copy of the judgment or proceedings for purposes of appealing before this court but instead filed the aforementioned application dated 26.4.2022.
7. She stated that failing to attend court and not serving the respondent with the application dated 18.8.2022 five months after filing the same was a demonstration of cavalier manner the applicant had treated this matter.



8. She stated that the applicant is on a fishing expedition and the allegation that he was not represented before the trial court holds no water since the firm of Munene Wambugu & Kiplangat Advocates represented him.
9. Directions were issued that the hearing of the application be dispensed with by filing of written submissions.

Applicant's Submissions

10. The Applicant filed their submissions on January 10, 2023 and submitted that they are bound to suffer a miscarriage of justice occasioned by operation of law.
11. He explained that the suit before the lower court was defended by Lawyers for an Insurance Company who were aware that pursuant to section 5 (b) (iv) of the Insurance (Motor Vehicle Third Party Risks) Act; the Insurance Company's exposure to liability is protected and thus took no further step to ensure that the Applicant's interests were protected by way of filing an appeal against the decision of the trial court. He thus contended that this effectively deprived the insured (ie, The applicant herein) its rights to equal protection and benefit of the law as provided for in article 27(1) of the Constitution considering that the execution proceedings in which stay is being sought threaten to auction the Applicant's tools of production in his business.
12. On whether the Court should review, vary and/or set aside its orders of 26/1/2022; the Applicant relied on Order 45 Rule 1 of the Civil Procedure Rules and argued that the application dated 18.8.2022 was dismissed for non-attendance which was inadvertent on their part. It submitted that the mistake of counsel should not be visited on the applicant asserting that it was keen to prosecute the matter on merits. They relied on the position in Ghehona v Seventh Day Adventist Church of East Africa Union [2013] eKLR where the Court found that poor judgement by Counsel was the reason for the delay in concluding the matter and thus it was unjust to blame the Plaintiff for its Counsel's mistake.
13. On whether stay of the decree should issue pending the hearing and determination of the application dated August 18, 2022; the Applicant submitted that the conditions for grant of stay of execution are provided for under Order 42 Rule 6 of the Civil Procedure Rules. It cited the case of Northwood Service Ltd v Mac & More Solution Ltd (2015) eKLR where the guiding principles of stay pending appeal were restated by the Court, namely: if the applicant may suffer substantial loss, the application is made without unreasonable delay and on provision of such security as the court may impose.
14. It was submitted that the Applicant faces imminent collapse of business operations as the Respondents pursue attachment and sale of its tools of trade which will certainly halt production and ultimately lead to the total destruction of the Applicant's business. The Applicant maintained that the instant application was brought 20 days after the dismissal of its substantive application dated August 18, 2022 which had been filed on the backdrop of the dismissal by the trial court of its application to settle the decretal sum by instalments following the trial court's judgment on February 8, 2022. It thus asserted that considering that the substantive application for leave to appeal out of time and stay of execution were filed on August 19, 2022, the Applicant's submitted that 6 months delay was not unreasonable in view of the explanation and given the totality of the circumstances of this matter.

Respondents' Submissions

15. The respondents filed their submissions on January 3, 2023 and contested the application on two key points which they argued made it unsustainable.



16. On whether the applicant has met the set conditions for review of the court's order dated October 26, 2022, it was submitted by the Respondents that the applicant had not demonstrated that there was any new or important matter of evidence that was not within its knowledge to warrant seeking a review of the orders. It pointed out that there was no evidence of the purported misdiarization of the date of October 26, 2022, or any email/correspondence from the court received by the applicant or, any served hearing notice informing the respondent about the application.
17. On whether the application dated November 16, 2022 and/or any application by the applicant is merited, it was submitted that judgment was delivered on 8.2.2022 after which the Applicant had 30 days to lodge an appeal against the said judgment on or before 8.3.2022. It was submitted the Applicant did not apply for judgement or lower court proceedings; instead, the applicant lodged an application dated 26.4.2022 seeking to settle the decretal sum in instalments of Kshs 75,000/= which was heard and dismissed by the trial court. He did not appeal the ruling. It was submitted for the respondent that this Application is an abuse of court process.

Analysis and Determination

18. Having reviewed the application together with the response thereto plus the submissions thereof, I am of the humble view that there are three salient issues that fall for determination in this application, namely:
 - a. Whether the instant application is merited;
 - b. If (a) above be in the negative, then the entire application will stand dismissed. If in the affirmative, the question would be whether it is prudent to stay the execution of the decree in Runyenjes SPMCC No 3 of 2020 pending the hearing inter-partes of the Applicant's Notice of Motion dated August 18, 2022.
 - c. Lastly, who should pay costs of the application?
19. In the instant application, the applicant seeks to review, set aside and/or vary the orders issued by this court on October 26, 2022 which dismissed the application dated 18.8.2022. This was after the Applicant's Counsel failed to turn up for the hearing of the notice of motion application after service of the hearing notice via email by the Court informing him the date the application was listed for hearing. The applicant explained the reason for non-attendance was due to his Advocate's involuntary mistake to diarize the said date.

The Respondents on the other hand insisted that the applicant had displayed cavalier attitude in dealing with this matter by failing to attend court and also in his failure to serve them with the application dated 18.8.2022 since it was filed and which it now seeks to reinstate. It was further argued that the respondent had never bothered to apply for proceedings and judgement for purposes of filing an appeal.
20. The applicant has relied on order 45 rule 1 of the *Civil Procedure Rules* which essentially deals with review of decree or order. For an application for review to be successful, a party must demonstrate to the court that passed the decree or order that-There is discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by the applicant by the time the order was made, or,On account of some mistake or error apparent on the face of the record, orFor any other sufficient reason; and,That there is no appeal pending and the application is brought without unreasonable delay.



21. As long as the application meets the parameters defined above, the Court may exercise its discretion judicially and ensure justice to the parties is done.
22. The right to fair hearing is sacrosanct and is the foundation for the existence of courts. This right extends to the right to challenge any decisions by way of appeal or review where permitted by the law.
23. A party who is vigorously pursuing his right to be heard should not lightly be denied that opportunity as it may mean condoning condemnation of a party without a hearing. The Court can only close its eyes or ears to a party when it is clear that he has deliberately made the choice not to participate in the proceedings or where the party is simply abusing the process of the court by frustrating the trial through misconduct.
24. In the present application, the Applicant has concisely explained the genesis of its predicament. Without going to the merits of the application it seeks to reinstate, it disclosed that in the lower court trial, it relied on services of lawyers who had been hired by the Insurance Company and who it later discovered were disinterested in filing an appeal in respect of the sum that was beyond the Insurance Company's level of exposure on liability. When the Applicant learnt about this, the appeal was already time barred and hence the application dated 18/8/22 to appeal out time. However, that application did not see the light of the day as it was dismissed because the Applicant's Advocate did not attend Court on the day the application was fixed for hearing as he mis-diarised the hearing notice sent by the Court via email.
25. It is my finding that these facts demonstrate a genuine grievance by the Applicant which to me befits the description of a 'sufficient reason' under Order 45 rule 1 of Civil Procedure Rules to warrant a review the order of dismissal by this Court of the Applicant's application dated 18/8/22 and ensure the same is disposed of by merits. My finding therefore is that this application is merited.
26. The second issue would therefore be whether a stay of execution of Runyejes SPMCC 3 of 2020 should issue pending the hearing of the application dated 18/8/2022.
27. Order 42 Rule 6 of the Civil Procedure sets out the principles for issuing a stay of execution. These principles are provided for under Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides:
 - "No order for stay of execution 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 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.
28. The Court of Appeal expounded the above provisions in [Butt v Rent Restriction Tribunal](#) [1979] eKLR where it discussed what ought to be taken into account in deciding whether to grant a stay of execution or not. The Court reaffirmed that granting or denying a stay is a discretionary remedy and that discretion ought to be exercised in a way that it would not be tantamount to preventing an aggrieved person from pursuing an appeal. It also held that generally, if there was no overwhelming hindrance, a stay should be granted so that an appeal is not rendered nugatory were the appellate Court to overturn the decision appealed from. Further, that the remedy of stay should not be denied just because the Court is of the view that a better remedy could be obtained by the applicant at the end of the proceedings. Lastly, that the Court in making its decision on either granting or the stay or not, has to consider any other exceptional circumstances in the case.



29. The applicant has pleaded that they made their application for stay of the decree dated February 8, 2022 timeously. The Respondent called out the Applicant and said that they were all along aware that the judgment was delivered on 8.2.2022 which they ought to have appealed 30 days thereafter. Further, that the Applicant was have yet to serve the application dated 18.8.2022 for leave to appeal out of time. The Respondents further submitted that the applicant never informed the court that they intended to appeal the judgment when they brought an application to pay the decretal sum in instalments as at 26.4.2022.
30. So far, the substantive application seeking leave to appeal out of time has not been canvassed yet. I believe the question that the Respondent is raising on whether there was justification by the Applicant to utilize the 30 day window allowed to file his appeal will be better addressed in the main application itself.
31. Concerning the filing of an application by the Applicant in the lower court to pay the decretal amount in instalments without disclosing that it intended to file an appeal, I do not think this submission holds any water either. It was within the right of the Applicant to seek legal redress it considered suitable to its situation at the time. It cannot be judged harshly if it reconsiders and adopts a different legal strategy as long as it is operating within the legal options at its disposal. It is my considered view that the time spent by the Applicant in pursuing other lawful options cannot be taken adversely against it. All considered, I am of the view that the instant application has been filed without unreasonable delay.
32. Turning now to what amounts to substantial loss, the same was explained in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, where it was held as follows:
- “...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 ... 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...”
33. The applicant has pleaded that they will suffer substantial loss as their business faces imminent collapse since the execution targeted its operational equipment in its business namely, computers, posho mill and transportation trucks. The Applicant additionally annexed their bank statements as evidence of the dire financial position it was experiencing.
34. At it were, the outstanding decretal sum is Kshs 6,827,678/=. The respondents admitted they have so far received payment to the tune of Kshs 3,500,000/= towards settlement of the decretal sum.
35. The Respondents financial means remains unknown as that was not disclosed. It is thus speculative as to whether if the remainder of the monies are paid to the respondents they would be in a position to refund the same if the Applicant were to be successful in appealing that decree.
36. Having considered the totality of circumstances above, it is my finding that the applicant has demonstrated that they might suffer substantial loss should it be allowed to appeal the Judgement and succeed in the appeal.



37. On the issue of security, the Applicant submitted it was ready to abide by the directions of the Court but pleaded that a reasonable sum be considered. The Respondent did not submit on the issue of security. Order 42 Rule 6(2) explains that security is for the due performance of the decree.

38. In *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others* [2015] eKLR, the Court opined as follows:

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

39. While deciding on the issue of security, courts are supposed to balance the competing interests of the parties before them. The Court must carefully weigh and ensure protection is accorded to the party that is appealing so that if the appeal succeeds, it would not find it difficult to recover his money and likewise, the decree-holder who should not be put in a position where he cannot execute the decree if the appeal is unsuccessful. This is why requirement for security in stay of execution proceedings plays a central role.

40. The issue of adequacy of security was dealt with by the Court of Appeal in *Ndubiu Gitahi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 where the Court of Appeal expressed itself as follows:

“...The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it...”

41. In the instant application, I consider that the Respondents have already received a sizable amount in settlement of the decretal sum so far. The other consideration I make is that no appeal has been filed



yet, as the application of 18/8/22 will have to be heard first for the Applicant to know if it will be granted leave to appeal out of time or not. There is thus a need to protect the Applicant as he pursues the application seeking leave to appeal out of time and the Respondents too who are keen to enjoy the fruits of their judgement.

42. The upshot of the foregoing is that a stay of execution of the decree of Runyejes SPMCC E003 of 2020 pending the hearing and determination of the application dated August 18, 2022 is hereby granted subject to payment of security to the tune of Kshs 1.2 million to be held in interest earning account in joint names of both advocates on record within 30 days from the date hereof.
43. There will thus be a mention before the Presiding Judge, Embu High Court on 28/3/2023 to confirm compliance and for further directions as to the hearing of the application dated 18/8/22.
44. In default of payment of security within the stipulated time-frame, the order of stay shall automatically lapse and the Respondents shall be at liberty to execute for the entire decretal sum.
45. Costs in the cause.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT BUSIA HIGH COURT THIS 27TH DAY OF FEBRUARY, 2023.

L.N. MUGAMBI

JUDGE

In presence of

Applicant – absent

1st proposed Respondent - absent

2nd proposed Respondent- absent

Advocate for the Applicant – absent

Advocate for the 1st Proposed Respondent – absent

Advocate for the 2nd Proposed Respondent – absent

Court Assistant – Sikolia

The Ruling is to be transmitted digitally by the Deputy Registrar to the Counsels on record through their respective email addresses.

L.N. MUGAMBI

JUDGE

