Budul Investment Company Limited & another v Odhiambo (Miscellaneous Application 156 of 2022) [2023] KEHC 2521 (KLR) (24 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2521 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS APPLICATION 156 OF 2022

OA SEWE, J

MARCH 24, 2023

BETWEEN

BUDUL INVESTMENT COMPANY LIMITED ..... 1ST APPLICANT

ABDIKADIR AHMED SAID ..... 2ND APPLICANT

AND

FLORENCE AKINYI ODHIAMBO ..... RESPONDENT

RULING

[1] Before the Court for determination is the Notice of Motion dated 5th August 2022. It was filed by the two applicants, Budul Investment Company Ltd and Abdikadir Ahmed Said, under Sections 1A, 1B, 3A, 63(e) and 79G of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya. They also cited Order 42 Rules 6 and 32,Order 43 Rule 2, Order 50 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*. The applicants seek orders that:

(a) Spent

(b) Spent

(c) The Court be pleased to grant the applicant leave to file an appeal out of time against the judgment of Hon. J.B. Kalo, Chief Magistrate, delivered on 2nd June 2022 in Mombasa Chief Magistrates Civil Case No. 2284 of 2019.

(d) The Court be pleased to say execution pending hearing and determination of the intended appeal.

(e) The applicants do file their appeal within such time as the Court will direct.

(f) The costs of the application be in the cause.

[2] The application was premised on the grounds that judgment in the lower court matter was delivered on 2nd June 2022; and that Mr. Mogaka who had instructions to file and conduct the appeal travelled to India on medical grounds and was therefore unable to file the applicants' Memorandum of Appeal within time. It was therefore the assertion of the applicants that the failure to file the intended appeal in time was due to unavoidable circumstances. They further contended that their intended appeal raises arguable grounds and therefore they stand to suffer substantial and irreparable harm if the orders for stay of execution and enlargement of time are not issued.

[3] The grounds aforestated were explicated in the Supporting Affidavit of William Mogaka, Advocate, sworn on 5th August 2022. At paragraph 4 of that affidavit, Mr. Mogaka deposed that, upon receipt of the judgment the insurers of the applicants, M/s CIC Insurance Co. Ltd, instructed him to file an appeal; but that the matter escaped his attention as he was then busy making arrangements to travel out of the court's jurisdiction with his spouse who required specialized medical attention abroad. He was therefore unable to file the Memorandum of Appeal within time, granted that he returned to the Country on 24th July 2022; by which time the appeal period had lapsed. Thus, Mr. Mogaka averred that failure by the applicants to file their intended appeal was not deliberate but was due to an inadvertent mistake on his part. He added that the intended appeal is arguable and has very high chances of success and that unless the orders sought are granted, the applicants stand to suffer substantial and irreparable harm. He annexed copies of the lower court judgment, his travel documents as well as a draft Memorandum of Appeal as annexures to the Supporting Affidavit.

[4] The application was resisted by the respondent, Florence Akinyi Odhiambo. In her Replying Affidavit sworn on 31st August 2022, she averred that it is improper for an advocate to make a deposition in a contentious matter; especially where the matters in question are not within the personal knowledge of the advocate. The respondent narrated the genesis of the dispute in paragraphs 8 and 9 of her affidavit. She then posited that the delay in filing the instant application has not been satisfactorily explained; and therefore that the instant application has not been brought in good faith; granted that Mr. Mogaka is not the only advocate in the subject firm. She accordingly prayed that the application be dismissed with costs.

[5] The application was canvassed by way of written submissions, pursuant to the directions dated 20th September 2022. Accordingly, the applicants' written submissions were filed by Mr. Mogaka on 19th October 2022. He submitted that the Civil Procedure Rules grant the courts unfettered discretion to enlarge time whenever the circumstances call for such enlargement. He referred, for instance, to Section 79G of the *Civil Procedure Act* as well as Order 50 Rule 6 and Order 42 Rule 32 of the *Civil Procedure Rules*, as some of the relevant provisions on extension of time. Counsel also cited *Paul Musili Wambua v Attorney General & 2 Others* [2015] eKLR, *Belinda Murai & Others v Amos Wainaina* [1979] eKLR and *Butt v Rent Restriction Tribunal* [1979] eKLR in urging the Court to find that a plausible justification has been given for the delay. He further urged the Court not to visit the mistake of counsel on the innocent applicants.

[6] As to the applicants' prayer for stay of execution, Mr. Mogaka submitted, on the authority of Order 42 Rule 6 and the case of *R M K v A M M* [2017] eKLR, that the instant application has been made without unreasonable delay; and that the applicants are prepared to furnish such security as the Court may order for the due performance of such decree as may ultimately be binding on them. Mr. Mogaka submitted at length on the aspect of substantial loss, contending that the respondent has not adduced any evidence as to how she will refund any sums paid to her in the event of a successful appeal. He relied on *Magnate Ventures v Simon Mutua Muatha & Another* [2018] eKLR, *National Industrial Credit Bank Ltd v Aquinas Wasike & Another* (UR) Nairobi Civil Application No. 238 of 2005, *Kenya*

Hotel Properties Limited v Willesden Properties Limited, Civil Application No. Nai. 322 of 2006 and *Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & Another* [2015] eKLR to demonstrate that the applicants have shown that they stand to suffer substantial loss unless stay is granted.

[7] On behalf of the respondent, Mr. Ndungu filed his written submissions on 1st November 2022. His first point was that the application is defective in so far as it has invoked Order 40 of the *Civil Procedure Rules*. In his view, if the Court were to grant the application as drawn, it would lead to a legal absurdity, namely, granting an order not prayed for. He relied on *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & Others* [2014] eKLR for the proposition that parties are not allowed to depart from their pleadings; and that courts are similarly bound to grant only orders prayed for by the parties in their pleadings. In addition, Mr. Ndungu argued that the application, as filed, offends the provisions of Order 19 Rule 3 of the *Civil Procedure Rules*, and should therefore be struck out. He submitted that it is not permissible for counsel to depose to contentious issues; and therefore, on the authority of *East African Foundry Works (K) Ltd v Kenya Commercial Bank Ltd* [2002] 1 KLR 443 at 446I and *Heywood Ochieng Aseso v Jackson Kimeu Mulinge & 2 Others* [2013] eKLR, he urged the Court to strike out the Supporting Affidavit without further ado and proceed to dismiss the application.

[8] On the merits, it was the submission of Mr. Ndungu that the applicants have utterly failed to meet the threshold for the orders sought. On stay of execution, counsel made reference to Order 42 Rule 6 and the three conditions provided for therein for stay. He noted that the instant application was filed after a delay of over 33 days from the lapse of the order of stay granted by the lower court. He posited that no explanation for the delay was given. He further argued that the applicants have not demonstrated the substantial loss that will result if stay is not granted. He referred the Court to various authorities, including *Kenya Shell Limited v Kariga* [1982]-88] 1 KAR 1018 on what substantial loss entails and how it is proved. In his view, the respondent is entitled to the fruits of her judgment; and therefore that the application ought to be dismissed with costs.

[9] On extension of time, Mr. Ndungu made reference to the decision of the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR for the applicable principles. He added that, in the circumstances of this case, the applicants have not approached the Court with clean hands but simply to obstruct the course of justice, and are therefore not deserving of extension of time.

[10] Having considered the application in the light of the averments set out in the respective affidavits filed by the parties as well as the written submissions filed herein by learned counsel, the over-arching issue for determination is whether the applicants have made out a good case for extension of time to appeal and for stay of execution.

[a] On Extension of Time:

[11] According to Section 79G of the *Civil Procedure Act*, an appeal from the subordinate court to the High Court ought should be filed within 30 days; failing which leave of the Court is a prerequisite for purposes of extension of time to file the intended appeal. That provision states:

> 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.

[12] Thus, it is incumbent upon an applicant for extension of time to demonstrate "good and sufficient cause" for not filing the appeal in time. In *Paul Musili Wambua v Attorney General & 2 others* [2015] eKLR the Court of Appeal expressed the view that:

> "...it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted. (See Mutiso V Mwangi) [1999] 2 EA 231."

[13] The same position was taken by the Supreme Court in the case of *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR thus:

> "...It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as:
>
> "the under-lying principles that a Court should consider in exercise of such discretion:
>
> 1. Extension of time is not a right of a 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 on 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 respondents if the extension is granted;
> 6. Whether the application has been brought without undue delay;"

[14] In the instant matter, the impugned judgment was delivered on 2nd June, 2022. Hence the appeal ought to have been filed by 2nd July 2022; which was not done. It is noteworthy too that the instant application was not filed until 15th August 2022 and therefore the question to pose is whether the delay has been satisfactorily explained.

[15] Before turning attention to the merits or otherwise of the explanation given in the Supporting Affidavit, it is imperative to consider whether the Supporting Affidavit is tenable from the standpoint of Order 19 Rule 3 of the *Civil Procedure Rules*. That provision stipulates that:

1. Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.

2. The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents, shall (unless the court otherwise directs) be paid by the party filing the same.

[16] Further to the foregoing, in Rule 8 of the *Advocates (Practice) Rules*, 1966, it is provided: -

> " No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:
>
> Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears."

[17] Thus, the general rule is that advocates ought not to swear affidavits on behalf of their clients; because doing so would invariable expose such an advocate to the prospect of cross-examination in a matter in which he is appearing simply as counsel. Hence, in *Republic v Nairobi City County Government & 6 others Ex Parte Mike Sonko Mbuvi* [2015] eKLR the Court held: -

ss-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted..."

[18] However, there is, to my mind, no such prohibition when it comes to non-contentious matters, particularly depositions made on the basis of facts only known to the advocate. Indeed, in *Kamlesh Mansukhlal Damji Pattni v Nasir Ibrahim Ali & 2 others* [2005] eKLR the Court of Appeal held: -

> " ...There is otherwise no express prohibition against an advocate who of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client. So too an advocate who cannot readily find his client but has information the sources of which he can disclose and state the grounds for believing the information. On both counts we do not find Muite's remaining affidavit offensive. As we stated earlier he is possessed of the facts stated therein and secondly he has explained, and we believe him in the circumstances of this case, that his clients were not readily available..."

[19] With the foregoing in mind, I have perused the Supporting Affidavit sworn by Mr. Mogaka and note that the matters deposed to are matters that were within the knowledge of counsel; and were deposed to in an attempt to explain why, although instructions were given to him to file an appeal, he did not take appropriate action in time. Mr. Mogaka annexed to his affidavit personal documents, such as copies of the relevant parts of his passport, his visa and boarding passes for himself and his wife, among others, to demonstrate that he in fact travelled to India with his wife for medical attention and did not return until 24th July 2022. In those circumstances only Mr. Mogaka could have deposed to such facts and therefore I find no justifiable cause for striking out the Supporting Affidavit.

[20] It was further argued by the respondent that the application is incompetent for the reason that it was brought under the wrong provision of the law. According to Mr. Ndungu, the application ought to have been brought under Order 40 of the *Civil Procedure Rules* for extension of orders of stay

of execution that were granted by the lower court. He therefore submitted that the application is a non-starter and therefore ought to be dismissed on that account. I have no hesitation in rejecting that submission not only because it is a constitutional imperative, per Article 159(2)(d) of the *Constitution*, that justice be administered without undue regard to procedural technicalities, but also because Order 51 Rule 10 of the *Civil Procedure Rules* provides that:

(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."

[21] Turning now to the merits of the application, there was a delay of about two and a half months between 2nd June 2022 when the impugned decision was delivered and 15th August 2022 when the instant application was filed. Hence, the question to pose is whether the delay has been satisfactorily explained. Indeed, in *Ivita v Kyumbu* [1975] eKLR the position taken was that:

> "...the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay..."

[22] In my careful consideration, a plausible explanation was given by Mr. Mogaka for the delay and therefore the prayer for extension of time is justified.

[b] On Stay of Execution:

[23] The prerequisites for stay of execution pending appeal are set out in Order 42 Rule 6(2)of the *Civil Procedure Rules*: -

(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.

[24] Thus, the appellant had to satisfy the court that, it stands to suffer substantial loss unless the order for stay of execution is made; that it made the application without unreasonable delay; and finally, that it has provided security for the due performance of the order as may be made by court. Having ruled that the delay has been satisfactorily explained, and since the applicants having indicated that they are ready to comply with such orders as to security as the Court may make, the only issue to consider is whether the applicants have demonstrated substantial loss.

[25] Several authorities were brought to the Court's attention by learned counsel on this point. In *Rhoda Mukuma v John Abuoga* [1988] eKLR for instance, the Court of Appeal stated that: -

> "..... substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory. Therefore, it is necessary to preserve the status quo."

[26] The same position was taken in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR that the legal burden was on the applicant to show that the loss contemplated was such as would irreparably affect him if he succeeded on appeal. It was held: -

> " 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. This is what substantial loss would entail..."

[27] The lower court judgment is for a liquidated sum of Kshs. 919,100/=. The draft Memorandum of Appeal challenges only the component of general damages amounting to Kshs. 750,000/= on the ground that it is excessive in the circumstances of the case; and the contention of the applicants is that they may never recover the judgment sum from the respondent in the event of success on appeal. Having made that assertion at paragraph 10 and 11 of their Supporting Affidavit, the evidential burden shifted to the respondent to adduce evidence of means. In this regard, the Court of Appeal held thus in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR:

> " This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. 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."

[28] With the foregoing in mind, I have perused the respondent's response but find no such indication of means. I therefore find the applicant's assertion, that it stands to suffer substantial loss, unrebutted. This is notwithstanding that the impugned decree is a money decree. The case of *Kenya Hotel Properties Ltd v Willesden Properties Ltd* speaks to the issue. Here is what the Court of Appeal had to say:

> " The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a "man of straw" but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree."

[29] On arguability of the appeal, I am guided by the decision of the Court of Appeal in *Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited* [2020] eKLR held: -

> " ...Court can gauge the arguability of an intended appeal from other supportive evidence. Herein the applicant intends to challenge the dismissal of its liquidated claim which according to counsel involves a colossal amount of money.In my view, that in itself is arguable notwithstanding that it may not succeed as in law an arguable appeal need not succeed so long as it raises a bona fide issue for determination by the Court.In my view, the issue of whether the applicant's claim was meritorious or otherwise is arguable notwithstanding that it may not succeed..."

[30] In the result, I find merit in the application dated 5th August 2022. The same is hereby allowed and orders granted in respect thereof as hereunder:

(a) That leave be and is hereby granted to the applicants to file their appeal out of time. The same be done within 30 days from the date hereof.

(b) That an order of stay of execution of the judgment delivered on 2nd June 2022 by the Hon. J.B. Kalo, Chief Magistrate, in Mombasa CMCC No. 2284 of 2019: Florence Akinyi Odhiambo v Budul Investment Co. Ltd & Another, be and is hereby granted pending the hearing and determination of the appeal on condition that the entire decretal sum be deposited in an interest earning account in the joint names of counsel on record herein for the parties. The same be done within 30 days from the date hereof.

(c) That the costs of the application be costs in the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF MARCH 2023

OLGA SEWE

JUDGE