Masika t/a Ritake Group of Companies v Irungu (Civil Appeal E168 of 2022) [2023] KEHC 22210 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEHC 22210 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E168 OF 2022

F WANGARI, J

APRIL 27, 2023

BETWEEN

GEORGE SIKUKU MASIKA T/A RITAKE GROUP OF COMPANIES .... APPELLANT

AND

JAMES KARANJA IRUNGU .... RESPONDENT

RULING

1. This ruling relates to an application dated 12th October, 2022 which sought for the following orders: -

    a. That this application be and is hereby certified urgent and service is dispensed with in the first instance;

    b. That pending the hearing interpartes and determination of this application, this Honourable Court be pleased to stay the judgement, ruling, warrants, execution of decree dated 29th July, 2021 and any further proceedings or consequential orders in Mombasa Civil Suit No. 422 of 2021, James Karanja Irungu v George Sikuku Masika t/a Ritake Group of Companies;

    c. That pending the hearing and determination of this appeal, this Honourable Court be pleased to stay judgement, ruling, warrants of execution and any further proceedings or consequential orders in Mombasa Civil Suit No. 422 of 2021, James Karanja Irungu v George Sikuku Masika t/aRitake Group of Companies;

    d. That costs for this application be in cause.

2. The application was opposed through grounds of opposition dated 18th October, 2022 and a replying affidavit of even date sworn by the Respondent and filed on 19th October, 2022. The Appellant filed a supplementary affidavit on 26th January, 2023 and the same is dated 25th January, 2023.

3. The application was disposed off by way of written submissions wherein both parties complied by filing detailed submissions together with various authorities in support of the parties' rival positions.

Analysis and Determination

4. I have considered the said submissions together with the authorities relied upon by the parties as well as the law and in my respectful view, there is only one issue for determination which is whether the Appellant has made out a case for grant of orders of stay pending hearing and determination of appeal he has preferred. Corollary to this finding is the issue of costs.

5. The principles for grant of stay of execution pending appeal are settled. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the *Civil Procedure Rules*, 2010 which provides as follows: -

> " (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.
>
> (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

6. The power of a court to grant stay of execution is discretionary and just like any other discretionary power, the same must be exercised judiciously and not capriciously or whimsically. It must be recalled that the purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of each of the parties to the dispute. In *RRW v EKW* [2019] eKLR, the Court of Appeal addressed itself on this issue as hereunder: -

> " ...The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is

discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent..."

7. Having settled on the principles, an interrogation of whether the Applicant has met the tests above is imperative. On substantial loss, the Appellant submits that he is willing to liquidate the admitted sum of Kshs. 400,000/= by way of monthly instalments of Kshs. 50,000/= but the contested sum of Kshs. 520,000/= do await the outcome of the appeal. I note that what precipitated the application before the Lower Court and which is the subject of the appeal are warrants of attachment dated 5th July, 2022. In the said warrants, the Respondent sought to recover a sum of Kshs. 825,366.90/= and in default, the Appellant's property be sold off by way of auction. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the court while considering a similar application as the current one had the following to say; - "...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... This is so because execution is a lawful process..." Therefore, the fact that the Respondent has set in motion the process of execution does not of itself amount to substantial loss. As was held in the above case, 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.

8. Without delving into the merits of the appeal or otherwise, the Appellant appears to have admitted that there is a sum of Kshs. 400,000/= which is due and owing to the Respondent. On this sum, he proposes to liquidate it in equal monthly instalments of Kshs. 50,000/= each. However, there appears to be a disputed sum of Kshs. 520,000/= which the Appellant submits it has to be heard whether this sum is due and owing. In James Wangalwa & Another v Agnes Naliaka Cheseto (above), the Court held that substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory. I have perused the Appellant's supplementary affidavit and in particular, paragraphs 6 and 7 thereof. The paragraphs demonstrate a dispute as to what is due and owing. The Applicant states that thus if he is compelled to pay this sum which is not admitted, substantial loss would result were stay not to be granted. On the other hand, the Respondent would have been kept away from the fruits of his judgement for more than one (1) year. This Court while balancing these two interests, must satisfy itself that that no party would suffer undue prejudice. The Court of Appeal in *Absalom Dova v Tarbo Transporters* [2013] eKLR while enunciating this principle stated as follows: -

> " ...The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation..."

9. It is my considered view that were this court to deny the Appellant an order for stay of execution, it would place her at a more prejudicial position than the Respondent. While it is unfortunate that the Respondent will have to wait a little bit longer to enjoy the fruits of his judgement, the Applicant has adequately demonstrated that he is likely to suffer loss were his property to be sold in an auction and I so hold.

10. On the issue of delay, the Lower Court ruling subject of the appeal was delivered on 20th September, 2022 and the present application was filed on 13th October, 2022, a period of about twenty-three (23)

days. This in my view is within time and I have no difficulty in holding that the application was filed timeously.

11. Lastly, the Applicant is required to furnish security to the Court as security for the performance of the judgment debt should the appeal fail. The purpose of security was clearly enunciated in *Arun C. Sharma vs. Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others* [2014] eKLR, where the court stated: -

> " ...The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose..."

12. I note that the Appellant has no offered or proposed any security for the due performance of the decree of the Lower Court. This should be done as a sign of good faith that the Appellant is ready and willing to commit to giving security. But my reading of order 42 rule 6(2) (b) of the CPR reveals that, it is the court that orders the kind of security the Applicant should give as may ultimately be binding on the applicant.This modeling of the law is to ensure the discretion of the court is not fettered. I shall thus make orders accordingly on the issue of security.

13. Following the foregone discourse, the upshot is that the following orders do hereby issue: -

    a. The application dated 12th October, 2022 is hereby allowed on the following conditions: -

        i. The Applicant/Appellant shall deposit a sum equivalent to 50% of the decretal sum in a joint interest earning account in the names of Counsel on record for the parties herein within a period of thirty (30) days from the date hereof;

        ii. The Applicant to compile, file and serve a Record of Appeal within sixty (60) days from the date hereof;

        iii. In default of either (i) or (ii) above, the application dated 12th October, 2022 shall stand dismissed;

        iv. Costs to be in the cause.

    Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF APRIL, 2023.

F. WANGARI

JUDGE

In the presence of;

N/A for the Appellant

Ms. Wambui Advocate for the Respondent

Guyo, Court Assistant