



Mbula v Nguku (Civil Appeal E149 of 2022) [2023] KEHC 17886 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17886 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

CIVIL APPEAL E149 OF 2022

MW MUIGAI, J

MAY 25, 2023

BETWEEN

SNOW ELIUD MBULA APPELLANT

AND

MARY NZULA NGUKU RESPONDENT

RULING

NOTICE OF MOTION

1. Vide an application dated November 5, 2022 filed under Article 159 2 (a) and (d) of the Constitution of Kenya Section 3A,79G of the Civil Procedure Act and Order 21 rule 1b, Order 22 rule 22, order 42 Rule 6, Order 50 rule 6, Order 51 Rule 1 and 3 of the Civil Procedure Rules, the Applicant sought the following orders, that;
 - a. Spent
 - b. Spent
 - c. This Hon Court be pleased to grant stay of execution of the Judgment and/or decree issued by CA Hon Anne Nyoike, Principal Magistrate on October 27, 2022 pending hearing and determination of the intended Appeal.
 - d. This Hon court be pleased to issue any other order and/or direction it deems fit to grant in the circumstances.
 - e. The costs of this Application abide the outcome of the Appeal.
2. The Application is supported by the Affidavit of Snow Mbula Eliuddeponed on November 5, 2022 who stated that judgment was entered on 27.10.200 and he was found to be 100% liable and is to pay Kshs 300,000 for general damages, Kshs 7150 for special damages together with costs and interest and being dissatisfied with the judgment has appealed against it.



3. The Applicant contends that the Appeal has high chances of success, that the Respondent may levy execution against them as 30 days stay of execution that was granted is on the verge of lapsing rendering the appeal nugatory causing irreparable loss and damage upon them.
4. It was deposed that the insurer, M/s Directline Assurance Company is able and willing to provide security for the entire decretal sum in the form of a bank guarantee to be issued by Family Bank which he says is a reputable bank in Kenya without any partial payments/ settlements being made.
5. That further, of there is an order for partial payment, the payments will be utilized and alienated by the Respondents and recovery of the same will be arduous in the event the intended appeal is succeeds. Lastly, it was contended that the application was filed in good faith.

Responses

6. In opposition the Application, the Respondent filed a Replying Affidavit deposed on December 8, 2022 in which it was opined that the application should be struck out as it does not fulfil the conditions under Section 3A, 79G of the *Civil Procedure Act* and Order 22 rule 22, order 42 Rule 6, Order 50 rule 6, Order 51 Rule 1 and 3 of the *Civil Procedure Rules*. Secondly, that the amount awarded by the Trial Court was not excessive and therefore the intended appeal has no chances of success and this application has been brought to deny her from enjoying the fruits of the judgment.
7. The Respondent deposed that on November 1, 2022 through her advocates wrote a letter tabulating costs upon the Appellant which they failed and/or ignored only to rush to Court with the instant application when the stay period is almost lapsing. She said the application has not been filed in good faith. She also said that she is an employee of the Police Service with assets and is well endowed financially hence in a position to refund the said sum. The decretal sum amounts to Kshs 439,718 inclusive of costs of the suit.
8. The Respondent contended that a bank guarantee is not proof of availability of funds and it lasts for a period of 1 year as such, that cannot be proper security owing to the fact that an appeal may last for more than 1 year. Further, that it must be specific to a suit. Lastly, the Respondent prayed that half the decretal sum of Kshs 219,859 be paid to her and the other half be deposited in court pending the hearing and determination of the Appeal should the court be inclined to grant the orders sought in the interest of justice.
9. The application was canvassed by way of written submissions.

Applicant's Submissions Dated 3.01.2023

10. The Applicant submitted that in the subordinate courts, it is not a requirement to show that the Appeal has high chances of success and the Applicant only needs to show that he has an arguable appeal as stated in the case of *Bake 'N' Bite (Nrb) Limited v Daniel Mutisya Mwalonzi* [2015] eKLR.
11. It was submitted that the conditions for be fulfilled for stay of execution are provided under Order 42, rule 6 and Order 22 rule 22(1) as well as the case of *Tabro Transporters Limited vs Absalom Dova Lumbasi* [2012] eKLR.
12. As regards whether substantial loss will occur, it was submitted that the Appellant has furnished the court with a bank guarantee while the Respondent's means are not known as it has not disclosed nor furnished the court with any documentary evidence to prove the financial standing. That the decretal sum was a substantial sum and in the event the Respondent is unable to repay it, the Appeal will have been rendered nugatory and the Applicants exposed to irreparable damage. To buttress this point,



reliance was placed on the case of *Edward Kamau & Another v Hannab Mukui Gichuki & Another* [2015] eKLR, *Tabro Transporters* (supra).

13. Secondly, the Applicant submitted that it was ready and willing to furnish security, a bank guarantee by its insurer. The court was urged to exercise its discretion while citing the case of *Esther Wamaitba Njibia & 2 others vs Safaricom Limited* [2014] e KLR

Respondent Submissions Dated 25.01.2023

14. Whilst relying on the cases of *Butt vs Rent Restriction Tribunal* [1982] KLR 417, *Paul Kitthinji vs Olyvine Karwitha* [2017] e KLR, *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] e KLR, the Respondent submitted that the Applicant has not demonstrated what loss, if any she would suffer by making the payments to her.
15. Secondly that the Applicant has based her submissions on the inability to recover the decretal sum which it was submitted was an assumption since the Respondent is an employee of the police service with assets and is well endowed financially hence in a position to refund the said sum.
16. As to whether the Application has been made without undue delay, it was submitted while relying on section 79 G of the *Civil Procedure Act* and the case of *Gichobi Susana vs Philip Muchoki Ngugi & Another* [2015] e KLR, that the application is an afterthought and delay tactic meant to deny the Respondent fruits of judgment and justice delayed is justice denied.
17. Thirdly, it was submitted that chances of success of an appeal ought not take the center stage in such an application seeking stay of execution of court orders as the same would amount to the same court to interrogate a decision, which action was not contemplated by order 42 Rule 6 of the *Civil Procedure Rules*. Further, that a bank guarantee the Applicant rely on is just a mere document and does not prove availability of funds. The Respondent relied on the case of *Kenya Tanzania Uganda Leasing Company Limited v Mukenya Ndunda* [2013] e KLR, *Omara vs Machakos University* [2019] e KLR, *Mutiso & Another v Ngoma* [2021] KEHC 344 KLR and *Tabro Transporters* (supra).
18. While placing reliance on the cases of *Amal Hauliers Limited vs Abdulnasir Abukar Hassan* [2017] e KLR, *Ngirarious Mwangi vs Wabington Odhiambo Wanyang'* [2014] e KLR, *m/s Portreitz Maternity vs James Karanja Kabia*, Civil Appeal 63 of 1997 and *Victory Construction vs BM (A minor suing through next friend one PMM)* [2019] e KLR, the Respondent submitted that she had legitimate expectations that the applicant would make payment upon being the successful litigant and urged the court to order the Applicant to pay half the decretal sum to her as a condition for stay.

Determination

19. The court has considered the Application, the response thereto and the submissions on record and the issue for determination is whether the Applicant should be granted an order of stay of execution pending appeal.

Order 22 rule 22(1)

20. Stay of Execution is guided by the proviso under Order 42 Rule 6 of the *Civil Procedure Rules* 2010 that provides as follows;

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 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.”

21. These principles were enunciated in *Butt vs Rent Restriction* Tribunal [1979] 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:-

- a. 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.
- b. 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.
- c. 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.
- d. 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.

22. Warsame, J (as he then was) in *Samvir Trustee Limited v Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997 where he expressed himself as hereunder:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against



the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

23. There are three conditions to be satisfied by the Appellant. The first is whether he will suffer substantial loss if the order of stay is not granted. Kimaru, J in *Century Oil Trading Company Ltd v Kenya Shell Limited* Nairobi (Milimani) HCMCA No 1561 of 2007 stated that:

“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

24. Gachuhi, Ag JA (as he then was) in *Kenya Shell Limited v Kibiru* [1986] KLR 410, at page 417 held:

“It is not sufficient by merely stating that the sum of Kshs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that *status quo* should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment.”

25. The Applicant's submissions are that the Respondent will be unable to pay the decretal sum however the court have noted that poverty is not a ground for denying a successful litigant the fruits of judgment. In this case, the Respondent has demonstrated oath that she is capable is paying the decretal sum despite not providing any documentary evidence. In *Stephen Wanjohi vs Central Glass Industries HCCA 169 OF 2017 12 Ltd Nairobi HCCC No 6726 of 1991*, that financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonorable miscreant without any form of income. Suffice to state that the respondent, at this moment, is the successful party and in



order to deny him the fruits of his success, it is upon the applicant to prove that he is unlikely to make good whatever sum he may have received in the meantime.

26. The Applicant contends that stay will lapse and the Appeal will be rendered nugatory if the order is not granted. The court notes that release of the whole decretal sum would be prejudicial to the Applicant.
27. As to whether the Application has been filed without undue delay, judgment was entered on October 27, 2022 and this application was filed on November 15, 2022. The court finds that the Application has not been filed without undue delay.
28. On the deposit of security, The court observed in the case of *Gianfranco Manenthi & Another v Africa merchant Assurance Co Ltd* [2019] eKLR it was held that:-

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....

Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

29. This Court is persuaded by the submissions of the Respondent that indeed a bank guarantee is not proof of money and the one that has been presented to this court is not specific to this court. Further, that the same is for a period of 1 year. I also find that the Bank Guarantee is between the insurer and the bank, nowhere does it mention the Applicant. The same is also not fully executed. The bank guarantee presented this court is dated February 18, 2022 and 12 months have since lapsed thus it is not viable.

Disposition

30. In balancing the rights of the parties and in exercise of the court’s discretion, I direct as follows;
 - a. Stay of execution pending Appeal is granted on condition that the Appellant remit half of the decretal sum to the Respondent and the other half be deposited in a joint interest earning account of parties’ advocates on record within 60 days of this Ruling.
 - b. The Lower Court file shall be availed within the stated period.
 - c. The Record of Appeal shall be prepared and served.



- d. Costs will abide the Appeal.
- e. Further mention for directions shall be on 24/7/2023

**DELIVERED, SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 25/5/2023 (VIRTUAL/
PHYSICAL CON-FERENCE).**

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MS WAWERU FOR THE APPELLANT

MR. KITOO H/B MR. MULONDU - FOR RESPONDENT

GEOFFREY/PATRICK - COURT ASSISTANT(S)

