Auto Selection (K) Limited v Mbisu & 2 others (Civil Appeal 430 of 2019) [2023] KEHC 21495 (KLR) (Civ) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21495 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 430 OF 2019

CW MEOLI, J

JULY 28, 2023

BETWEEN

AUTO SELECTION (K) LIMITED ..... APPLICANT

AND

ELIZABETH NDUKU MBISU ..... 1ST RESPONDENT

PAUL WAINAINA ..... 2ND RESPONDENT

FRANCIS KIBE MUIRURI ..... 3RD RESPONDENT

RULING

1. The motion dated 13.12.2022 by Auto Selection (K) Limited (hereafter the Applicant) seeks primarily an order to stay execution of the judgment delivered on 26.05.2022 pending hearing and determination of the appeal in the Court of Appeal, namely, COACA E773 of 2022 Auto Selection (K) Limited v Elizabeth Nduku Mbisu & 2 Others. The motion is expressed to be brought under Section 3A of the *Civil Procedure Act* and Order 22 Rules 22, Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*.

2. It is premised on the grounds on the face of the motion as amplified in the supporting affidavit sworn by Fredrick Muriithi Thuku, the Human Resource and Administration Manager of the Applicant. To the effect that the instant appeal was commenced by way of a memorandum of appeal dated 26.02.2019 and conditional stay of execution granted and in place until the judgment delivered on 26.05.2022; that being aggrieved with the entirety of the judgment the Applicant has preferred an appeal to the Court of Appeal vide the Notice of Appeal dated 08.06.2022 ; and that the Applicant is actively pursuing certified copies of the proceedings from this court to enable it lodge its appeal before the Court of Appeal.

3. The deponent proceeds to assert that the Applicant has an arguable appeal with good chances of success and that Elizabeth Nduku Mbisu (hereafter the 1st Respondent) has commenced the process of execution against the Applicant. And therefore, expresses apprehension that the Applicant will suffer loss and the appeal rendered nugatory. He swears that the 1st Respondent's means are unknown and points out that the decretal amount is substantial and the Applicant stands to suffer irreparable loss if the motion is not allowed.

4. The 1st Respondent opposes the motion by way of a replying affidavit. She views the motion as frivolous, vexatious, bad in law and a scheme to derail the execution of a lawfully obtained decree after 20 years of litigation. That the appeal does not raise any arguable issues and lacks merit as the first appellate considered all relevant and legal principles. She contends that the allegation that she is not a person of means is misconceived and unsubstantiated and that the Applicant has not proved how it will suffer irreparable loss that cannot be compensated by an award of damages.

5. She further deposes that there was inordinate delay serving the memorandum of appeal and points out that the cause of action arose in 2002. She deposes the instant motion will further delay her enjoyment of the fruits of successful litigation. That it will be unjust and a miscarriage of justice to allow the motion in the circumstances.

6. Through a further affidavit sworn by Kangogo M. Kipkechem, counsel for the Applicant, it was asserted that the Court of Appeal had since issued directions on disposal of COACA E773 of 2022 as such the intended appeal will be rendered nugatory and an academic exercise if the judgment delivered by this court is not stayed pending hearing and determination of the foregoing appeal.

7. The motion was canvassed by way of written submissions. As regards the applicable principles for grant of stay pending appeal, counsel for the Applicant anchored his submissions on the provisions of Order 42 Rule 6 of the Civil Procedure Rules. Submitting on arguability of the appeal counsel contended that the appeal herein raises arguable grounds in law, and that the Applicant ought to be accorded an opportunity to ventilate the same.

8. Submitting on substantial loss counsel called to aid the decision in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR to argue that the Applicant had already deposited the entire decretal amount in a joint interest account between the advocates and further issued a bank guarantee for the balance thereof. He reiterated the Applicant's apprehension that if the decretal sum is paid to the 1st Respondent there is a likelihood that the Applicant will not recover the said sums if the appeal were successful. Occasioning loss to the Applicant and rendering the appeal nugatory.

9. Counsel asserted that the substantive appeal has been filed and directions already been issued by the Court of Appeal, hence the Applicant moved timeously and without unreasonable delay. In conclusion, it was submitted that the Applicant availed security during the first appeal by way of deposit in a joint interest and bank guarantee on the balance which is sufficient security for the due performance of the decree upon determination of the second appeal. The court was urged to allow the motion as prayed.

10. On behalf of the 1st Respondent, counsel called to aid the decision in *Karatina Municipal Council & Another v Kanyi Karoki* [2015] eKLR to assert that the first appellate court considered all relevant factors and legal principles thereby arriving at a sound decision. As such the appeal as presented in the grounds is unlikely to succeed, as it does not raise any arguable issues of law. Concerning substantial loss, counsel cited *Michael Ntouthi Mitheu v Abaraham Kivondo Musau* [2021] eKLR, to contend that the Applicant has not discharged its burden of proof that the 1st Respondent is not in a position

to refund the decretal sum. Hence the Applicant has failed to demonstrate the element of substantial loss to the required threshold.

11. Counsel asserted there has been unreasonable and inordinate delay in filing the instant motion as the impugned judgment was delivered on 26.05.2022 and the motion filed on 13.12.2022, approximately six months later. That the Applicant served its memorandum of appeal upon the 1st Respondent out of time and has further compounded the delay by failing to comply with the directions of the Court of Appeal on disposal of its appeal. Counsel went on to reiterate that the cause of action herein arose in 2002 and therefore it is in the interest of justice that the 1st Respondent be allowed to enjoy the fruits of her judgment.

12. Counsel submitted that the motion lacks merit and the 1st Respondent is entitled to the entire decretal sum. In the alternative the court was urged to release half of the decretal sum to the 1st Respondent to ensure proportionality given the age of the litigation. In conclusion, the court was urged to dismiss the motion with costs to the 1st Respondent.

13. The 2nd and 3rd Respondents have never participated in proceedings before the lower court or the superior court.

14. The court has considered the material canvassed in respect of the motion. At this interlocutory stage, the court is not concerned with the merits of the appeal. That said, the power of the court to grant stay of execution of a decree pending appeal is discretionary, however the discretion should be exercised judicially. See *Butt v Rent Restriction Tribunal* [1982] KLR 417. The Applicant's prayer for stay of execution pending appeal, is brought pursuant to Order 42 Rule 6 of the Civil Procedure Rules which provides 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".

15. The cornerstone consideration in a motion to stay execution is whether the applicant has demonstrated the likelihood of suffering substantial loss if stay is denied. One of the most enduring legal authorities on the issue of substantial loss is the case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the Shell Case are especially pertinent. These are 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 my humble view sets 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... (emphasis added)"

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." (Emphasis added)

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. The Applicant's appeal to the Court of Appeal is a second appeal. The Applicant has expressed apprehension that since execution has commenced, it is likely to suffer what is described as irreparable loss and the appeal rendered nugatory as the 1st Respondent's means to refund any sums paid to her

are unknown. The 1st Respondent for her part has challenged the position by arguing that the latter allegation is unsubstantiated, the Applicant having failed to demonstrate that the 1st Respondent is not in a position to refund the decretal sum.

20. In the oft-cited case of National Industrial Credit Bank Ltd the Court of Appeal stated that:

> " This court has said before and it would bear repeating that while the legal duty is on an Applicants 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 Applicants 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 – see for example Section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya."

21. Thus, the Applicant having demonstrated a reasonable apprehension concerning the 1st Respondent's financial ability to reimburse any decretal sum paid out should the second appeal succeed, the burden shifted on the 1st Respondent to controvert the assertion by proving her own means. She has not tendered evidence of her means but rather contended that the burden was on the Applicant to show that she is not in a position to refund the decretal sum. Her approach appears contrary to the settled position reflected in National Industrial Credit Bank Ltd (supra).

22. The decretal sum is Kshs. 4,239,233/- which is in no way a small amount. The record shows that as condition for stay pending hearing and determination of this appeal Nairobi HCCA 430 of 2019, the Applicant deposited half of the decretal sum in a joint interest account in the name of both advocates and secured the balance through a bank guarantee deposited before this court. The 1st Respondent had moved this court vide a motion dated 26.09.2022 seeking the release of the deposited sum and realization of the bank guarantee.

23. In the absence of evidence of the 1st Respondent's means, it seems likely that the Applicant may suffer substantial loss and its appeal if it were successful thereby rendered nugatory, if stay is not granted. As stated in the Shell case, substantial loss in its various forms, is the cornerstone of the court's jurisdiction for granting stay, and what has to be prevented. The court while not oblivious to the lengthy litigation in this matter is assured by the fact that directions have already issued in respect of the appeal in the Court of Appeal, an indication that the second appeal could well be disposed of expeditiously.

24. The court is obligated to balance the rights of both the parties to an application of this nature. The words of the court in *Nduhiu Gitahi & Another v Anna Wambui Warugongo* [1988] 2 KAR, citing the decision of *Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited* [1984] 3 ALLER 198 and others, are apt:

> " We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff.....
>
> It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal....."

25. While the Applicant's delay in lodging this motion appears borderline inordinate and is unexplained, the 1st Respondent can be adequately compensated by an award of costs. Apaloo, J.A. (as he then was) famously stated in *Phillip Kiptoo Chemwolo and & Anor. v Augustine Kubede* (1986) eKLR:-

> "I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of parties and not for the purpose of imposing discipline...."

26. In view of all the foregoing, the court finds that the Applicant's motion is merited and is granted, subject to the same conditions attached to the stay order granted pending determination of the first appeal. In light of the Applicant's delay in moving this Court, the costs of the motion are hereby awarded to the 1st Respondent in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 28TH DAY OF JULY 2023.

C.MEOLI

JUDGE

In the presence of

For the Applicant: Mr. Kangogo

For the 1st Respondent: N/A

C/A: Carol