Unik Driving School v Taib (Miscellaneous Civil Application 245 of 2021) [2023] KEHC 21943 (KLR) (24 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21943 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION 245 OF 2021

OA SEWE, J

AUGUST 24, 2023

BETWEEN

UNIK DRIVING SCHOOL ..... APPLICANT

AND

ABDALLA ALI TAIB ..... RESPONDENT

RULING

1. Before the Court for determination is the Notice of Motion application dated June 15, 2022. It was filed herein by the applicant pursuant to the provisions of Section 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya; and Order 42 Rule 6 of the *Civil Procedure Rules*. It seeks orders that:

   (a) Spent

   (b) There be a stay of execution of the respondent's costs herein pending the hearing and determination of this application *inter partes* (spent);

   (c) There be a stay of execution of the costs herein pending the determination of a Reference by the applicant against the ruling delivered herein on December 5, 2021 by the subordinate court; and;

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

2. The application was premised on the grounds that the Reference has good prospects of success; and that the 30 days' stay granted by the subordinate court on November 5, 2021 had since lapsed. The applicant further contended that the ends of justice would be defeated in the event the respondent proceeded to execute for his costs before the hearing and determination of the reference. It was apprehensive that the sums paid over to the respondent would be irrecoverable, thereby rendering the

Reference nugatory. The applicant further indicated that it was prepared to give appropriate security; and therefore that no prejudice would be suffered by the respondent.

3. The application was supported by the affidavit of Cynthia Mutune, Advocate, sworn on June 15, 2022, in which she averred that the subordinate court rendered its ruling on November 5, 2021 in respect of the respondent's Party and Party Bill of Costs dated August 17, 2020; and that, being aggrieved by the said ruling, the applicant instructed the firm of M/s A.B. Patel & Patel Advocates to file a Reference against the whole of that decision. She further averred that the applicant had obtained an order of stay of execution for 30 days which had since expired; and that unless the orders sought are granted, the Reference shall be rendered nugatory. Accordingly, she prayed that the application be allowed and the orders sought by the applicant granted, pending the hearing and determination of the Reference.

4. The application was opposed by Mr. Taib, counsel for the applicant. He relied on the Grounds of Opposition dated August 11, 2022, contending that:

   (a) the application is misconceived and bad in law;

   (b) The applicant has not shown what prejudice it will suffer if the order of stay is not granted;

   (c) The applicant has not undertaken to deposit security for due performance of such orders as may ultimately be binding upon themselves; and

   (d) The applicant has not established an arguable appeal.

5. The application was urged by way of written submissions, pursuant to the directions of the Court given herein on December 15, 2022. Accordingly, the applicant's written submissions were filed herein on October 12, 2022 in which counsel, Ms. Mutune, urged the Court to consider the twin overriding principles of proportionality and equality of arms, which are aimed at placing the parties on equal footing to ensure that any transitional motions before the Court do not render nugatory the ultimate end of justice. She relied on *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR in support of her argument.

6. Counsel further urged the Court to find that the averments of the applicant are unrebutted, for the reason that the respondent opted to rely on Grounds of Opposition instead of filing a Replying Affidavit. Thus, Ms. Mutune submitted that the applicant had demonstrated that it would suffer substantial loss unless stay is granted, given that the applicant had failed to disclose his source of income and ability to make a refund in the event of a successful appeal. Counsel further pointed out that the application was filed timeously and that the applicant is willing and prepared to offer appropriate security.

7. On his part, Mr. Taib submitted that the applicant had failed to demonstrate the conditions for stay of execution as provided for in Order 42 Rule 6 of the *Civil Procedure Rules*. He relied on *H G E v S M* [2020] eKLR and *Victory Construction v B M (a minor suing through next friend one P M M)* [2019] eKLR in urging the Court to balance the competing interests of the parties in the interest of justice. Thus, in conclusion, Mr. Taib proposed that, should the Court opt to allow the application, the taxed costs be deposited in an escrow interest earning account pending the hearing and determination of the Reference.

8. Having considered the application, the averments set out in the Supporting Affidavit as well as the Grounds of Opposition raised by the respondent in opposition to the application, including the written submissions filed herein by learned counsel, the only issue arising for determination is whether

the defendant has made out a good case for the grant of the order of stay of execution from the standpoint of Order 42 Rule 6 of the Civil Procedure Rules. That provision states thus:

> (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.
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> (2) No order for stay of execution shall be made under subrule (1) unless—
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> (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
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> (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.

9. Accordingly, for a party to succeed in an application for stay of execution, Order 42 Rule 6 (2) of the Civil Procedure Rules requires such party to fulfill three conditions namely:

(a) that substantial loss may result to the applicant unless the order is made;

(b) that the application has been made without unreasonable delay, and

(c) that such security as the court orders for the due performance of such decree.

(See James Wangalwa & Another v Agnes Naliaka Cheseto, supra)

10. It is also trite that the power of the court to grant or refuse an application for stay of execution is discretionary, and that the discretion should be exercised in such a way as not to entirely stifle an appeal. The Court of Appeal in the case of *Butt v Rent Restriction Tribunal* [1979] eKLR made this point thus:

> " ...It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:
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> "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 nugatory."

11. Hence in *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR the Court of Appeal held: -

> " Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a 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."

12. Similarly, in *Machira t/a Machira & Co Advocates v East African Standard* (*supra*) it was stated that: -

> " ...In this regard, this process means that in order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavit or on some other proper evidential material, that substantial loss may result to him out of all proportions in relation to the interests of justice and fairness, unless suspension or stay is ordered and the parties' positions so regulated and ordered that injustice is averted.
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> In attempting to convince a court that substantial loss is likely to be suffered so that whatever he intends to achieve by his intended recourse to some other authority will be nugatory if ultimately he prevails, the applicant is under a duty to do more than merely repeating to the court words of the relevant statutory rule or general words used in some judgment or ruling of a court in a decided case cited as a judicial precedent to guide. It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do.
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> If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant's business (eg appeal or intended appeal)..."

13. With the foregoing in mind, I have looked at the applicant's Reference and the Supporting Affidavit filed therewith. It cannot be said that the appeal is frivolous because it does raise triable issues fit for canvassing by way of appeal. I note too that there is no rebuttal of the facts as presented by the applicant; including the assertion that both the Reference and the instant application were timeously filed. That being the case, and balancing the interests of the parties, I am satisfied that sufficient cause has been shown by the applicant to warrant the issuance of the orders prayed for. In this regard, I am persuaded by the position taken by Hon. Warsame, J. (as he then was) in *Samvir Trustee Limited v Guardian Bank Limited* (*supra*) that:

> " ...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 judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant... 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..."

14. In terms of security, in the case of Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd [2019] eKLR it was pointed out 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 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 degree in order to enjoy the fruits of his judgment in case the appeal fails.
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> 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 judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal..."

15. Moreover, in the case of *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others* [2015] eKLR it was held:

> "...First of all, 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..."

16. Thus, at paragraph (e) of the Notice of Motion dated June 15, 2022, the applicant indicated its willingness to give appropriate security for the due performance of the orders that may ultimately be binding on it in the event of a successful Reference. Similarly, counsel for the respondent, at page 5 of his written submissions, was agreeable to the taxed costs being deposited in an interest earning account pending the Reference, should the Court be inclined to grant stay of execution.

17. In the light of the foregoing, it is my finding that the defendant has made out a good case for stay of execution and proved all the elements provided for under Order 42 Rule 6(2) of the *Civil Procedure Rules*. Accordingly, the Notice of Motion dated June 15, 2022 is hereby allowed and orders granted as hereunder:

    (a) That stay of execution of the costs be and is hereby granted pending the hearing and determination of the Reference filed by the applicant against the ruling delivered on December 5, 2021 by the subordinate court;

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

It is so ordered.

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

OLGA SEWE

JUDGE