Ndung'u & another v Ngure (Civil Appeal 418 of 2018)
[2023] KEHC 21745 (KLR) (Civ) (10 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21745 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 418 OF 2018

CW MEOLI, J

AUGUST 10, 2023

BETWEEN

BERNARD MWANGI NDUNG'U ..... 1ST APPELLANT

HELLEN WAMBUI MUCHEMI ..... 2ND APPELLANT

AND

RODRICK KARANJA NGURE ..... RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion dated September 30, 2022 brought by Bernard Mwangi Ndung'u and Hellen Wambui Muchemi (hereafter the Applicants) supported by the grounds set out on its body and the facts stated in the affidavit of the 1st Applicant. Seeking an order to stay execution of the judgment delivered by this court on April 14, 2022 pending the hearing and determination of an intended appeal against the said judgment, to the Court of Appeal.

2. In his supporting affidavit, the 1st Applicant stated that on the aforesaid date, the court allowed the appeal but awarded costs thereof to Rodrick Karanja Ngure (hereafter the Respondent) and aggrieved thereby the Applicants are desirous of pursuing the appeal in the Court of Appeal, having filed the Notice of Appeal dated April 28, 2022 and that the intended appeal has arguable chances of success. That unless the order for stay sought is granted, the Applicants stand to suffer substantial loss because the Respondent had already filed a party and party Bill of Costs seeking to recover the costs awarded and which Bill is scheduled to come up for taxation.

3. Moreover that, the Respondent's financial means are unknown and hence if the Applicants are compelled to settle the costs, and the appeal succeeds, the monies paid out may not be recovered from the Respondent, thereby rendering the appeal nugatory. It was averred that the Applicants who had earlier provided security for due performance of the decree issued of the trial court in Milimani CMCC

No 486 of 2017 are ready and willing to abide any conditions imposed by the court as a condition for granting stay of execution.

4. The Respondent resisted the motion through the replying affidavit sworn by his advocate, Kennedy Ochieng' stating that the Motion is premature since no execution proceedings have commenced. The advocate further stated that the Motion is an afterthought intended to curtail the taxation proceedings and that the intended appeal lacks merit. It was averred that the taxation proceedings should be allowed to proceed and thereafter, a stay of execution may be granted if necessary. In the alternative, it was averred that should the court be inclined to grant a stay, then court should impose a condition requiring the Applicants ought to deposit the sum of Kshs 259,645/- being estimated costs awardable on appeal, into an interest earning account.

5. When the parties attended court for hearing, the court directed the parties to file and exchange written submissions on the Motion. Submitting in support of the Motion, the Applicant's counsel anchored his submissions on the decision in *West Kenya Sugar Co. Ltd v Matayo Ingoshe* [2022] eKLR on the principles for consideration in applications of this nature. Counsel submitted that the Motion was timeously filed and that unless a stay is granted, the Applicants are likely to suffer substantial loss citing the decision in *Charles N. Ngugi v ASL Credit Limited* [2022] eKLR in that regard. It was contended that the Applicants have an arguable appeal before the Court of Appeal on the issue of costs and cited inter alia, the case of *NIC Bank Limited & 2 others v Mombasa Water Products Limited* [2021] eKLR as to what constitutes an arguable appeal.

6. Regarding the question of security for costs, counsel contended that the same had already been provided at the onset of the appeal, with the Applicants depositing the decretal sum of Kshs 675,000/- in a joint interest earning account and which sum has been accruing interest that could cater for any costs awarded on appeal.

7. On behalf of the Respondent, it was contended that the Applicants have not satisfied the conditions for grant of a stay of execution because of unreasonable delay in the filing of the Motion; that the Applicants have not demonstrated the manner in which they stand to suffer substantial loss. Citing *Michael Ntouthi Mitheu v Abraham Kivondo Musa*u [2021] eKLR. Counsel is of the view that there is no arguable appeal demonstrated, the court having correctly exercised its discretion by awarding costs of the appeal to the Respondent. He cited the decisions rendered in *Farah Awad Gullet v CMC Motors Group Limited* [2018] eKLR and *DGM v EWG* [2021] eKLR.

8. It was asserted further that the Applicants have not demonstrated willingness to provide security for the due performance of the order on costs and that the sums deposited in a joint interest earning account are in respect to the decretal sum and not the costs awarded on appeal. The court was therefore urged to dismiss the Motion with costs, but that should it be inclined to grant a stay, then the Applicants shouldbe ordered to provide security for costs.

9. The court has considered the grounds supporting the Motion, the rival affidavit material, submissions and authorities cited. It is appropriate to state here that the question whether or not there is an arguable appeal is the preserve of the Court of Appeal and cannot therefore be raised before this court.

10. That said, it is trite law that the courts have discretionary power to grant an order for a stay of execution of a decree or order pending appeal and which discretion ought to be exercised judicially. See Butt v Rent Restriction Tribunal (*supra*). The applicable provision surrounding a stay of execution is Order 42, Rule 6 of the CPR which stipulates 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".

11. Concerning the condition on whether the application has been brought without unreasonable delay, it is apparent that the judgment which triggered the instant Motion was delivered on April 14, 2022 whereas the instant Motion was brought close to five (5) months thereafter sometime on or about September 30, 2022. While it is apparent that there has been a prolonged delay, the court does not find it to be inordinate or unreasonable.

12. On the second condition, the relevance of substantial loss in any application for a stay of execution was aptly addressed by the Court of Appeal case in the renowned case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410 when it held that:

> " Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented..."

13. The Court proceeded to state as the follows on the matter of substantial loss:

> " 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."

14. The decision of Platt Ag JA (as he then was) , in the Shell case, in my humble view set 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."

15. 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."

16. 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."

17. The court has considered the averments by the Applicants how they stand to suffer substantial loss, alongside the resisting arguments by the Respondent. Ordinarily, a successful party is entitled to the fruits of his or her judgment (or order). It is also apparent from the record that the taxation proceedings arising out of the judgment on appeal have commenced in earnest.

18. The question of the party bearing the burden of proof of means to refund the decretal sum, was settled in the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR thus:

> "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..."

19. The Applicants having expressed their apprehension regarding the Respondent's means to refund monies paid in satisfaction of costs, the burden shifted to the latter party to demonstrate his

means. Here, the Respondent did not pick up the gauntlet and the court finds that the Applicants have reasonably demonstrated the likelihood of suffering substantial loss , rendering their appeal if successful.

20. On the provision of security for the due performance of the decree or order, it is not in dispute that the Applicants had provided security for the due performance of the decree by depositing the decretal sum in a joint interest earning account in the joint names of the parties' advocates. There is no way of ascertaining whether accruing interest thereon would be sufficient to satisfy the costs awarded on appeal. Hence the court is of the view that it would be in the interest of justice to order the Applicants to provide security for costs separately. The court is obligated to balance the rights of both the parties to an application of this nature.

21. 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 relevant here:

> " 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....."

22. In the result, the motion dated September 30, 2022 is hereby allowed on condition that the Applicants shall deposit into court the sum of Kes 200,000/- (Two Hundred Thousand) by COB on September 9, 2023. Costs will be in the cause.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 10TH DAY OF AUGUST 2023.

C.MEOLI

JUDGE

In the presence of

For the Applicant: Mr. Olala

For the Respondent: Mr. Ochieng

C/A: Emily