Kimaile v Muthama & another (Suing as the Sister and personal representative of Estate of John Mutuku Mule (Deceased) & 2 others (Civil Appeal 127 of 2023) [2023] KEHC 23146 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23146 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 127 OF 2023

MW MUIGAI, J

SEPTEMBER 28, 2023

BETWEEN

BENJAMIN MUISYO KIMAILE ..... APPLICANT

AND

EVERLYNE NDUNGWA MUTHAMA & SAMMY MUTUNGA MULE (SUING AS THE SISTER AND PERSONAL REPRESENTATIVE OF ESTATE OF JOHN MUTUKU MULE (DECEASED) ..... 1ST RESPONDENT

MAKINDU MOTORS LTD ..... 2ND RESPONDENT

PETER MULEI T/A MULLEY'S SUPERMARKET LTD ..... 3RD RESPONDENT

RULING

Notice of Motion

1. Vide a Notice of Motion under a Certificate of Urgency dated 6th June,2023 and filed in court on 12th June,2023 brought under sections 3A, 79G and 95 of the *Civil Procedure Act*, Cap 21, Orders 22 Rule 22, 42 Rule 6, 50 Rule 6 and 51 Rules 1 and 3 of the *Civil Procedure Rules, 2010*, wherein, the Applicant sought Orders That:

    1. Spent

    2. Spent

    3. This Hon Court to stay the execution of the judgement/Decree delivered on 25th May, 2023 by Hon M. Opanga (PM) sitting at Kangundo in Civil Suit No 25 of 2019 pending hearing and determination of the Appellant's Appeal filed at the High Court of Kenya at Machakos.

4. This Hon Court allow the Applicant to furnish the court with security in the form of a Bank Guarantee from a reputable Bank pending the full hearing and determination of this Appeal.

5. The Application be heard inter partes on such date and time as this Hon. Court may direct.

6. Costs of this Application to abide the outcome of the Appeal.

2. Grounds upon which the Application is premised are on the face of the Application herein

Supporting Affidavit

3. The said application is supported by an affidavit dated 6th June,2023 sworn by Benjamin Muisyo Kimaile, the Applicant herein wherein, he deposed that on 25th May,2023 the Honorable Court entered judgment against him and held a 100% liable. The Plaintiff was awarded pain and suffering: the deceased died on the same day and the court awarded 30,000; loss of dependency at 130,000 and loss of expectation of life Kshs 5,211,250/= and special damages of Kshs 21,250/= plus costs and interest at court rates.

4. He deposed that being dissatisfied with the judgement on liability their Insurance Instructed M/S Kimondo Gachoka & Co. Advocates to Appeal against the said judgment. (annexed and marked copy of Memorandum of Appeal).

5. He deponed that he is informed by their Advocate on record that the intended is merited, arguable and raises pertinent points of law with overwhelming chance of success; further that they are apprehensive that the Respondent may proceed and levy execution against them should 30 days' stay granted by trial court lapse (annexed and marked copy of a threatening execution and Decree).

6. Lamenting that unless stay of execution is granted and the Respondent will execute the said judgement rendering their appeal nugatory and will suffer irreparable loss and damage; and further that this application is made in good faith and will not occasion any prejudice to the Respondents

7. He deponed that their Insurance is ready, willing and able to furnish the Court with a bank Guarantee as security to the court. (annexed and marked copy of the bank guarantee from family bank); further that they stand to suffer great prejudice and irreparable substantial loss as there is likelihood that they will not recover the decretal if it is paid over to the respondent, before the determination of the appeal.

Grounds of Opposition

8. The Application is opposed by the grounds of opposition dated and filed in Court on 22 June,2023 on the grounds that:

    1. The Appellants Application is;

        a. Frivolous, incompetent and vexatious.

        b. Bad in law.

        c. Incurably defective.

        d. An abuse of the court process.

        e. An afterthought and brought in bad faith.

        f. Brought after inordinate delay.

    2. The Appellant has not given any good reason as to why the Application should be allowed.

3. The Appellant has not offered any meaningful security for costs as required in law and should be ordered to release to the 1st Respondent half of the decretal sum amounting to Kshs 1,309,812.50/= and deposit the balance of Kshs 1,309,812.50/= in a joint interest earning account within (14) fourteen days from the date of the ruling of this Application to demonstrate his seriousness as is normal practice in the courts so that the interest of both parties is protected.

4. The Respondent objects to the bank guarantee security being proposed by the Appellant as it only protects the interests of the Appellant and not hers.

5. The Respondent is a person of means and is a business lady and can refund the same in the event the appeal herein is successful.

6. The application is bad in law, incompetent and misconceived.

9. The matter was disposed by way of written submissions.

Submissions

Applicant's Written Submissions.

10. The Applicant in his submissions dated 7th July,2023, wherein, counsel for the Appellant submitted on the following issues sequentially:

11. On arguable Appeal, counsel submitted that the Memorandum of Appeal annexed to the present Application sets precisely the grounds upon which the Applicant intend to appeal the decision of the lower court. averring that the Memorandum of Appeal herein is arguable and raises serious points of law and fact that warrant this Honorable Court's intervention on Appeal.

12. It was contended by the counsel for the Applicant that in applications for stay pending appeal in the subordinate courts it is not a requirement to shoe that the Appeal has high chances of success the Applicant only needs to show arguable appeal. To buttress this position, reliance was placed on the case of *Bake 'N' Bite (Nrb) Limited v Daniel Mutisya Mwalonzi* [2015] eKLR.

13. It was submitted that the conditions upon which the Applicant must satisfy in order to be granted the Orders of stay of execution pending appeal are stated under Order 42 Rule 6 (2) of the *CPR* which provides as follows:

> " No order for stay of execution shall be made under sub rule (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."

14. Further reliance was placed on Order 22 Rule 22 (1) of *CPR* which states that:

> 22. (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first

instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

15. Similarly, counsel place credence on the case of *Tabro Transporters Ltd v Absalom Dova Lumbasi* [2012] eKLR, Gikonyo J. ruled as follows:

> "Sufficient cause is established when the Applicant proves the following conditions on a balance of probabilities that:
>
> a. Substantial loss may result to the Applicant unless the order is made.
>
> b. The application has been made without unreasonable delay; and
>
> c. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

These conditions are the essence of Order 42 Rule 6 *CPR*. They however share inextricable bond such that, if one is absent, it will affect the exercise of the discretion of the court in granting stay of execution. The Court of Appeal in *Mukuma v Abuoga* (1988) KLR 645 reinforced this position. Each of the condition is examined below to see whether the circumstances of this case neatly fits the scales."

16. As to substantial loss it was urged that the Respondent has not disclosed his financial status and thus his means are unknown and it is highly unlikely that the Respondent will be capable of refunding the decretal amount in the event that the Applicant's appeal succeeds since the Respondent has not disclosed nor furnished the court with any documentary evidence to prove his financial standing.

17. It was averred that Applicant herein is the only one who can specifically show that he has means to repay the decretal amount if the court if the court allows the filing of the Memorandum of Appeal and the said appeal succeeds. To buttress this position, reliance was made on the cases of *Edward Kamau & another v Hannah Mukui Gichuki & another* [2015] eKLR and *Tabro Transporters Ltd v Absalom Dova Lumbasi* [2012] eKLR, and submitted that this a substantial sum and in the event that the Respondent is unable to repay the decretal sum, the appeal will be rendered nugatory and the applicant exposed to irreparable damage. Contending that this is a suitable case where this court should exercise its discretion and order stay of execution.

18. On the issue of no delay in filing application, counsel opined that there has been no inordinate delay on the part on the part of the Applicant in appealing the matter. Reliance was made in the Supporting Affidavit sworn by Benjamin Muisyo Kimaile.

19. On security, it was submitted by counsel that the Applicant's insurer is ready and willing to provide a Bank Guarantee as Security for stay of execution pending Appeal as stated in the Supporting Affidavit at Paragraph 10. To cement this position counsel placed reliance on the case of *Empower Installations Limited v Eswari Electricals (pvt) Limited interested Party Kenya Electric Genearating Co Ltd* [2016] eKLR, where parties were allowed to issue a Bank Guarantee from a reputable Bank as ordered by the court through its ruling with 30 days from the date of the ruling herein.

20. It was contended that the Applicant having satisfied the conditions set out in Order 42 Rule 6 prayed that they be granted an order of stay of execution pending the hearing and determination of aforesaid Appeal.

The Respondents' Written Submissions

21. The Respondents in their written Submissions dated and filed in court on 12th July,2023, wherein counsel for the Respondents wished and relied on the grounds of opposition dated 22/6/2022 and

filed in court on 23/6/2022 wholly save to add that no good and convincing reasons has been given by the Appellant to warrant the granting of the orders sought.

22. It was submitted by counsel that the Appellant has not offered any security for costs as required by law and should the unlikely event this Application is allowed be ordered to release to the Respondent half of the decretal sum of Kshs 1,309,812.50/= and deposit the balance of Kshs 1,309,812.50/= in court account within (30) days from the date of ruling of this application to demonstrate his seriousness as the normal practice in the courts so that the interest of both parties is protected.

23. It was the counsel's contention that the Respondent objects the bank guarantee security being proposed by the appellant as both party's interests are not protected by it. The Respondent is a person of means and is a business lady and can refund the same in the event the appeal herein is successful.

24. It was the request of the Respondent that this Honorable Court dismiss the Applicant's application dated 6th June,2023 with costs to the respondent as it lacks merit.

Determination/analysis

25. I have considered the application, the supporting affidavit, the grounds of opposition and the submissions filed as well as the authorities relied upon.

26. The issue that commends itself for determination is whether the applicant has demonstrated that the orders of stay of execution pending appeal are merited

27. The guiding principles for grant of execution pending appeal are well established. These principles are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which is to the effect that:

> " 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."

28. Further to the forgoing, court in determining on whether to grant a stay or not is enjoined to have regard to the sufficient cause. The overriding objective espoused under Section 1A and 1B of the *Civil Procedure Rules* no longer limit the court. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under *Civil Procedure Act* or in the interpretation of any of its Provisions.

29. Section 1A(2) of the *Civil Procedure Act* provides that "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objectives are; "the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties."

30. In the case of *Vishram Ravji Halai v Thornton & Turpin* Civil Application No Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal observed thus:

> " whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the *Civil Procedure Rules* is fettered by

three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. According to section 1A (2) of the *Civil Procedure Act*:

> " the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective."

31. It is therefore worth noting that an Applicant for stay of execution of Decree or any consequential orders thereto pending Appeal must demonstrate/and or satisfy the conditions set out under Order 42 Rule 6(2), aforementioned 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 or order as may ultimately be binding on the applicant has been given.

32. As to what substantial loss is the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, observed that:

> " 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. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

33. In the instant case, the applicant submitted that the Respondent has not disclosed hi financial status and thus his means are unknown and it is highly unlikely that the Respondent will be capable of refunding the decretal sum amount in the event that the Applicant's Appeal succeeds since the Respondent has not disclosed nor furnished the court with any documentary evidence to prove his financial standing. The Respondent in rebuttal while placing her reliance on the Grounds of Opposition submitted that she is a person of mean means and is a business lady and can refund the decretal sum in the event the Appeal herein is successful.

34. Platt, Ag. JA (as he then was) in *Kenya Shell Limited v Kibiru* [1986] KLR 410, at page 416 expressed himself as follows:

> " 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 corner stone 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".

35. On the part of Gachuhi, Ag. JA (as he then was) at 417 held thus:

> " 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 judgement. 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."

36. Dealing with the contention that there was no evidence that the 1st Respondent would be able to refund the decretal sum if paidover to the Respondent,Hancox, JA (as he then was) in the above cited case when he expressed himself as follows:

> " I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age."

37. From the above case, the three Judges of Court of Appeal (as they then were) distilled the import of substantial loss noting that it is not sufficient to state the sum is a lot of money and the Applicant will suffer loss if the money is paid. The Applicant must establish what loss it would be. Therefore, an allegation that a decree holder is a person of unknown means does not rob the said decree holder from the enjoyment of the fruits of a judgement. The doctrine is and has been that courts are enjoined not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court.

38. It Suffices to say as was held in *Stephen Wanjohi v Central Glass Industries 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"

39. In this case, the Applicant's apprehension that the Respondent will not be able to refund the decretal sum of paid over to her and the appeal succeeds, is grounded on the fact that the Respondent's financial means is unknown. In my considered view, where the sum involved is a large amount the court may have regard that the payment of such a sum may hinder the Applicant's ability to pursue his appeal hence rendering the said appeal nugatory. In the instant case the amount involved is more than Kshs 1million. However, it has not been alleged that the Applicant that payment of the said sum may adversely affect the financial position of the Applicant or his insurers. Accordingly, it is my considered view that the Applicant will not suffer substantial loss in the event that the decretal sum is paid to the Respondent.

40. The next issue for consideration is the issue of security. It is true that under Order 42 rule 6 aforesaid, the applicant is required to offer security for the due performance of the decree and the Court is

entitled to take into account the fact that no such security has been offered in deciding an application thereunder.

41. I am in agreement with the position in *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others* [2015] eKLR, where it was held that:

> " ... 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."

42. Further, I also associate myself with the holding in *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR, where the court stated 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.
>
> 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 ... This 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." (emphasis mine)

43. The Court of Appeal in *Nduhiu Gitahi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100, expressed itself as follows:

> " The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the

> ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it."

44. In the instant case the Applicant is ready, willing and able to furnish the court with a bank guarantee as security. The bank guarantee given is by Family Bank. In my view I see no reason why the same should not be accepted as security bearing in mind that it is from a reputable bank.

45. Taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful plaintiff;

46. I grant a stay of execution of the decree herein on condition that the Applicant pay to the Respondent Kshs 800,000/- of the decretal sum within 90 days and give a banker's guarantee of the remaining balance of decretal amount together with costs and accruing interests from a reputable financial institution specific to this appeal for the whole duration of the appeal.

47. The said conditions to be met within 90 days from the date of this ruling and in default the application shall be deemed to have been dismissed with costs and the Respondent will be at liberty to execute.

48. Upon compliance of the above terms; Appeal is duly filed, LCF retrieved and Record of Appeal to be filed and served.

49. The costs of the application abide the outcome of the Appeal.

50. It is so ordered.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 28TH DAY OF SEPTEMBER, 2023 (PHYSICAL/VIRTUAL CONFERENCE).

M.W. MUIGAI

JUDGE

In The Presence/Absence of:

No Appearance - For the Applicant

No Appearance - For the Respondents

Geoffrey/Patrick - Court Assistant(S)