Monarch Insurance Company Limited v Musau (Civil Appeal E091 of 2023) [2023] KEHC 23054 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23054 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E091 OF 2023

MW MUIGAI, J

SEPTEMBER 28, 2023

BETWEEN

MONARCH INSURANCE COMPANY LIMITED ..... APPLICANT

AND

JOB KILONZO MUSAU ..... RESPONDENT

RULING

Pleadings

1. By a Notice of Motion dated and filed on 27th April,2023 brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya, and Order 22 Rule 22, Order 42 Rules 6 and 51 (1) of the Civil Procedure Rules, 2010 wherein the Applicants sought the following orders that:

    a. Spent

    b. Spent

    c. There be stay of execution of the decree emanating from the judgment in Kangundo CMCC No. E033 OF 2023- Job Kilonzo Musau vs Monarch Insurance Company Limited pending the hearing and determination of the appeal herein.

    d. Costs of this application be in the cause.

Supporting Affidavit

2. The application was supported by Supporting Affidavit dated 27th April, 2023 sworn by Enoch Kamau Muriuki, an Advocate who deposed that on 25th April,2023, the Chief Magistrate's Court issued order in relation to the Applicant's Notice of Motion application brought under certificate of urgency dated 25th April 2023 in relations to Kangundo CMCC No. E033 OF 2023- Job Kilinzo

Musau vs Monarch Insurance Company Limited wherein the court failed to issue stay of execution orders pending the hearing and determination of the application.

3. The Applicant deposed that he faces an imminent and real danger of execution by the Respondent to satisfy the decree emanating from the default judgement entered in relations to Kangundo CMCC No. E033 OF 2023- Job Kilonzo Musau vs Monarch Insurance Company Limited.

4. It was deposed that Appellant/Applicant filed a memorandum of appearance and statement of defense on 14th April 2023 and the same were received and stamped by the court after payment of the requisite fees and it was therefore deemed after the court registry accepted the above pleadings, that there was no default judgement. (attached and marked copies of memorandum of appearance and statement of defense filed on 14th April,2023.)

5. It was further deposed that the Appellant/Applicant was never served with a notice of entry of judgement and was only served with a proclamation of attachment and warrants of attachment dated 24th April,2023. (attached and marked copies of the proclamation documents and warrants of attachment dated 24th April,2023.)

6. It was deposed that the Applicant filed an application for stay of execution dated 25th April,2023 (attached and marked copy of the Notice of Application dated 25th April2023.)

7. It was further deposed that the trial court gave a date for inter-partes hearing of the Appellant's application on 10th May,2023 without granting stay of execution which proclamation seven (7) days' notice is set to lapse on 31st April,2023 when that attachment and sale would have taken place before 10th May,2023 and the inter-party hearing would be rendered moot and just an academic exercise.

8. It was deposed that the Applicant stands to suffer Substantial loss if the application herein is not allowed as the Respondent will proceed with the process of execution.

9. It was deposed that the Appellant has lodged an appeal in this Honorable Court as the orders of the Honorable Magistrate are not supported by evidence that was tendered in court by the Appellant/ Applicant and that the Appellant's appeal has high probability of success and it will be rendered nugatory if this application is not allowed

10. It was finally deposed that the Application is brought in good faith and without unreasonable delay.

Grounds of Opposition

11. The application was opposed vide a Grounds of Opposition dated and filed in court on 29th May,2023, wherein the Plaintiff/Respondent opposed the Application dated 27th April,2023 on grounds that:

    1. The Applicant's 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.

1. It was stated that the application herein is brought with unclean hands as it was only brought after proclamation was done.

2. It was further stated that the Appellant/Applicant has no Locus Standi as you cannot appeal a matter that is never defended.

3. The Respondent stated that the Appellant unprocedurally filed defence on 14/4/2023 which was ten (10) days after interlocutory judgement was entered on 3/4/2023.

4. It was stated that the sole purpose of this application as can be seen from the timing is to frustrate process of execution and to buy time.

5. The Respondent contended that all procedural requirements were followed in the extraction of the decree.

6. The Respondent further contended that the Applicant's failure to file defence on time clearly shows it has no defence at all to the Plaintiff's claim. It was stated that the Applicant has not given good reasons as to why the Application should be allowed.

7. It was further stated that service of summons to enter appearance was personally done upon the Defendants on 9/3/2023 and judgment in default of appearance entered procedurally.

8. It was opined that the law is very clear on the consequences after being served with summons to enter appearance and failing to enter appearance and defense and the law cannot bend to suit individuals.

9. It was stated that the Applicant's application lacked merit and is an abuse of the court's process.

10. The court was urged to dismiss the Applicant's application with costs.

11. The matter was canvassed by way of written submissions.

Submissions

Applicant's Submissions

12. The Applicant filed submissions dated 26th July 2023, where issues for determination were submitted on the following heading:

13. On the issue of whether stay of execution pending appeal should be granted, it was submitted that an application for stay of execution pending appeal can only be allowed if the Applicant satisfies the following conditions:

    a. substantial loss may result to the applicant unless the order is made.

    b. The application has been made without unreasonable delay.

    c. 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.

14. On the issue of whether substantial loss may result, reliance was made on the case of James Wangalwa & Another Vs Agnes Naliaka Cheseto [2012] eKLR, 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."

15. It was submitted that the Appellant/Applicant filed a memorandum of appearance and statement of defense on 14th April 2023 and the same were received and stamped by the court after payment of the requisite fees. It was therefore deemed that there was no default judgement by acceptance of the above pleadings and that the applicant was not served with notice of entry of judgement and was only served with a proclamation of attachment and warrants of attachment dated 24th April, 2023. The Applicant filed an application for stay of execution dated 25th April 2023 and the court failed to grant stay- and issued a date for inter-parte hearing of application on 10th May 2023, that the proclamation had a notice of 7 days and thus attachment and sale would have taken place before 10th may 2023, the inter-partes hearing would have rendered moot and just an academic exercise. Therefore, the execution will result in the applicant undergoing substantial loss.

16. It was submitted that the Appellant/Applicant was not given opportunity to defend itself in Kangundo CMCC No. E032 of 2023 and as such the Applicant's application dated 25th April 2023 should have been heard on merit without fear on the part of the Applicant that execution may ensue at any time due to lack of stay of execution orders.

17. It was submitted that unless the stay is granted the appeal herein will be rendered nugatory in so far as the Respondent cannot repay back decretal sum in case the same is released to him.

18. Reliance was placed on the case of Michael Ntouthi vs Abraham Kivondo Musau [2021] eKLR.

19. It was submitted that the Respondent has failed to demonstrate that he is engaged in any income generating activity and his means of income are unknown and presumably insufficient and may not be able to repay the Applicant the decretal sum together with costs just in case the same is paid to him. Reliance was placed in the case of G.N. Muema P/A (sic) Mt View Maternity & Nursing Home vs Miriam Bishar & Another [2018] eKLR, where the court considered the Respondent's ability to repay the decretal sum in case the appeal succeeded as there was no affidavit evidence by the Respondent on record on the means.

20. Similarly, reliance was placed on the case of Kenya alliance Insurance Co. Ltd Vs John Mutuku Musyimi (Nairobi HCCA No. 473 of 2004) to buttress the point on the Respondent's ability to repay the decretal sum in the event that the appeal succeeds.

21. It was submitted that proof of loss is enough reason by its own to warrant dismissal of the Applicant's Application.

22. On the issue of whether the appeal will be rendered nugatory, reliance was placed on the case of Kenya Shell Limited Vs Kibiru where PLATT, Ag JA (as he then was) held that failure to substantiate substantial loss by an applicant has an adverse effect of making an appeal not being rendered nugatory by other events.

23. It was therefore submitted that the Applicant has substantiated substantial loss and therefore the appeal will not be rendered nugatory thus this condition has been met by the Applicant.

24. On the issue of whether security has been furnished, reliance was placed on the case of Mwaura Karuga T/A Limit Enterprises Vs Kenya Bus Services Ltd & 4 Others [2015] eKLR. It was submitted that the Applicant is ready and willing to abide by any reasonable condition set forth by the Honorable court which includes depositing the entire decretal sum together with costs as security to court or in a joint interest earning account in the names of both advocates.

25. It was submitted that the applicant has demonstrated to this honorable court that it intends to pay the security adequately.

26. The Applicant prayed that the Applicant's Notice of Motion Application dated 27th April,2023 be allowed.

Respondent's Submissions

27. The Respondent filed his submissions dated 7th July,2023, where he stated that he wished to rely on the grounds of opposition dated 29th May,2023 and filed on the same day wholly, except that the Application herein was brought with unclean hands as it was only brought after proclamation was done.

28. It was further submitted that the Appellant/Applicant had no locus standi as one cannot Appeal a matter that was never defended, the Appellant unprocedurally filed defence on 14/4/2023 which was ten (10) days after interlocutory judgement was entered on 3/4/2023 and the said interlocutory judgment has never been set aside hence the appeal is improperly before Court.

29. It was submitted that the sole purpose of this application as can be seen from the timing is to frustrate process of execution and to buy time. All procedural requirements were followed in the extraction of the decree and the Applicant is bound in law to satisfy the claim herein.

30. It was stated that the Applicant's failure to file defence on time clearly shows it has no defence at all to the Respondent's claim and has not given good reasons as why the application should be allowed.

31. It was submitted that all legal procedural requirements were followed in entering the interlocutory judgement and this application is an abuse of the court process.

32. It was finally submitted that Appellant's Application dated April,2023 lacks merit and the court was urged to dismiss it with costs.

33. Reliance was placed on the cases of Nancy Musili Vs Joyce Mbete Katisi HCCA No. 189 OF 2011 Machakos and Anjeli Limited vs Kenga Simba & 12 Others and Chengo Omar & 19 Others ELC NO. 292 OF 2017- Mombasa.

Determination

34. 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.

35. Stay of Execution is provided by the proviso under Order 42 Rule 6 of the Civil Procedure Rules 2010 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."

36. The three conditions to be fulfilled can therefore be summarized as follows;

a. that substantial loss may result to the applicant unless the order is made

b. application has been made without unreasonable delay

c. security as the court orders for the due performance

37. 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.

Substantial Loss

38. On the issue of substantial loss, Ogolla, J gave stated as follows in Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation) [2004] 2 EA 331 that:

> " Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.'

39. In the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR the court expressed itself as hereunder:

> " 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."

40. The applicant contends that it filed an application for stay of execution dated 25th April 2023 and the court failed to grant the stay and issued a date for inter-parte hearing of the application on 1oth may 2023. The proclamation had a notice of seven days and thus attachment and sale would have taken place before 10th May 2023 and the inter-parte hearing would be rendered moot and academic exercise and the execution will result in the Applicant undergoing a substantial loss and the Respondent cannot repay back the decretal sum incase the same is released to him.

Arguable Appeal

41. The Applicant has submitted that it has a strong arguable appeal which has high chances of access that will be rendered nugatory if the orders sought are not granted. Further, that the Respondent will be unable to refund the decretal sum if the appeal is successful as the respondent has failed to demonstrate that he is engaged in any income generating activity, his means of income are unknown and presumably insufficient.

42. This was emphasized in Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63 it was held that:

> " To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of

procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

43. The Respondent in this case has not provided any evidence to show that he is capable of refunding the decretal sum. This was the position in the case of Stanley Karanja Wainaina & Another vs. Ridon Ayangu Mutubwa Nairobi H.C.C.A. 427/2015 where it was stated that:

> "...It is not enough for the Respondent to merely swear that fact in an affidavit without going further to provide evidence of his liquidity. In my view the Respondent has evidential burden to show that he has the resources since this is a matter that is purely within his knowledge.

Undue Delay

44. As to whether the Application has been filed without undue delay, judgment was entered on 03.04.2023 and this application was filed on 27.04.2023, less than a month later. The court finds that the Application has not been filed without undue delay.

Security

45. As regards deposit of security, the court observed in the case of Gianfranco Manenthi & Another vs 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."

46. The Applicant contended that it is willing and ready to abide by any reasonable condition set forth by the Honorable Court which includes depositing the entire decretal sum together with costs as to security to court or in a joint interest earning account in the names of both advocates.

47. This court is persuaded by the submissions of the Applicant that it has demonstrated that it has met the threshold for grant of stay of execution.

Disposition

48. 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 or a bank guarantee within 90 days of this Ruling.

    b. Costs will abide the Appeal.

RULING DELIVERED SIGNED DATED IN OPEN COURT IN MACHAKOS ON 28TH SEPT, 2023 (VIRTUAL/PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE

In the presence of:

Ms Kamau for Mumbi - for the Appellant/Applicant

No appearance - For the Respondent

Geoffrey/Applicant - Court Assistant(s)