



REPUBLIC OF KENYA



KENYA LAW

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Invesco Assurance Company Limited v Nzai & 57 others (Insolvency Cause 1 of 2018) [2023] KEHC 22653 (KLR) (26 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22653 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
INSOLVENCY CAUSE 1 OF 2018
SM GITHINJI, J
SEPTEMBER 26, 2023
IN THE MATTER OF INSOLVENCY ACT, NO. 18 OF 2015
AND
IN THE MATTER OF THE COMPANIES ACT**

BETWEEN

INVESCO ASSURANCE COMPANY LIMITED DEBTOR

AND

DAMA CHARO NZAI & 57 OTHERS CREDITOR

RULING

- 1 For determination is the debtor/applicant's Notice of Motion dated 30th May 2023 seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That an order for stay pending appeal be granted.
 - d. That the costs of the application be provided for.
- 2 The application is predicated upon the grounds set out on the face of the application and the sworn affidavit of Stephen Kinyanjui Kibunja, the Advocate having conduct of the matter on behalf of the Judgment Debtor who deposed that on 25/5/2023 this Court delivered a Ruling on an Application dated 27/6/2022 without notice of the court or by opposing counsel; that at no point has the judgment debtor been unwilling to pay any money as directed by the Court; however, the Advocate of the Judgment Creditors has frustrated any such efforts due to unwillingness on his part to comply with existing Court Orders issued by Honourable Lady Justice Njoki Mwangi on 14/7/2022 where she



- ordered, *inter alia* that the advocate for the Creditors to render true and just accounts of all the money received on behalf of the minor claimants and the deceased claims. That the Applicant intends to appeal the Ruling of the Court delivered on 25/5/2023 on Application dated 27/6/2022 and has so far filed a notice of appeal.
- 3 Mr. Kibunja further deposed that the intended appeal will be rendered nugatory if the execution of the Court Order that was extracted from the said Ruling dated 25/5/2023 is carried out.
 - 4 Opposing the application for stay pending appeal, the Creditors through their advocate filed a replying affidavit dated 7/7/2023 contending that the application is a non-starter as in a matter appealed to the court of Appeal, stay can only be issued by the Court of Appeal; that no notice of appeal has been filed in the court of Appeal as per the Court of Appeal Rules; that the Orders issued by Hon. Lady Justice Njoki Mwangi were set aside hence the Creditors are not required to comply with the said orders; that whether the ruling was delivered in the absence of the Applicant is a non-issue since their attendance or non-attendance would not have changed the outcome of the ruling which was initially slated for 3/4/23 but court did not sit; that the issues raised in current application are res-judicata having been dealt with earlier vide numerous applications by the Debtor; that the court found that the Debtor is unable to pay its debts and allowed the Petition for winding up the Debtor and that judgment has never been set aside, reviewed, stayed or appealed against. Mr. Kilonzo also deponed that this court lacks jurisdiction to determine the issues of investment order and letters of administration. That the issues ought to have been raised in the trial court that issued the decrees and that these are new issues raised after the matter has been concluded, which amounts to amending the defence and is res judicata.
 - 5 It is the Respondents' case that a stay cannot be issued in vacuum since there is no Appeal. That the instant application is a delaying tactic made to loop the Creditors in non-ending litigation process hence the application ought to be dismissed and order for stay vacated.
 - 6 The parties agreed to canvass the application by way of written submissions.
 - 7 It was submitted by counsel for the applicant that the subject matter of the Application dated 27th June 2022 by the Judgment Debtor is of substantial importance to this suit and the Judgment Debtor stands to suffer irreparable and substantial losses if the Ruling delivered on 25th May 2023 is allowed to stand.
 - 8 It is further submitted that the insolvency process is being used as a tool to extort money from the Judgment Debtor as the Decrees emanating from the Subordinate Courts are suspect and not enforceable; and at no point has the Judgment Debtor been unwilling to pay any money as directed by the Court but their efforts to pay has been frustrated by unwillingness on the part of the Advocate for the Judgment Creditors to comply with existing Court Orders issued on 14th July 2022 by Hon. Lady Justice Njoki Mwangi. That the said Orders have not been set aside or appealed.
 - 9 It was further submitted that Jurisdiction to handle this matter is clothed by Section 1A of the [Civil Procedure Act](#) where the overriding objective of the act is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act, under Section 1B, 3A and 63E of the [Civil Procedure Act](#), Order 22, rule 22, Order 42, rule 6 and Article 50(1) of the [Constitution](#) of Kenya 2010.
 - 10 The Applicant has also challenged Mr. Kilonzo replying affidavit sworn on 7th July 2023 that it should be struck out for stating that he has the conduct of the matter on behalf of the Creditors hence competent to swear the affidavit while he does not depose that he has been authorized to swear the affidavit. Counsel placed his reliance on the finding in the Supreme Court in Presidential Election Petition No. E003 of 2022 as consolidated with Nos. E001, E002, E003, E004, E007 & E008 of 2022. Applicant's further submitted that it is not clear if Mr. Kilonzo has an appointment as a guardian ad



- litem and if he has leave of the court. Mr. Kilonzo cannot receive property or monies belonging to the decree holder/minor petitioners. I have perused the entire court file and I find Mr. Kilonzo to have been in conduct of the matter since inception and all the matters raised herein are well known to him.
- 11 The Creditors through their Counsel submitted that the Applicant herein filed Application dated 27/6/22 seeking review of the judgment delivered on 25/5/2022 which application was dismissed with costs. That this Court does not have jurisdiction to hear an application for stay in a matter appealed to the court of Appeal.
- 12 It was submitted by the Counsel for the Creditors that there is no Appeal on record as the Debtor has not complied with Court of Appeal Rules, 2010; Rule 82 on Institution of appeals and that under Rule 83 and 84 of the Court's Rules, the instant application cannot be sustained. It was further submitted that this Court lacks jurisdiction to determine the issues of investment order and letters of administration since the issues ought to have been raised in the trial court that issued the decrees. This was also to be raised during the hearing of the Petition hence by raising new issues after the matter has been concluded amounts to amending the defence and is also *res judicata*. The instant insolvency Petition arose from the failure by the Debtor to settle the decrees and therefore these proceedings are a scheme to frustrate Debt collection.
- 13 Counsel further submitted that there is no existence of the orders made by Justice Njoki Mwangi since the same expired upon delivery of the ruling which was delivered on 25/5/23 which dismissed the application dated 27/6/23.
- 14 On the issue of Replying affidavit sworn by Mr. Kilonzo, Counsel submits that the allegation that the Creditor's Advocate ought not to have sworn the affidavit is unfounded for reason that the source of the information is disclosed *vide* the various annexures, and the facts deponed are not contentious as it is a known fact that the Debtor has been unable to pay its debts and the contents of the affidavit are on matters within the Advocate's knowledge and can be verified by the court file. This was supported by the case of Regina Waitbera Mwangi Gitau –Vs- Boniface Ntbenge 2015 eKLR among others that discuss the issue of Advocate swearing affidavits.
- 15 The Creditors submissions are that the Application as filed is in bad faith and that the Applicant has not met the principles guiding the grant of a stay of execution pending appeal.

Analysis and Determination

- 16 I have considered the Application for stay, grounds thereof, supporting affidavit and annexures. I have also considered the Replying Affidavit and submissions together with case law cited by both counsel.
- 17 The Application subject to this ruling is seeking order for stay of execution.
- 18 Before I delve into the merits of the application, I find it prudent to deal with the issues raised by the Applicant in his submissions namely; that Counsel for the Creditors has not complied with the Court Orders issued on 14th July 2022 by Hon. Justice Njoki Mwangi; and the Affidavit of Mr. Kilonzo being incompetent and defective.
- 19 On the first issue, the record is explicit that the Ruling issued on 25/5/2023 triggering the filing of the notice of appeal which the application under consideration is anchored, evidently the issues raised by the Debtor in his submissions are similar to the one in the application dated 27th June 2022 which this court dismissed on 25th May, 2023. It is my considered view that this court cannot hear and determine issues similar to the ones it had dealt with earlier. It is trite law that this court cannot sit on appeal of its own ruling for it already determined the issues in its ruling delivered on 25/5/2023.



20 On the issue of the Replying affidavit by Mr. Kilonzo, there is nothing barring an advocate from swearing an affidavit in appropriate cases where the matters deponed are purely within the Advocate's knowledge. The affidavit deals only with facts which are within the deponent's own knowledge. The applicant's advocate has also sworn the supporting affidavit dated 30/05/2023 as counsel in conduct of the matter on behalf of the applicant. I am of the view that the affidavits by both counsel do not contain contested facts. Furthermore, the Applicant had indicated its intention to cross examine Mr. Kilonzo on his affidavit and did not cross-examine him during hearing of application and cannot therefore purport cross-examine him through submissions.

21 Order 19 Rule 3 (1) of the *Civil Procedure Rules*, 2010 provides:

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

Further, Rule 9 of the *Advocates (Practice) Rules* states:

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear: Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”

22 In my view, nobody needs authority to depose to an affidavit if they have knowledge of the relevant facts and authority to institute proceedings was not challenged. There is no merit in that point and it was not pursued in argument.

23 Regarding the orders for stay of execution, it is trite law that as one appeals the decision of lower court to a higher one, they may need to seek for stay of execution of the order or decree of the lower court pending appeal. Application for such orders may be lodged either at the court where the appeal is emanating from or the higher court. The Applicant has lodged a notice of appeal in the Court of Appeal. The notice of Appeal does not automatically stay the execution of the judgment of the High Court.

24 The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6 (1) of *Civil Procedure Rules* as follows:

“No appeal or a second appeal shall operate as a stay of execution or proceedings 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”

Order 42 rule 6 (2) states:

“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.

25 An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), namely;

- a. Substantial loss.
- b. That the application has been made without unreasonable delay.
- 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.

26 The Applicant contends that it will suffer irreparable and substantial losses if the Ruling delivered on 25/5/2023 is allowed to stand.

27 As to what substantial loss is, it was observed in *James Wangalwa & Another v 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.”

28 There is no evidence of substantial loss in this case. Substantial loss in its various forms is the cornerstone of both jurisdiction for granting stay. Therefore without such evidence, it is difficult to see why the Creditors should be kept out of their long waited money.

29 The Ruling of the Court being appealed against was delivered on 25/5/2023. The instant application was filed on 30/5/2023. As such, the application was filed timeously.

30 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 where no such security has been offered in the application. I agree with the position in *Mwaura Karuga t/a Limit Enterprises vs. 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.”

31 The Applicant in this matter has not offered any security in the event that the appeal fails. The condition for provision of security has therefore not been met.

32 Lastly, on 31/5/2023 this court granted stay orders pending hearing and determination of the instant application. The stay orders subsists and no execution has taken place.

33 I wish to further observe that a stay can only be granted pending hearing and determination of an appeal. The applicant only attached a notice of appeal but there is no evidence of whether the same was filed. There is no court stamp nor receipt from the court. These allegations were raised in the replying affidavit and the applicant did not bother to respond to them, meaning they are admitted. Further, under Rule 115, 83 and 84 of the *Court of Appeal rules*, the applicant did not lodge an appeal within 60days. Essentially therefore, there is no pending appeal. Without a valid appeal, a stay of execution cannot issue.

34 The applicant was keen to belabour the ruling issued on 14/7/22 by Justice Njoki Mwangi on the application dated 27/6/2022. To my understanding, this was an interim exparte order. The purpose of which was to preserve a state of affairs. When I delivered the ruling of 25/5/2023 on the application dated 27/6/2022, the interim orders were spent by the dismissal of the application dated 27/6/2022, and accordingly the interim orders issued on 14/7/22 were spent. Essentially the orders of Justice Njoki Mwangi were vacated by the ruling of 25/5/2023. Given the foregoing finding, I am persuaded by the decision of Justice Muchemi in Civil Appeal 19 of 2020 *Charles Mwangi Gitidu –vs- Charles Wanjohi Wathuku* at paragraph 40; -

“Consequently, I find that this court lacks jurisdiction to entertain the applications dated 25th and 29th June 2021. Regarding the orders for stay granted in favour of the applicant and extended on 5/10/21, my view is that by their interim nature, they expire by the delivery of this ruling. As we stand there are no orders to be vacated as the stage in regard to this application dated 31/8/21”

35 Likewise, as it stands now, there are no orders that the respondent or her counsel are obliged to comply with.

36 Repeatedly referenced to by the applicant is that this court can interfere with the judgment of the trial magistrate without a valid appeal to that effect. Any review or setting aside of the judgment of the trial court where no appeal lies, belongs to the trial court. Before me was a bankruptcy petition and decrees of the trial court were exhibited. Investments of monies for minors and issue of letters of administration could only be raised before the trial court of the suits giving rise to the decrees. I well considered this in my ruling of 25/5/2023.

37 In the instant application, it is also stated that the Judgment Debtor is willing to pay the decretal sums. This cannot be the true position as the Applicant was ordered by Justice Korir on 21/2/2019 to pay the Petitioners Kshs.10,000,000/= within 60 days from the date of ruling which stands todate unpaid. Further, the Debtor was adjudged bankrupt by my judgment of 22/5/2022 and the money has not been paid. There is no demonstration of willingness to pay any monies or even work out a scheme of payment by the debtor.

38 In the end, I find that the Applicant has not satisfied the legal requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the *Civil Procedure Rules*. The grounds in support thereof as contained in supporting affidavit are not tailored to support the



application for stay of execution pending appeal and are *res judicata*. They offend the provisions of Section 6 of the [Civil Procedure Rules](#). The application dated 30th May, 2023 is therefore void of merit and the same is hereby dismissed with costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 26TH DAY OF SEPTEMBER, 2023.

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S.M. GITHINJI

JUDGE

IN THE PRESENCE OF; -

MR KILONZO FOR THE RESPONDENT

MR KIBUNJA FOR THE APPLICANTS

