Kingley Beverages Kenya Limited & 2 others v Omondi t/a Blackstreet Investments (Civil Appeal E203 of 2022) [2023] KEHC 27600 (KLR) (27 October 2023) (Ruling)

Neutral citation: [2023] KEHC 27600 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E203 OF 2022

F WANGARI, J

OCTOBER 27, 2023

BETWEEN

KINGLEY BEVERAGES KENYA LIMITED ..... 1ST APPELLANT

JOS DOS REIS ..... 2ND APPELLANT

ENOCK C ALOO ..... 3RD APPELLANT

AND

MICHAEL OKATCH OMONDI T/A BLACKSTREET INVESTMENTS ..... RESPONDENT

RULING

1. This ruling relates to an application dated 14th December, 2022 which sought for the following orders: -

   a. Spent;

   b. Spent;

   c. That pending the hearing and determination of this application, this Honourable Court be pleased to stay judgement entered herein on 19/10/2022 in Mombasa and any other order that may be issued pursuant thereto pending the hearing of the Appeal;

   d. That the Honourable Court be pleased to extend time for filing and service of Memorandum and deem the Memorandum of Appeal lodged on 6/12/2022 and served on the Respondent on 7/12/2022 as properly filed;

   e. That costs incidental to this application abides the result of the said appeal.

2. The Appellants in grounds in support of the application contended that they were dissatisfied with the judgement delivered on 19/10/2022 and that they have an arguable appeal with good prospects

of success. Further that the Respondent has issued a notice demanding payment in terms of the judgement of 19/10/2022 thus rendering the appeal nugatory if stay is not granted.

3. The application was opposed through a replying affidavit dated 2nd February, 2023 sworn by the Respondent. In opposing the application, the Respondent averred that the Appellants were aware of the judgement and they only moved the court upon his Counsel writing a letter to executing the judgement.

4. Further, he stated that no evidence was demonstrated to show that the Appellants made any efforts to appeal the judgement or seek stay of execution. It was also stated that the allegation that the change of advocates resulted to the appeal being filed out of time was not supported by the Appellants' actions.

5. Lastly, the Respondent averred that the requirements for grant of stay of execution as provided for under Order 42 Rule 6 (1) and (2) had been met thus the orders sought could not issue.

6. The application was canvassed by way of written submissions wherein both parties complied by filing detailed submissions and cited various authorities in support of their rival positions.

Analysis and Determination

7. I have considered the application, responses, submissions together with the authorities relied upon by the parties as well as the law and in my view, the following are the issues for determination: -

    a. Whether leave to appeal out of time is merited;

    b. Whether the Applicant has made out a case for the grant of stay of execution pending hearing and determination of the appeal;

    c. Who bears the costs of the application?

8. On the first issue, Section 79G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. Section 79G of the *Civil Procedure Act* provides as follows: -

    > Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
    >
    > Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

9. The proviso to the above section clearly confirms that an appeal can be filed out of time. However, this being a discretionary power, a party seeking to invoke the provision ought to give reasons as to why the appeal was not filed within time. Some of the considerations to factor before enlarging time or not were suggested by the Court of Appeal in Thuita Mwangi v Kenya Airways Limited [2003] eKLR. The include; -

    i. The period of delay;

    ii. Reason for the delay;

    iii. The arguability of the appeal;

    iv. The degree of prejudice which could be suffered by the Respondent if the extension is granted;

v. The importance of compliance with the time limits to the particular litigation or issue;

vi. The effect if any on the administration of justice or public interest if any is involved.

10. On the period of delay, the judgement subject of the appeal was delivered on 19th October, 2022. The memorandum of appeal was filed on 6th December, 2022. Thirty (30) days as mandated by section 79G above lapsed on or about 20th November, 2022 if one factors computation of time as per *Interpretation and General Provisions Act*. The appeal was thus filed about sixteen (16) days out of time.

11. On the reason for delay, it was submitted that there was change of advocates from the period judgement was delivered and when the memorandum of appeal was filed. Though there is no evidence of the alleged change, I have no hesitation to hold that sixteen (16) days delay is not inordinate. In the circumstances, I will not delve on the other grounds as I am satisfied and fortified by the provisions of section 79G above as well as Order 50 Rule 6 of the Civil Procedure Rules. I thus proceed to allow the enlargement or extension of time as sought by the Applicant.

12. On the second issue, the principles for granting stay of execution pending hearing of an appeal are settled. It is governed by Order 42, Rule 6 of the Civil Procedure Rules, 2010 which provides as follows: -

> "(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.
>
> (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

13. The power of a court to grant stay of execution is discretionary and just like any other discretionary power, the same must be exercised judiciously and not capriciously or whimsically. It must be recalled that the purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of each of the parties to the dispute.

14. In RRW v EKW [2019] eKLR, the Court of Appeal addressed itself on this issue as hereunder: -

> " ...The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent..."

15. Having settled on the principles, an interrogation of whether the Applicants have met the tests above is imperative. On substantial loss, the Applicants submit that the Respondent has set in motion execution process and as such, if stay is not granted, they will suffer loss and that their appeal would be rendered nugatory.

16. In James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, the court while addressing this limb had the following to say; -

> " ...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... This is so because execution is a lawful process..."

17. Therefore, the fact that the Respondent might have set in motion the process of execution does not of itself amount to substantial loss. As was held in the above case, 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 Applicants as the successful parties in the appeal.

18. In the same decision above, the Court held that substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory. Though the Applicants argue that they stand to suffer substantial loss if stay is not granted, it is equally a fact that the Respondent shall be kept away from enjoying the fruits of his judgement.

19. This Court while balancing these two interests, must satisfy itself that that no party would suffer undue prejudice. The Court of Appeal in Absalom Dova v Tarbo Transporters [2013] eKLR while enunciating this principle stated as follows: -

> " ...The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation..."

20. In Charles Ngugi v ASL Credit Ltd [2022] eKLR, it was held that substantial loss is a factual issue which must be raised in the supporting affidavit and further supported by evidence. In the present application, other than the averment that there is real danger if stay not is not granted, the Applicant has not demonstrated substantial loss.

21. However, I note that the Respondent is seeking to recover a sum of Kshs. 2,640,372/= which amount is quite substantial considering the current prevailing economic situation. I am satisfied that execution of the decree will cause the Applicants substantial loss. Even if the Respondent is capable of refunding the money, the court has to consider whether it is fair and just to allow execution to continue which process will naturally cause the Applicants some financial burden.

22. On the issue of delay, I have determined the issue of extension of time and that brings the application for stay within reasonable time and I need not say more on this limb.

23. Lastly, the Applicant is required to furnish security to the Court as security for the performance of the judgment should the appeal fail. The purpose of security was clearly enunciated in Arun C. Sharma vs. Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others [2014] eKLR, where the court stated: -

> " ...The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose..."

24. The Applicants have offered to deposit security in the form of a motor vehicle log book. The Respondent on his part submitted that courts have not always accepted logbooks as a form of security for among other reasons that it is subject to devaluation due to wear and tear. The case of Lochab Brothers Ltd v Lilian Munabi Nganga & 2 Others [2007] eKLR was cited in support.

25. Ordinarily, giving of security should be done as a sign of good faith that the Applicant is ready and willing to commit to giving security. But my reading of Order 42 rule 6(2) (b) of the Civil Procedure Rules reveals that, it is the court that orders the kind of security the Applicants should give as may ultimately be binding on them. This modeling of the law is to ensure the discretion of the court is not fettered.

26. The case of Nicholas Stephen Okaka & Another and Gitahi & Another v Warugongo are all persuasive authorities and not binding. I shall thus allow the Applicants to avail the logbook before court upon meeting certain conditions which I specify below.

27. To ensure that the motor vehicle is not wasted, I direct that the Applicants insure it with a reputable insurance if that is not the case within the next twenty-one (21) days. Similarly, the vehicle shall at all times be well maintained and serviced.

28. On the issue of costs, the same shall abide the outcome of the appeal.

29. Following the foregone discourse, the upshot is that the following orders do hereby issue: -

    a. The application dated 14th December, 2022 is hereby allowed on the following terms: -

        i. That leave is granted to the Applicants to file an appeal out of time against the judgement delivered in Mombasa RMCC No. 809 of 2021;

        ii. The Memorandum of Appeal filed on 6thDecember, 2022 is herein deemed to have been properly filed;

iii. That the execution of judgement/decree in Mombasa RMCC No. 809 of 2021 is hereby stayed pending the hearing and determination of the Appeal;

iv. The Applicants to deposit the log book for the motor vehicle in court within the next twenty-one (21) days and at the same time avail a certified copy of insurance certificate from a reputable insurance company for the said vehicle;

v. That during the subsistence of the appeal, the Applicants shall ensure that the motor vehicle is maintained in a good and road worthy condition.

b. The Applicants/Appellants are directed to file and serve the Record of Appeal within thirty (30) days from, the date hereof;

c. In default of either (iv), (v) or (b) above, the stay of execution issued herein shall lapse and the Respondent shall be at liberty to execute;

d. Costs to abide the outcome of the appeal

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF OCTOBER 2023.

F. WANGARI

JUDGE

In the presence of;

Okumu Advocate for the Appellants

Mkan Advocate for the Respondent

Barille, Court Assistant