Namusyule v Nzilani (Civil Appeal E108 of 2023)
[2023] KEHC 26713 (KLR) (19 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26713 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E108 OF 2023

FR OLEL, J

DECEMBER 19, 2023

BETWEEN

WINSTON KISEMBE NAMUSYULE ..... APPELLANT

AND

FLORIDAH NZILANI NGWILI ALIAS FRORIDAH NZILANI NGWILI ALIAS FLORIDAH NZILANI ..... RESPONDENT

RULING

A. Introduction

1. The application before this court is the Notice of Motion application dated 19th May 2023 brought pursuant to provisions of Section 1A, 3A 79G & 95 of the *Civil Procedure Act*, Order 42 Rule 6(2), Order 51 Rule 1 and 3 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers 1 and 2 of the said application are basically spent and the main prayer sought is that there be stay of execution pending hearing and determination of the appeal filed.

2. The application is supported by a supporting affidavit of the applicant Winston Kisembe Namusyuledated 20th June 2023, where he depones that the trial court did deliver judgment on 10th May 2023 against him, where his liability was determined at 100%, General damages was awarded at Kshs 200,000/= and special damages at Kshs 5,600/=. Being aggrieved by the said judgment, he had already filed his memorandum of appeal, which raised several triable/pertinent issues for determination and had high chances of success. Thus, if stay was not granted it would render the appeal nugatory and greatly prejudice him. Further his underwriter Directline Assurance co ltd was also ready to furnish court with a bank guarantee as security as the court may direct.

3. This application is opposed by the Respondent Floridah Nzilani Ngwiliwho filed her Replying Affidavit's dated 29th May 2023. She deponed that the insurance company was not a party to this suit and was opposed to any bank guarantee being issued as security by the said insurance company. The

same according to her could only be used in a declaratory suit. Secondly, she was a person of means and was in a position to refund the decretal sum should the court find merit and uphold the appeal. The applicant signature as appended in the application also differed with his signature used in the witness statement and it was suspect that the signature appended to the supporting affidavit was a forgery and needed to be investigated. The application was thus not merited and should be dismissed.

B. Analysis & Determination

4. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and submissions filed by both parties. The only issue for determination is whether the Appellant has met the conditions necessary for the grant of stay pending appeal.

5. Order 42 rule 6(1) and (2) of the *Civil Procedure Rules* provides 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."

6. In *Vishram Ravji Halai v Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that 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 that the application has been made without unreasonable delay, satisfaction of substantial loss and the furnishing of security. The Court, in exercising its discretion, should also further opt for the lower rather than the higher risk of injustice and also consider the overriding objective as stipulated in sections 1A and 1B of the *Civil Procedure Act*, which the courts are now enjoined to give effect to. See *Suleiman v Amboseli Resort Limited* [2004] 2 KLR 589, *Samvir Trustee Limited v Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997 & *Machira T/A Machira & Co Advocates v East African Standard (No 2)* [2002] KLR 63:

7. The appellant is obviously aggrieved, by the judgment delivered and did file this appeal promptly. The grounds of appeal do disclose arguable grounds to challenge the judgment appealed against. Secondly, the decretal amount is a tidy sum and no affidavit of means has been filed by the respondent to show that indeed if the said sum is released to her, she will be in a position to refund the same should the appeal succeed.

8. In the case of *G. N. Muema P/A (516) Mt View Maternity & Nursing Home v Miriam Maalim Bishar & Another* [2010] eKLR the court states as follows;

> " It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful."

9. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR the Court of Appeal held thus;

> " Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge."

10. Guided by the above authorities and in the absence of the requisite proof from the Respondent that she is a person of means, I find that the Appellant has satisfied this court that he will suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.

11. On the security, the Appellant has indicated that his insurer is ready and willing to provide a bank guarantee. The Respondent on the other hand opposes the same. In determining what appropriate security should be offered, the court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of her judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of her judgment. See *Attorney General v Halal Meat Produces Limited* Civil Application No. Nairobi 270 of 2008; *Kenya Shell Ltd v Kibiru & another* (Supreme); *Mukuma v Abuoga* [1988] KLR 645.

12. The law is that where the Applicant succeeds, he/she should not be faced with a situation in which he would find himself unable to get back his money. Likewise, the Respondent who has a decree in his favour should not, if the applicant is eventually unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.

13. This issue of adequacy of security was dealt with in the Court of Appeal in *Nduhiu Gitahi v Warugongo* [1988] KLR 621; IKAR 100;(1988-92) 2 KAR 100 where the Court of Appeal 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 guarantees 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 judgment has been given. It is subject to 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 issues pending in the appeal. For that purpose, it matters not whether the plaintiff are secured in one way rather than the other, it would be easier for the defendants or if for any

> reasons they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no principles why they should not do so... The aim of the court in this case was to make sure, in an even handed manner, that there 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 any 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."

Disposition

14. 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 I grant a stay of execution of the decree herein on condition that the Applicant do pay to the Respondent half of the decretal sum and gives a bankers guarantee to pay the remaining half together with costs from a reputable financial institution specific to this appeal for the whole duration of the appeal.

15. The said conditions are to be met within 30 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.

16. The costs of the application are awarded to the Respondent in any event.

17. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 19TH DAY OF DECEMBER 2023.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 19TH DAY OF DECEMBER, 2023.

In the presence of;

Ms Waweru for Appellant

Ms Muthoki for Respondent

SusanCourt Assistant