Nzuki & another v Musyoki (Civil Appeal 273 of 2023)
[2023] KEHC 26712 (KLR) (19 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26712 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 273 OF 2023

FR OLEL, J

DECEMBER 19, 2023

BETWEEN

FESTUS KYAILA NZUKI ..... 1ST APPELLANT

DOROTHY NDUNGU MAWEU ..... 2ND APPELLANT

AND

NZOMO MUSYOKI ..... RESPONDENT

RULING

A. Pleadings

1. For consideration before this court is the Notice of Motion dated 16th October 2021, 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 for various order, the main one being (prayer 3) that:

    a. That the Honourable Court be pleased to Order stay of execution of the judgement/decree delivered on 19th September 2023 by Honourable M.A. OTINDO (PM) sitting at Machakos in CMCC E47 OF 2020 pending the hearing and determination of the Appellants Appeal filed at the high court of Kenya at Machakos.

    b. Costs of this application be provided for.

2. The application is supported by the grounds on the face of the said application and the Supporting Affidavit dated 16th October, 2023 sworn by the 1st appellant festus kyaila nzukI. The Respondent did oppose this application by filing his replying affidavit dated 2nd November 2023.

3. The 1st appellant/applicant did depone that they had read through the judgment delivered on 19th September 2023 and were aggrieved and dissatisfied with the same and thus had instructed their advocate to lodge an appeal. A notice of appeal was indeed lodged/preferred as against both quantum and liability and the appeal as filed was merited and raised triable issues which had high chances of success.

4. The appellants were reasonably apprehensive that respondent on the other hand would start the process of enforcing the decree herein and unless stay was granted, the same would render the appeal as filed to be nugatory and the appellant would suffer irreparable loss and damage as the respondent was not a man of means and would not be able to refund the sums paid out.

5. The applicants' final argument was that they had satisfied the conditions for granting stay of execution as provided under order 42 rule 6(1) of the *Civil procedure rules* and they were ready to abide by any conditions that may be imposed by the honorable court with regard to furnishing security. In particular they offered to furnish the court with a bank guarantee as security to secure the decretal sum pending determination of the said appeal.

6. The respondent opposed this application and stated the application filed was frivolous, vexatious, untenable and constituted a gross abuse of the process of this court. Liability had been properly determined at 50%: 50% and the appeal as filed did not raise any triable issue especially considering the fact that the appellants never called any evidence during trial thus the respondents evidence remained uncontroverted. If the court was inclined to allow the said application then the respondent averred that the appellants should pay half the decretal sum and deposit the other half in a joint interest earning account.

B. Determination

7. The court has considered the Application, the Response thereto and easily discerned that the only issue for determination is whether the Applicants should be granted an order of stay of execution pending appeal.

8. Stay of Execution is provided 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."

9. 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

10. These principles were enunciated in *Butt v 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.

11. 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 42 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.

12. To the foregoing I would add that an order of stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay shall also consider the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, to enable court give effect to the overriding objective, while in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See *Suleiman v Amboseli Resort Limited* [2004] 2 KLR 589.

i.Undue Delay

13. As to whether the Application has been filed without undue delay, judgment was entered on 19.09.2023. The notice of appeal and application for stay pending appeal was filed on the 19.10.2023, which was within one month. This court thus finds that the appeal and this application for stay of execution has been filed without undue delay.

ii.Substantial Loss

14. On the issue of substantial loss, Ogolla, J in *Tropical Commodities Suppliers Ltd & Others v International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 stated 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.'

15. In the case of *James Wangalwa & Another v 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."

16. The same position was adopted by Kimaru, J in *Century Oil Trading Company Ltd v Kenya Shell Limited* Nairobi (Milimani) HCMCA No. 1561 of 2007 where he stated that:

> " The word "substantial" cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words "substantial loss" must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement."

17. The respondent did file a replying affidavit to rebut the averments made by the applicants in the supporting affidavit, but never filed any affidavit of means to show or prove that indeed if he is paid the decretal sum and the appeal is successful, he will be in a position to refund the decretal sum paid to him.

18. 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."

19. Guided by the above authorities and in the absence of the requisite proof from the Respondent that he is a person of means, I find that the Appellants have satisfied this court that they 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.

iii.Security

20. As regards deposit of security, the court observed in the case of *Gianfranco Manenthi & Another v 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."

21. The Court must similarly consider the overriding objective and balance the interest of the parties to the suit while considering the issue of security to be offered. The law is that where the applicant intends to exercise his undoubted right of appeal, and in the event, that he were eventually to succeed, he should not be faced with a situation in which he would find himself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.

22. The issue of adequacy of security was dealt with by the Court of Appeal in *Nduhiu Gitahi v Warugongo* [1988] KLR 621; 1 KAR 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 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".

23. The applicants did state with regard to the issue of security that, they were ready to abide by any conditions that may be impose by court and were willing to deposit a bank guarantee for the decretal amount. The respondent averment that the appellants never adduced evidence before the trial court and thus his evidence was not controverted during trial, which essentially means that the main substratum of the appeal will be on quantum.

B. Disposition

24. 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 party to the appeal, I do grant prayer (3) of the application dated 16th October 2023 pending hearing and determination of the appeal filed on condition that the appellants will pay the respondent half of the decretal sum awarded and deposit the other half in a joint interest earning account held in the join names of both counsels herein at a reputable commercial bank.(Kshs.150,000/= being half of the Ksh.300,000/= the appellants were ordered to settled under the decree.)

25. The appellant is granted 45 days within which to comply with the above order from the date of delivery of this Ruling and should they fail to do so, the application dated 16th October 2023 will be deemed to have been dismissed and the respondent will be at liberty to execute.

26. Costs herein will abide the Appeal.

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;

No appearance for Appellant

No appearance for Respondent

Susan Court Assistant