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Ndigwa v Big Two Limited (Civil Suit 2 of 2014) [2022] KEHC 3111 (KLR) (28 April 2022) (Ruling)

Neutral citation: [2022] KEHC 3111 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL SUIT 2 OF 2014

GWN MACHARIA, J

APRIL 28, 2022

BETWEEN

MARY NJAMBI NDIGWA .... APPLICANT

AND

BIG TWO LIMITED .... RESPONDENT

RULING

The Application

1. The application for consideration is Plaintiff's Notice of Motion dated the 27th day of September, 2021 brought under Order 42 Rule 6(1) & (2) and of the Civil Procedure Rules, Sections 2A of the *Civil Procedure Act* and all other enabling provisions of law. The Application seeks the following orders THAT:

   a. Spent.

   b. Spent.

   c. There be stay of execution of the Court's judgment/decree delivered on the 3rd December, 2020 pending the hearing and determination of the Defendant's/Applicant's appeal.

   d. Costs of this Application be provided for.

2. The application is based on the grounds on the face of it and supported by the Affidavit of one Mary Njambi Ndigwa, the sworn on the 27th September, 2021 and a Further Affidavit sworn on the 7th day of February, 2022.

3. The Application was opposed by the Plaintiff/Respondent vide a Replying Affidavit of David Ndwiga Gathendusworn on the 17th December, 2021.

The Applicant's Case

4. It was the Applicant's case that judgment was entered on the 3rd day of December, 2020 and the informal stay granted had since lapsed.

5. The Applicant had lodged an appeal against the entire judgment which said appeal they believed to have good chances of success.

6. In the absence of stay of execution pending the hearing and determination of the said appeal, the Applicant was apprehensive the Respondent would proceed to execute as they had already filed their bill of costs for assessment.

7. The Applicant averred that the appeal will be rendered nugatory thereby occasioning the Applicant substantial loss if the Respondent was to execute.

8. The Applicant further states that it was willing to comply with any reasonable conditions imposed by the Honourable Court.

9. The Applicant intimated that it was apprehensive that if the sum is paid, the Respondent will not be in a position to make good of the same upon a successful appeal.

Applicant's submissions

10. The Applicant filed submissions on the 9th February, 2022 in support of the Application in which it submitted on the conditions for granting stay of execution pending appeal noting that it had shown sufficient cause.

11. The Applicant submitted that it stood to suffer substantial loss unless the orders sought are not granted. It submitted that the application's intention is to maintain the status quo pending the hearing and determination of the appeal; that unless the same is maintained, the said appeal would be rendered nugatory.

12. In view of the foregoing, the Applicant cited the authority of J*ames Wangalwa & another vAgnes Naliaka Cheseto*[2012]eKLR where substantial loss was defined as follows:

> " 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. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:
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> "...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."

13. Further, the Applicant submitted that the amount of Kshs. 1,582,000.00, costs and interest was substantial and in any event the same is paid and upon a successful appeal the Respondent is unable and/or unwell to refund the same, the Applicant will suffer substantial loss. In this regard, the Applicant invited the Court to consider the position in *Century Oil Trading Company Ltd vs. Kenya Shell Limited* Nairobi (Milimani) HCMCA No. 1561 of 2007 where it was held:

> "The word "substantial" cannot mean the ordinary loss to which every judgment 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 judgment."

14. On whether the Application is brought without unreasonable delay, the Applicant submitted that it was filed eight (8) months after the impugned judgment and as at the time, the party and party bill of costs by the Respondent had not been filed and the decree had not been issued. It further submitted that it had been vigorously pursuing the typed proceedings so as to compile its record of appeal.

15. The Appellant cited the authority of J*aber Mohsen Ali & another v Priscillah Boit & another* [2014] eKLR where it was stated:

> "The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter."

16. On offering security for performance of the decree, the Applicant submitted that it was amenable to the same as may be directed by the Honourable Court and urged that the Application be allowed.

Respondent's Case

17. The Respondent opposed the said application noting that pursuant to the judgment, the Applicant was granted 30 days stay of execution which had since lapsed and the move to seek further stay almost eight (8) months later amounted to inordinate delay.

18. The Respondent was of the averment that there was no proof that the appeal stood any chances of success and no prejudice would be suffered if the Applicant were to release the sums as the deponent was in full control of the Respondent and the same would be refunded on a successful appeal.

19. The Respondent further averred that it would be prejudiced in the event the application is allowed as realizing the fruit of the judgment would greatly help it wade through the tough economic times brought about by Covid-19 pandemic and no evidence had been presented to illustrate that the Respondent will not be in a comfortable position to refund the Applicant upon a successful appeal.

20. The Respondent urged that in any event the Honourable Court was inclined to grant the orders sought, it was amenable to having the Applicant deposit the entire decretal sum in court.

21. The Respondent did not however file submissions despite being given sufficient time to do so.

Analysis and Determination

22. I have rendered myself to the pleadings as well as submissions by Counsel for the Applicant in support to granting stay of execution pending appeal as well as the Respondent's Replying Affidavit. I reiterate that the Respondent on its part did not have their submissions on record.

23. Order 42 Rule 6(2) of the *Civil Procedure Act* sets out the principles that the court should consider while deciding whether to grant Stay of Execution Pending Appeal. These are:-

> " No order for stay of execution shall be made under subrule (1) unless—
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> 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
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> 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."

24. On whether the Applicant will suffer substantial loss as the Respondent might be unable to refund the sums paid upon a successful appeal by the Applicant, the same ought to have been rebutted by evidence from the Respondent. See *Michael Ntouthi Mitheu v Abraham Kivondo Musau* [2021] eKLR where it was stated:

> " The law, however appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then, in those circumstances, where the applicant has reasonable grounds which grounds must be disclosed in the application that the Respondent will not be in a position to refund the decretal sum if the appeal succeeds, have shifted to the Respondent to show that he would be in a position to refund the decretal sum."

25. The decretal sum of Kshs. 1,582,000.00 is a substantial amount and it was incumbent upon the Respondent to prove that it was in a position to refund the same in the event the Applicant was successful on appeal. In *Rana Auto Selection Ltd v Lilian Osebe Moses* [2021] eKLR the Court stated:

> " The award of Kshs 950,000/- is a substantial amount and there was need for the respondent to show the resources she had in order to disprove the case established against her by the applicant."

26. In view of the foregoing, I am of the considered view that the Applicant stands to suffer substantial loss in the event of a successful appeal.

27. On the issue of inordinate delay, the Applicant admits that following the lapse of the 30 days stay of execution granted on the 3rd December, 2020, it filed the present application approximately eight (8) months after the initial stay had lapsed. It was the Applicant's position that it had no reason to be apprehensive that the Respondent would proceed to execute as it was yet to have its party and party costs assessed. On its part, the Applicant followed up on the typed proceedings so as to put in the record of appeal.

28. I note that the Applicant's Notice of Appeal was lodged on the 10th day of December, 2020 which was within time and the Applicant duly sought to be supplied with certified typed proceedings. I am alive to the principle that inordinate delay ought to be based on the circumstances of each case.

29. In the case of *Directline Assurance Company Ltd v Michael Njima Muchiri & Another* (2020) eKLR where the court cited with approval the case of *Anthony Kaburi Kario & 2 Others v Ragati Tea Factory Company Limited & 10 Others* [2014] eKLR in which the court rendered itself thus:

> "...There is no precise measure of what amounts to inordinate delay, as what amounts to inordinate delay will differ from case to case depending on the circumstances of each case. But, care should be taken not to apply the word "inordinate" in its dictionary meaning; but rather in the sense of excessive as compared to normality. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads to an inescapable conclusion that it is inordinate and therefore, inexcusable."

30. In view of the foregoing, I find that even though the delay on the part of the Applicant was inordinate, it is excusable for reasons fronted by the Applicant.

31. The next issue for consideration is the issue of security. It is true that under Order 42 rule 6 aforesaid, an Applicant is required to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder. 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 C*ivil 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."

32. I also associate myself with the holding in *Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd* [2019] eKLR, cited by the Applicant where the court observed:

> "... 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 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 degree in order to enjoy the fruits of his judgment in case the appeal fails.

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 judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... This 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."

33. Of critical convergence with respect to the security to be offered by the Applicant is the position of the Court of Appeal in *Nduhiu Gitahi vs. 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".

34. Further, in the Rana Case (Supra) it was stated that:

> " The law is that where the applicant intends to exercise its undoubted right of appeal, and in the event it were eventually to succeed it should not be faced with a situation in which it would find itself 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."

35. The Applicant indicated that they were amenable to providing security for satisfaction of the decree as may be directed by the court. The same in the view of this court is a sign of good faith in its pursuit of an appeal.

Disposition

36. For all the foregoing reasons, I am satisfied that the Application dated the 27th September, 2021 is merited and I make the following orders –

    a. That stay of execution of the decree herein is granted on condition that the Applicant shall deposit in court the full decretal sum of Kshs. 1,582,000.00 within 30 days from the date of this ruling.

    b. That in default of compliance with (a) the Application shall be deemed to have been dismissed with costs and the Respondent will be at liberty to execute.

    c. That the costs of the application are awarded to the Respondent in any event.

37. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 28TH DAY OF APRIL, 2022.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

Mr. Akang'o Defendant/Applicant.

Mr. Ndung'u Plaintiff/Respondent.