Ruarai Ndia-Ini Kiambi Building Company v Segcon Limited (Civil Appeal E076 of 2021) [2022] KEHC 634 (KLR) (28 April 2022) (Ruling)

Neutral citation: [2022] KEHC 634 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E076 OF 2021

FN MUCHEMI, J

APRIL 28, 2022

BETWEEN

RUARAI NDIA-INI KIAMBI BUILDING COMPANY ..... APPLICANT

AND

SEGCON LIMITED ..... RESPONDENT

RULING

Brief Facts

1. The application for determination dated 20th November 2021 brought under Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* and Sections 1A, 3A and 79G of the *Civil Procedure Act* seeks for orders for stay of execution of the judgment and decree in Nyeri CMCC No. E180 of 2021 pending the hearing and determination of the intended appeal.

2. In opposition of the said application, the respondent filed a Replying Affidavit dated 31st January 2022.

The Applicant's Case

3. It is the applicant's case that interlocutory judgement was entered on 25th June 2021 and the trial court issued a decree on 2nd July 2021 for Kshs. 13,026,546/- and costs of Kshs 314,460/-. The applicant argues that judgment was irregular, premature, null and void *ab initio* because the applicant had already filed its memorandum of appearance and defence in good time and the trial court entered interlocutory judgment for both liquidated and an unliquidated claim whereas the latter ought to have been subjected to formal proof. Moreover, the applicant contends that it challenged the interlocutory judgment vide an application dated 6th September 2021 but it was dismissed with costs on 16th November 2021 and consequently the orders of stay of execution lapsed as well.

4. The applicant states that the respondent is at an advanced stage of execution having proclaimed the applicant's immoveable property Plot 45 Gakindu. Consequently, the applicant is apprehensive that

the respondent will move ahead and sell its properties which shall cause it substantial loss as it shall not be able to recover the sum paid to the respondent in the event the appeal succeeds.

5. The applicant is apprehensive that the appeal will be rendered nugatory should the orders sought not be granted as the intended appeal is arguable. The applicant further states that there has been no undue delay in bringing the instant application and no prejudice shall be caused to the respondent which cannot be compensated by an award of costs. Further the applicant states that that they are willing to offer security for costs for the performance of the decree. As such, the applicant states that in the interests of justice, the application for stay be granted.

The Respondent's Case

6. The respondent states that the application is bad in law, frivolous and has no chance of success. Furthermore, the respondent contends that there has been a delay of more than one month in filing the application which is inordinate and unexplained.

7. The respondent further states that the applicant has not met the threshold for the grant of stay of execution as it not shown what prejudice it would suffer if it pays the money. The respondent contends that the decretal sum is Kshs. 13,026,546/- which the applicant being a construction company would be able to repay comfortably in the unlikely event of the appeal succeeding. Further, the respondent contends that the applicant has not provided any security for the performance of the decree. As such, the respondent prays that the application be dismissed.

8. Parties hereby disposed of the application by way of written submissions.

The Applicant's Submissions

9. The applicant relies on Order 42 Rule 6 of the *Civil Procedure Rules* and the case of *Tassam Logistics Ltd v David Macharia & another* (2018) eKLR and submits that it has satisfied the principles for an order of stay of execution pending appeal. Further, the applicant relies on the case of *Antione Ndiaye v African Virtual University* [2015] eKLR and submits that it shall suffer substantial loss as the decretal sum is colossal and the applicant is apprehensive that the respondent will be unable to refund the said amount. The applicant invites the court to reject the deposition of the respondent that it shall be able to refund the monies because the affidavit was sworn by the respondent's advocate who cannot possibly know or has not demonstrated that his depositions are based on his client's position on its ability to pay.

10. The applicant further submits that the ruling was delivered on 16th November 2021 and they filed their application on 22nd November 2021and as such, the application was filed timeously.

11. The applicant further relies on the case of *Tassam Logistics Ltd v David Macharia & another* (2018) eKLR and submits it is willing to furnish security to secure the performance of the decree.

12. The applicant filed Supplementary submissions on 9th March 2022 and states that the respondent filed a request for judgment dated 21st June 2021 for failure to enter appearance and/or file a defence within the prescribed time. Summons to enter appearance were served to the applicant on 4th June 2021 and the applicant states that it filed its memorandum of appearance on 18th June 2021 which is within the 15 days prescribed. The applicant further submits that the 14 days prescribed for filing a defence started running on 18th June 2021 and on 30th June 2021, it filed and served the respondent with its defence. As such, the applicant submits that since both documents were filed within the prescribed time, the request for judgment was premature, irregular, null and void. To support its contention, the applicant relies on the case of *Kwanza Estate Limited v Dubai Bank Kenya Limited & 2 Others* (2018) eKLR.

As such, the applicant submits that the appeal has overwhelming chances of success and in the event the prayers are not granted, the appeal will be rendered nugatory.

13. The applicant reiterates that it has satisfied Order 42 Rule 6 of the *Civil Procedure Code* and states that considering the fact that the execution was intended to unmovable property the same remains intact and available even after the appeal is heard and therefore no need to furnish any liquid security as the applicant has no motivation to part with that land. Further, the applicant submits that the issue of intentional premature and irregular default judgment does not qualify for security to the respondent.

14. The applicant further submits that the respondent shall not suffer any prejudice considering the fact that the respondent intentionally and deliberately chose to mislead the court to grant premature and irregular default judgment which was overtly untenable and which under the law the court has no discretion to exercise as nothing put on a nullity can stand. As such, the applicant prays that the application be allowed.

The Respondent's Submissions

15. The respondent submits that in a money decree, substantial loss lies in the inability of the respondent to refund the decretal sum in the unlikely event the appeal succeeds. The respondent states that the applicant has not made such an allegation in its supporting affidavit. The respondent relies on the case of *Michael Mtouthi Mutheu v Abraham Kivondo Musau* (2021) eKLR to support its contention.

16. The respondent further submits that the applicant has not offered any security for the performance of the money decree. The respondent states that the affidavit has been sworn by the applicant's advocate and it invites the court to reject the said disposition for the reason that the deponent is an advocate dealing with the matter and could possible not know or has not demonstrated that his dispositions are based on his client's position on its ability to offer security for the performance of the money decree. The respondent further urges the court to order the applicant to pay half the decretal sum and the balance be deposited in a joint interest earning account in the names of the advocates on record for the parties. To support this contention the respondent relies on the case of *Machira t/a Machira & Co Advocates v East African Standard* No 2 (2002) KLR 63.

17. The respondent submits that the applicant has conveniently failed to annex the ruling of the trial court in dismissing the application by the applicant for this court to consider if the appeal has chances of success in the appeal. Arguably, the applicant has thus denied this court the chance to consider if the appeal has chances of success as there is no material even a draft memorandum of appeal annexed to the supporting affidavit of the applicant. As such, the respondent urges the court to dismiss the application and award the respondent costs.

Issues for determination

18. After careful analysis, the main issue for determination is whether the applicant has met the prerequisite for grant of stay of execution pending appeal;

The Law

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

19. As a rule of thumb, an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) *Civil Procedure Rules*. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:-

    1. "No appeal or 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 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 orders set aside.

    2. 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 1st 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.

20. Thus under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:

    1. Substantial loss may result to him/her unless the order is made;

    2. That the application has been made without unreasonable delay; and

    3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

21. 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:-

    1. 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.

    2. 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.

    3. 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.

4. 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.

Substantial loss

22. Under this head, an applicant must clearly state what loss, if any, they stand to suffer. This principle was enunciated in the case of *Shell Ltd v Kibiru and Another* [1986] KLR 410 Platt JA set out two different circumstances when substantial loss could arise as follows:-

> "The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages....It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the *Civil Procedure Rules* was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts...."

The learned judge continued to observe that:-

> " It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.

25. Earlier on, Hancox JA in his ruling observed that:-

> " It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would...render the appeal nugatory.
>
> This is shown by the following passage of Cotton LJ in Wilson vs Church (No.2) (1879) 12 ChD 454 at page 458 where he said:-
>
> "I wish to state my opinion that when a party is appealing, exercising his undoubtedly right of appeal, this court ought to see the appeal, if successful, is not rendered nugatory. "
>
> As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause."

26. The applicant has not indicated or demonstrated what loss he stands to suffer in the event that the orders are not granted. The applicant through his advocate has deponed in his affidavit that the decretal sum is colossal and the respondent if paid, would be unable to refund the said sum. Further, the applicant has stated that its property is at the imminent risk of sale in satisfaction of the impugned decree. The respondent on the other hand, has stated in an affidavit sworn by its advocate that it is a

construction company and is financially capable of paying back the decretal sum should the appeal be successful.

27. It is generally accepted position that an advocate may swear an affidavit on behalf of his/her client provided the issues are not contentious. Courts have been slow to strike out a affidavits sworn by counsels who are on record for the parties. These issues were enunciated in the case of *East African Foundry Works(k) Ltd v KCB* HCC 1077 of 2002 eKLR and in that of *Kamlesh Mansukhalal Damji Pattni v Nasir Ibrahim Ali & 2 others*[2005}eKLR. I have perused the affidavit sworn by Kimani Kimondo advocate for the applicant and I am of the view that it contains no contentious issues.

28. I have perused the court record and note that the respondent is at an advanced stage of executing the decree having placed an advertisement of Sale of the applicant's immoveable property Plot 45 Gakindu which was scheduled to take place on 22nd December 2021. However, the applicant moved the court and was granted interim orders for stay of execution which are still subsisting.

29. Arguably, I find that the applicant has not demonstrated the loss he will suffer if the decretal sum is paid to the respondent.

The application has been made without unreasonable delay.

30. The ruling was delivered on 16th November 2021 and the applicant has brought the present application on 3rd December 2021. The trial court did not grant stay of execution after the ruling was delivered. The applicant filed the application about 15 days after the ruling was delivered in CMCC No 180 of 2021. The applicant in my view filed the application timeously.

Security of costs.

31. The applicant ought to satisfy the condition of security. In the persuasive case of *Gianfranco Manenthi & another v Africa Merchant Assurance Co Ltd* [2019] eKLR 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 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."

32. Similarly in *Arun C Sharma v Ashana Raikundalia t/a Rairundalia & Co Advocates & 2 others* [2014] eKLR 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 the 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."

33. From the above persuasive decisions, it is clear that the issue of security is discretionary and it is upon the court to determine the same. Notably, the applicant has stated in its affidavit that it is willing and ready to offer security to secure the performance of the decree.

34. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Mohammed Salim t/a Choice Butchery vs Nasserpuria Memon Jamat* (2013) eKLR where the Court upheld the decision of *Portreitz Maternity v James Karanga Kabia* Civil Appeal No 63 of 1991 and stated that:

> " That right of appeal must be balanced against an equally weighty rigid right that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right."

35. The court in granting stay has to carry out a balancing act between the rights of the two parties. The question then begs as to whether there is just cause for depriving the respondent its right of enjoying their judgment. The respondent state that the applicant has not satisfied the conditions to warrant him stay of execution. The applicant on the other hand states that the appeal will be rendered nugatory if the orders sought are not granted and that the applicant stands to suffer substantial loss as its property is at the imminent risk of been sold.

36. In my view, I find that on a balance of interests, it will not prejudice the applicant if the application for stay is not granted. I have perused the grounds of appeal in the applicant's supporting affidavit and the record of the trial court and note that the applicant does not raise arguable points on law or fact. As such, I find that in the interests of justice, the respondent shall be prejudiced more than the applicant if the application for stay is allowed.

37. Having found that the applicant has failed to satisfy this court on to the requirements under Order 42 Rule 6, and that the balance of interests does not favour him, I hereby find that this application dated 20th November 2021 has no merit and it is hereby dismissed with costs.

38. It is hereby so ordered.

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

F. MUCHEMI

JUDGE

Ruling delivered through videolink this day of 28th April, 2022