Musau & another v Ngugi (Civil Appeal E310 of 2021)
[2022] KEHC 10933 (KLR) (Civ) (26 May 2022) (Ruling)

Neutral citation: [2022] KEHC 10933 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E310 OF 2021

CW MEOLI, J

MAY 26, 2022

BETWEEN

JOHN NJUGUNA MUSAU ..... 1ST APPLICANT

DANIEL NJAU WAWERU ..... 2ND APPLICANT

AND

JUDY WANJIKU NGUGI ..... RESPONDENT

RULING

1. The motion dated 21st June 2021 by John Njuguna Musau and Daniel Njau Waweru (hereafter the 1st and 2nd Applicant/Applicants) seeks to stay execution of the judgment and decree in Nairobi Milimani CMCC No. 8295 of 2018 pending the hearing and determination of the appeal. The motion is expressed to be brought under Order 42 Rules 4 & 6 of the Civil Procedure Rules, inter alia, and is anchored on the grounds on the face of the motion as amplified in the supporting affidavit sworn by Janerose Nanjira, counsel for the Applicants.

2. To the effect that being aggrieved and dissatisfied with the whole judgment of the lower court delivered on 21st May 2021 the Applicants have preferred an appeal which raises pertinent points of law and has an overwhelming chance of success; that Judy Wanjiku Ngugi (hereafter the Respondent) has not furnished the court with any documentary evidence of her financial standing, and as such the Applicants may suffer substantial loss as there is a likelihood that they may not recover the decretal amount if it is paid over to the Respondent ; that the Respondent will not suffer any prejudice that is not capable of being compensated by way of costs if the motion is allowed; and that the Applicants are willing to furnish such reasonable security in the form of a bank guarantee.

3. The motion was opposed through the replying affidavit sworn by the Respondent. She contended that the appeal lacks merit and urges the court if inclined to allow the motion, to require the Applicant to furnish security for due performance of the decree.

4. The motion was canvassed by way of written submissions. As regards the applicable principles, the Applicants based their submissions on the provisions of Order 42 Rule 6 of the *Civil Procedure Rules* and the decision in *Halai & Another v Thorton & Turpin (1963) Ltd* [1990] KLR 365 cited in *Elena Doudoladova Korir v Kenyatta University* [2014] eKLR. Submitting on the question of substantial loss counsel relied on *Kenya Orient Insurance Co. Ltd v Paul Mathenge* [2014] eKLR to emphasize that the award by the trial court is substantial and the Appellants are apprehensive that if the decretal sum is paid over to the Respondent, the Appellants may be unable to recover the same from her upon their appeal succeeding. Counsel reiterated that the Respondent's means are unknown and the Applicants' l willingness to furnish security by way of a bank guarantee and urged that the motion be allowed.

5. On behalf of the Respondent, it was submitted by counsel that the grounds of appeal do not disclose an arguable appeal and the motion ought therefore to be dismissed. Citing *Mohan Meakin (K) Ltd v Mutunga Kiundi* Civil Appeal No. 2552 of 2000 UR 120/200 counsel urged that if the court is persuaded otherwise, it should order the Applicants to furnish security for the entire decretal sum as a condition for stay pending appeal.

6. The court has considered the material canvassed in respect of the motion. First, it is pertinent to state that at this stage, the Court is not concerned with the merits of the appeal. It is trite that the power of the court to grant stay of execution of a decree pending appeal is discretionary, however the discretion should be exercised judicially. See *Butt V Rent Restriction Tribunal* [1982] KLR 417

7. The Applicants prayer for stay of execution pending appeal, is brought under Order 42 Rule 6 of the Civil Procedure Rules which provides that:

> "(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".

8. The cornerstone consideration in the exercise of the discretion is whether the Applicants have demonstrated the likelihood of suffering substantial loss if stay is denied. One of the most enduring legal authorities on the issue of substantial loss is the case of *Kenya Shell Ltd v Kibiru & Another*

[1986] KLR 410. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the Shell case are especially pertinent. These are that:

> "1. .....
>
> 2. In considering 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.
>
> 3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
>
> 4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid."

9. The decision of Platt Ag JA, in the Shell case, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Platt Ag JA (as he then was) stated inter alia that:

> "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 the 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... (emphasis added)"

10. 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." (Emphasis added)

11. 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 L J in *Wilson -Vs- Church (No 2)* (1879) 12ChD 454 at page 458 where he said:-
>
> > "I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that 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."

12. The Applicants affidavit material emphasizes that the Respondent's financial means are unknown and the Applicants' apprehension of the risk of suffering substantial loss in the event their appeal succeeds and they are unable to recover any monies paid out to the Respondent in satisfaction of the decree. The Respondent did not offer any evidence of her means in countering the foregoing. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another* [2006] eKLR the Court of Appeal stated that:

> "This court has said before and it would bear repeating that while the legal duty is on an Applicants to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such Applicants to know in detail the resources owned by a respondent or the lack of them. Once an Applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example Section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya."

13. The decree in the lower court was for a sum of Kshs 220,000/- with costs and interest. This sum is not insubstantial as rightly asserted by the Applicants. Upon the Applicants expressing apprehension about the Respondent's capacity to repay, the burden shifted on her to controvert the assertion by proving his own means. She has not tendered evidence of her means; her bald depositions do not amount to much. In the circumstances the Applicants have established the likelihood of substantial loss and possibility that the appeal if successful may be rendered nugatory if stay is denied. As stated in the Shell case, substantial loss in its various forms, is the cornerstone of the court's jurisdiction for granting stay, and what has to be prevented.

14. The Applicants have expressed willingness to provide security by way bank guarantee for the entire decretal sum. The Respondent has rejected the proposed form of security and urged the court to order the Applicants to remit half of the decretal to the Respondent. The court must balance the competing interests of the parties so as not to prejudice the matter pending appeal, and the words stated in *Nduhiu Gitahi & Another v Anna Wambui Warugongo* [1988] 2 KAR, citing the decision of *Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited* [1984] 3 ALLER 198 and others, are apt:

> " We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff.....
>
> It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal....."

15. In view of all the foregoing, that the Applicants' motion is hereby allowed on condition that the Applicants deposit the entire decretal sum into an interest earning account in the joint names of the parties' advocates within 45 days of today's date. Costs will abide the outcome of the appeal.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 26TH DAY OF MAY 2022

C.MEOLI

JUDGE

In the presence of:

For the Applicants: Ms. Sagini

For the Respondent: Mr. Kaburu

C/A: Carol