Ngugi & another v Ngugi (Civil Appeal E355 of 2021)
[2022] KEHC 11366 (KLR) (Civ) (26 May 2022) (Ruling)

Neutral citation: [2022] KEHC 11366 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E355 OF 2021

CW MEOLI, J

MAY 26, 2022

BETWEEN

NJUGUNA NGUGI ..... 1ST APPLICANT

GODFREY NJOROGE ERUNGI ..... 2ND APPLICANT

AND

NELLY WANJOHI NGUGI ..... RESPONDENT

RULING

1. The motion dated June 29, 2021 by Njuguna Ngugi and Godfrey Njoroge Erungi (hereafter the 1st and 2nd Applicant/Applicants) seeks to stay execution of the judgment and decree in Nairobi Milimani CMCC No 5751 of 2019 pending the hearing and determination of the appeal. The motion is expressed to be brought under Order 42 Rules 4, 6 & 7 of the *Civil Procedure Rules*, inter alia, and is based on the grounds on the face of the motion as amplified in the supporting affidavit sworn by 1st Applicant.

2. To the effect that the applicants are dissatisfied with the whole judgment of the lower court delivered on May 21, 2021 and have preferred an appeal which raises pertinent points of law. That Nelly Wanjohi Ngugi (hereafter the respondent) has threatened to execute the decree arising from the said judgment and unless stay of execution is granted, the application and appeal will be rendered nugatory. He goes on to depose that the respondent's means are unknown hence the applicants' apprehension that any sums paid to her may not be recovered, thereby rendering the appeal nugatory if successful. The deponent asserts that orders to stay execution will not visit any prejudice upon the respondent as is incapable of being compensated by way of costs. In conclusion he expresses willingness to furnish security in the form of a bank guarantee for the performance of the decree.

3. The motion was opposed through the replying affidavit deposed by the respondent. He views the motion as an afterthought, brought with the intent of denying him the fruits of judgment and asserts that the appeal lacks merit. He contends that applicants have not demonstrated substantial loss; that the court ought to dismiss the motion; and that in the alternative if the court is inclined to allow the motion, the Applicant ought to be ordered to provide adequate security for the performance of the decree.

4. The motion was canvassed by way of written submissions. As regards the applicable principles, the Applicants anchored their submissions on the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*. Submitting on the question of substantial loss counsel relied on *GN Muema p/a Mt. View Maternity & Nursing Home v Miriam Bishar & Another* [2018] eKLR and *Butt v Rent Restriction Tribunal* [1982] KLR 417 as cited in *Amal Hauliers Limited v Abdulnassir Abukar Hassan* [2017] eKLR to assert that if stay of execution is not granted and the appeal if successful may be rendered nugatory and the applicants exposed to substantial loss as there is no evidence that the respondent has the means to refund the decretal sum in such event.

5. Relying on *Samuel Kungu Wathika (Suing as administrator of the Estate of Joyce Wanjiru Kungu) v Bus Car East Africa Ltd* [2019] eKLR counsel contended that the appeal was filed timeously and that the Applicants are ready and willing to furnish security by way of bank guarantee. The case of *Focin Motorcycle Co Limited v Ann Wambui Wangui & Another* [2018] eKLR was cited in that regard.

6. On behalf of the Respondent, counsel similarly citing the applicable principles under the provisions of Order 42 Rule 6 (2) of the *Civil Procedure Rules*, submitted that the relief sought is discretionary and the discretion must be exercised judicially, upon defined principles of law and not capriciously or whimsically. It was stated that substantial loss is a matter of fact as held in Civil Appeal No E121 of 2021 *Shoko Molu Beka & Another v Augustine Gwaro Mokamba* and that the Applicants have failed to place before court evidential material on the basis of which this court can find that they stand to suffer substantial loss unless stay is granted. Concerning provision of security counsel cited the decision in *Edward Kamau & Another v Hannah Mukui Gichuki* Misc 78 of 2015 to assert that the Respondent is entitled to equal treatment before the law and the court should require the Applicants to furnish a reasonable security.

7. 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* (supra).

8. 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".

9. 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."

10. 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)"

11. 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)

12. 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 v 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."

13. The Applicants have in their affidavit expressed apprehension that they stand to suffer substantial loss as the Respondent is a person of unknown means and that if the decretal sum is paid out to him, the Applicants may be unable recover the same upon the appeal succeeding. The Respondent countered this by stating that the Applicants have not demonstrated substantial loss. 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."

14. The Applicants have expressed a reasonable apprehension that the Respondent may be unable to refund any decretal sums paid to him should the appeal succeed. The decree in the lower court was for a sum of Kshs 203,550/- with costs and interest. This is a substantial sum as rightly asserted by the Applicants. Upon the Applicants expressing apprehension about the Respondent's capacity to repay, the burden shifted on him to controvert the assertion by proving his own means. He has not tendered evidence of his means. Thus, it seems likely that the Applicants stand to suffer substantial loss and the appeal rendered nugatory if stay is not granted. 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.

15. Concerning security, the Applicants have expressed willingness to provide security by way bank guarantee for the enter decretal sum. The Respondent has rejected the proposed form of security and urged that court to order the Applicants to remit two-thirds of the decretal amount to him while depositing the balance in a joint interest earning account. Further, as rightly submitted by counsel for the Respondent the court must balance the competing interests of the parties so as not to prejudice the matter pending appeal. 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 v 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....."

16. In view of all the foregoing, that the applicants motion is merited and is 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.

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

C. MEOLI

JUDGE

In the presence of:

For the Applicants: N/A

For the Respondent: N/A

C/A: Carol.