Kiptoo v Moraa (Civil Appeal E047 of 2022) [2022] KEHC 11210 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEHC 11210 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E047 OF 2022

EKO OGOLA, J

JULY 28, 2022

BETWEEN

EVANS KIPTOO .... APPELLANT

AND

NANCY KERUBO MORAA .... RESPONDENT

RULING

1. By way of Notice of Motion dated 12th April 2022 the applicant sought the following orders
    1. Spent
    2. Spent
    3. Thatthis Honourable court be pleased to grant an order for stay of execution of the judgment delivered on 18th April 2022 for kshs. 238,500/ plus costs and interest pending the hearing the determination of Eldoret HCCA No. E47 of 2022.
    4. That this Honourable court allow the applicant to furnish the court with security in form of a Bank Guarantee from Family Bank, Equity Bank or any other bank in good standing.
    5. Thatthe costs of this application be provided for.
2. The court delivered its judgment on 18th March 2022 awarding the respondent kshs. 238,500/ plus costs and interest. The applicant being aggrieved with the decision of the court lodged an appeal against the judgment.

Applicant's Case

3. The applicant filed submissions on 1st June 2022, stating that the prerequisite conditions for grant of an order for stay under Order 42 Rule 6 of the *Civil Procedure Rules* has been met. Further, that the

application was filed on 18th April 2022 which was six days from the delivery of the judgment and thus it was filed timeously.

4. Citing *James Wangalwa & Another vs Agnes Naliaka Cheseto* (2012) eKLR the applicant submitted that if the orders sought are not granted the respondent will proceed to execute the decree in her favour and the applicant shall be forced to settled the decretal sum despite there being an appeal. In order to protect the substratum of the appeal, it would be in the interests of justice that an order of stay of execution is issued.

5. Citing *Nairobi Industrial Credit Bank Limited vs Aquinas Francis Wasike & Anor* (UR) C.A 238/2005, the applicant submitted that the respondent has not placed anything before the court to show that she would be in a position to refund the decretal sum if the same is paid out to her and the appeal succeeds.

6. By offering security in form of a Bank Guarantee from Family Bank, Equity Bank or any other bank in good repute it shows good faith on the part of the applicant as the application for stay is not only meant to deny the respondent the fruits of the judgment as the form of security will ensure that the interests of both the applicant and the respondent will be secured pending the hearing and determination of the appeal.

Respondent's Case

7. The respondent opposed the application by way of Grounds of Opposition dated 21st April 2022. The application is opposed on the grounds that it offends the mandatory provisions of Order 42 Rule 6 of the Civil Procedure Rules. Further, the affidavit in support of the application is incompetent and the application is based on mere apprehensions. The respondent prayed that as a pre-condition, the applicant pay half the decretal sum to the respondent and the rest be deposited in a joint interest earning account. The Respondent was opposed to the Bank Guarantee as it would not ensure due performance of the decree.

8. Before determining the issues herein, I note that the application in its prayers seeks a stay of execution of judgment delivered on 18th April 2022. There is no such judgment that was delivered on such a date. It is my view that this error is not merely technical but the same goes to the root of the application as the court cannot litigate for the applicant. The Court of Appeal in *Daniel Toroitich Arap Moi & Another v Mwangi Stephen Murithi & Another* (2014) eKLR held that:

   > "Submissions cannot take the place of evidence. The Respondent had failed to prove his claim by evidence what appeared in submissions could not come to his aid---Submissions are generally parties "marketing language...."

   From the supporting affidavit however, it is clear that the judgment that the applicant seeks stay from is judgment delivered on 18th March 2022. Keeping this in mind I proceed to address the main issue for determination which is;

Whether the Order for Stay should be Granted

9. Order 42 rule 6 gives the following provisions on stay of execution;

   (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 sub rule (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".

Whether the applicant will suffer substantial loss

10. Substantial loss has been discussed at various lengths in various decisions. In James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR the court held that: -

> " 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.
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> 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 Silvester –vs- Chesoni [2002] 1 KLR 887, and also in the case of Mukuma –vs- Abwoga 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 S (2)(b) of the court by 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 of what has to be prevented by preserving the status quo because such loss would render the appeal nugatory?

11. The Applicant expressed concerns as to whether the respondent will be able to refund the decretal sum should the appeal succeed. In National Industrial Credit Bank Limited v Aquinas Francis Wasike and Another (UR) C.A. 238/2005, the Court was confronted with a similar scenario, it made the following pronouncements;

> " This Court has said before and it would bear repeating that while the legal duty is on an applicant 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 an applicant to know in detail the resources owned by the respondent or lack of them. Once an applicant expresses 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."

12. The respondent failed to prove to the court that she is a person of means by at least filing an affidavit of means. Therefore, the applicants' apprehension on whether she will refund the same if the appeal succeeds is justified. Be that as it may, it is evidence that the trial Court found the Appellant 100% liable

for the accident in which the Respondent suffered injuries. Since the Respondent was a passenger in a matatu, it is not likely that the appeal will wholly succeed. What is likely to change, if at all, is damages. With this in mind, I will grant stay on condition that one half (1/2) of the decretal sum is paid to the Respondent within 30 days. In the other half, the Appellant shall execute a bank guarantee within 30 days.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH OF JULY 2022.

E. K. OGOLA

JUDGE