Mutungati Farmers Co-op Society Ltd v Ndurere (Civil Appeal 56 of 2020) [2022] KEHC 11604 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEHC 11604 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 56 OF 2020

JM NGUGI, J

JULY 28, 2022

BETWEEN

MUTUNGATI FARMERS CO-OP SOCIETY LTD .... APPELLANT

AND

STEPHEN WANJAMA NDURERE .... PROSECUTOR

RULING

1. The application before me is a straightforward request for stay pending appeal. In the Court below, the respondent sued the appellant for malicious prosecution. He was successful. Judgment was entered in his favour by the Learned J. Kalo, Chief Magistrate, on 25/02/2020 for Kshs. 423,000/- consisting of both general and special damages.

2. The appellant was dissatisfied with the judgment and timeously filed an appeal. It also sought a stay of execution in the lower court. A ruling denying the application was delivered on February 4, 2021.

3. The appellant says that it was unaware of the delivery of the ruling because it was delivered without notice and in the absence of both parties. It only became aware, the affidavit of its advocate claims, on May 18, 2022 when the respondent's auctioneers visited its premises and left a copy of warrants of attachment and proclaimed its properties.

4. Five days later, the appellant brought the present application. It seeks the same prayers it did in the lower court in the following terms:

    1. – Spent - .

    2. – Spent - .

    3. That there be stay of execution of the judgment delivered on February 25, 2022 by the lower court in Nakuru Civil Suit SO of 2012 against the applicant pending the hearing and determination of this appeal.

4. That costs of this application be in the cause.

5. The grounds for the application are stated on the face of the application as well as the supporting affidavit of David Njonge Ikua, the advocate who has the conduct of the matter on its behalf. It was sworn on 20/05/2022. Mr. Ikua also filed a further affidavit deponed on June 22, 2022.

6. The application is opposed through the affidavit of the respondent sworn on October 6, 2022.

7. When the matter came up for hearing, the parties asked the court to make its determination based on the material filed by the parties.

8. I begin by pointing out that the appellant has a right to approach this court for a stay of execution pending an appeal, even where the lower court had disallowed a similar application. The only requirement in such a case is for the applicant to disclose to the high court that there was a similar application in the lower court and disclose its outcome. The applicant has done so here.

9. The requirements for the grant of an order for stay of execution by this court are derived from the terms of order 42 rule 6 of the *Civil Procedure Rules*. The conditions to be met by an applicant in order to be entitled to an order for stay are encapsuled in that Rule in the following terms:

> 6.
>
> (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—
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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
>
> (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.

10. The law regarding the grant of stay of execution is well established in Kenya. Among the legion of authoritative cases establishing it, the judges of the Court of Appeal were both concise and emphatic in *Rhoda Mukuma v John Abuoga*:

> It was laid down in M M Butt v The Rent Restriction Tribunal, Civil Application No Nai 6 of 1979, (following Wilson v Church (No 2) (1879) 12 Ch 454 at p 488) that in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard.
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> Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security.

11. Hence, under our established jurisprudence, to be successful in an application for stay, an Applicant has to satisfy a four-part test. He must demonstrate that:

    a. The appeal it has filed is arguable;

    b. It is likely to suffer substantial loss unless the order is made. Differently put, it must demonstrate that the appeal will be rendered nugatory if the stay is not granted;

    c. The application was made without unreasonable delay; and

    d. It has given or is willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on it.

12. The respondent has only addressed the third element: the timeousness of the filed application. On that issue, the respondent says that the appellant is guilty of laches because the ruling disallowing its application for stay in the lower court was delivered on February 4, 2021 and the appellant made no move to file the present application until more than a year later on 23/05/2022. This, the respondent says, disentitles the appellant from the discretionary relief of stay because it went to slumber until awaken by the proclamation by the respondent's auctioneers.

13. The appellant has respondent with the history of the litigation outlined above. In essence, the appellant contends that the ruling on its application in the court below was delivered without notice and with neither parties present. As such, the appellant was not aware of the ruling until auctioneers showed up in its premises. This version of events is not disputed by the respondent. It is, therefore, disingenuous in the circumstances to claim that the application for stay was not timeously filed in this court. It was filed a mere five days after the appellant became aware of the ruling delivered on February 4, 2021.

14. What about the other three conditions for issuance of the relief sought? There is no disputing that the memorandum of appeal as filed raises arguable points of law or fact. I have perused the memorandum of appeal and I am unable to say that the grounds of appeal enumerated are in-arguable. In particular, the question whether the Learned magistrate erred in applying the test for malicious prosecution is, for a first appellate court, an arguable one. It is important to recall that to be eligible for a stay of execution, one is not required to persuade the appellate court that the filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the appellant has plausible and conceivably persuasive grounds of either facts or law to overturn or vary the original verdict.

15. The appellant has already offered security for the due performance of the decree by issuing a cheque in the joint names of the advocates herein.

16. This case turns on the question of substantial loss. In the Application as filed and in the supporting affidavit, the appellant baldly claims that that it would suffer substantial loss which may render the appeal nugatory but does not say exactly why that is so. There is no allegation either on the face of the application or deponed in the affidavit that the respondent is so impecunious that he would be unable to refund the decretal sum. The alleged substantial loss is if the proclaimed goods are sold. However, those goods would only be sold if the appellants fails to satisfy the judgment. That is, therefore, not sufficient to be termed as substantial loss.

17. Our jurisprudence is that when it comes to money decrees in such situations, the first onus is on the judgment-debtor seeking a stay of execution to make a case for its apprehension that the judgment-creditor will be unable to refund any decretal sums disbursed to them. Only upon such claim being made by a judgment-debtor is the onus of the judgment-debtor to credibly demonstrate his means and capacity to refund the decretal sum is triggered. It then falls on the court to ultimately determine if the judgment-debtor's apprehension is reasonable in the circumstances of the case.

18. In the present case, the appellant did not trigger the respondent's onus because it did not make any claim that the respondent is sufficiently impecunious to provoke reasonable apprehension that he would be unable to reimburse any decretal sums paid to him by the appellant.

19. In the circumstances, the appellant did not satisfy a crucial condition for the independent grant of stay of execution by this Court: it did not demonstrate that the appeal will be rendered nugatory if stay is not granted. The application cannot, therefore, succeed.

20. The disposition, then, is that the application dated May 20, 2022 is hereby dismissed with costs.

21. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 28TH DAY OF JULY, 2022.

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JOEL NGUGI

JUDGE