Kariithi & 2 others v Irene Thuo t/a Renekam Enterprises & another (Civil Appeal E594 of 2021) [2022] KEHC 11304 (KLR) (Civ) (4 August 2022) (Ruling)

Neutral citation: [2022] KEHC 11304 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E594 OF 2021

CW MEOLI, J

AUGUST 4, 2022

BETWEEN

NANCY KARIITHI ..... 1ST APPLICANT

KARRY MART LIMITED ..... 2ND APPLICANT

GEORGE KARIITHI ..... 3RD APPLICANT

AND

IRENE THUO T/A RENEKAM ENTERPRISES ..... 1ST RESPONDENT

ADAM W. NGETHE T/A GARAM INVESTMENTS ..... 2ND RESPONDENT

RULING

1. The appeal herein was purportedly filed by Nancy Kariithi , Karry Mart Limited and George Kariithi (hereafter the 1st ,2nd and 3rd Applicant/Applicants) on 22nd September 2021. I say purportedly because there is no trace of a memorandum of appeal on the physical file, while a copy supposedly of the memorandum of appeal marked annexure "B" is attached to the affidavit sworn by the 1st Applicant in support of the motion dated 21st September 2021. At paragraph 4 of the said affidavit, the said Applicant states that she was in the process of seeking leave to file the said memorandum of appeal. A search on the Case Tracking System (CTS) has revealed that the same annexure 'B' was separately filed on 22nd September 2021 together with other annexures also found in the motion.

2. Be that as it may, several motions were filed in this matter by the Applicants. The first motion to be filed is dated 21st September 2021 and seeks an order to stay of execution of the ex-parte judgment delivered on 12th October 2018 in Nairobi Milimani CMCC No. 4912 of 2016 pending the hearing and determination of this appeal. The motion is expressed to be brought under Order 42 Rules 6 of the

Civil Procedure Rules, inter alia, on grounds on the face of the motion and amplified in the supporting affidavit sworn by 1st Applicant who describes herself as a director of the 2nd Applicant.

3. The 1st Applicant deposes that the Applicants are aggrieved with the ruling delivered in Nairobi Milimani CMCC No. 4912 of 2016 on 17th September 2021 concerning the said judgment and has preferred an appeal which has a high chance of success; that it is in the interest of justice that the motion be allowed as execution is imminent; that the appeal herein shall be rendered nugatory and an academic exercise ; and that the Applicants stand to suffer irreparable loss and damage if the stay orders are not granted. Other depositions in the affidavit relate to matters which address the merits of the appeal and/ or propriety of the proceedings in the lower court. In conclusion she deposes that the court ought to be guided by the rules of natural justice and base its decision on substantive justice rather than eject the Applicant from the seat of justice while the appeal is pending.

4. The 1st Respondent opposed the motion through the replying affidavit dated 29th October 2021. She attacked the motion on the chief ground that the Applicants had filed a similar motion before the lower court and asserted that the instant motion is an attempt at forum shopping and an abuse of the court process. In her view, the Applicants do not stand to suffer any irreparable or substantial loss and the motion should be dismissed with costs.

5. Prior to the hearing of the first motion scheduled for 26.04.2022, the Applicants filed a second similar motion dated 14th April 2022 in which it was revealed that they had subsequent to the filing of the replying affidavit withdrawn the motion in the subordinate Court. Upon objections raised by the Respondent's counsel on 26.04.2022, the Applicants withdrew the second motion. The first motion then proceeded for inter partes hearing and a ruling date reserved for 4.08.2022. The Court also granted the Applicants' request for temporary stay of execution on condition the Applicant deposited into court the sum of Kshs. 800,000/- within 14 days. A few days to the lapsing of that period, the Applicants filed yet another application dated 4.05.2022 seeking review of the orders of 26th April 2022. The motion was heard on 11.05.2022 and the Court reviewed the requirement for deposit downwards to Shs. 500,000/- in two equal instalments by close of business 22.05.2022. The registry confirms that as of 3rd August 2022, the Applicants had only deposited a total sum of Kshs. 345,000/- in two instalments, the last being on 16th June 2022.

6. Returning now to the first motion, it was canvassed orally before this court. Counsel for the Applicants in setting the circumstances of the motion stated that the an application in the lower court to review terms given earlier (I gather from the material in respect of the second withdrawn motion that this was in reference to terms given in the ruling of the lower court for the deposit of the decretal sums as condition to setting aside the judgment of the lower court) and another by the 3rd Appellant/Objector had had been dismissed in the lower court. In supporting the prayer for stay of execution, he pointed out that the judgment in the lower court was obtained exparte and that the 1st Applicant was a mere director of the 2nd Applicant. He therefore argued that the court ought to order stay of execution to prevent a potential miscarriage of justice arising from the 1st Applicant being compelled to settle debts she did not personally incur. Counsel concluded that the purpose of the instant motion is to enable the Applicants have their day in court.

7. The 1st Respondent's counsel on his part stated that though represented the 1st Applicant defaulted in filing defence leading to the entrty of the ex parte judgment and that the subsequent application to set aside the judgment was allowed subject to payment into court of the decretal sumand that the Applicant did not comply. He listed five applications filed in the lower court by the Applicants which had been dismissed and the second motion herein submitted that the Applicants had previous filed

several similar motions before the lower court and in this court. In his view, the Applicants are guilty of abuse of the process of the Court and the motion should be dismissed.

8. In a rejoinder, the Applicant's counsel denied the accusation while reiterating earlier submissions.

9. The court has considered record herein, the history of the matter and the issues canvassed in respect of the motion dated 21st September 2021. Although the three Applicants herein filed this appeal and application dated 21st September 2021, and that the 1st and 3rd Applicants are directors of the 2nd Respondent and judgment debtors in the lower court suit, there was scant specific reference to them in the motion and their counsel constantly referred to the "Applicants". And based on the constant use of the word "we" in the depositions of the 1st Applicant in her affidavit, it appears that for all intents and purposes, this application was made for and on behalf of the three Appellants. The Court therefore treated the motion as such.

10. That said, it is pertinent to state that at this stage, the Court is not concerned with the merits of the appeal which have been canvassed by the Applicant in her affidavit material. It is trite that the power of the court to grant stay of execution of a decree pending appeal is discretionary, but the discretion should be exercised judicially. See *Butt v Rent Restriction Tribunal* [1982] KLR 417.

11. The Applicants prayer for stay of execution pending appeal, is brought under Order 42 Rule 6 of the *Civil Procedure Rules* (CPR) 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".

12. On a plain reading of Order 42 Rule 6(1) of the CPR, an order to stay execution pending appeal presupposes the existence of an appeal. The filing of an appeal is a condition precedent to the exercise of this court's appellate jurisdiction under Order 42 Rule 6 (1) of the Civil Procedure Rules. Although the provision does not expressly say so, this can be inferred from the rule. Further, an analogy can be drawn from Order 42 Rule 6 (4) of the Civil Procedure Rules which states that an appeal is deemed filed in the Court of Appeal when the notice of appeal has been given. Equally, Order 42 Rule 6 (6) of the Civil Procedure Rules states:

> " Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with." (Emphasis added).

13. Therefore, the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the Civil Procedure Rules must be preceded by the filing of a competent appeal in the prescribed format, in this case a memorandum of appeal as envisaged in Order 42 Rule 1 CPR:

    (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

    (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

14. Until such a memorandum of appeal is filed, the court would be acting in vacuo by considering the Applicants' prayer for stay of execution pending appeal. What is currently before this Court by way of initiating appeal in this matter, and styled as a memorandum of appeal, is an annexure marked "B". The supporting affidavit by the 1st Applicant states that she was seeking leave in relation to filing the said annexed pleading. A perusal of the annexure reveals that the subject matter of the appeal are the two rulings in the lower court relating firstly to the application for review of its earlier orders, and secondly, to objection proceedings brought by the 3rd Applicant. Under Order 43 of the CPR, an appeal does not lie as of right from the latter but in any event, the supposed memorandum of appeal which is marked as an annexure appears defective in form and cannot be deemed as a proper memorandum of appeal.

15. The Court of Appeal in A*bubaker Mohamed Al-Amin v Firdaus Siwa Somo* [2018] eKLR while citing with approval the decision of the High Court in *Rosalindi Wanjiku Macharia vs. James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased))* [2017] eKLR concurred with and adopted the position that the existence of a competent appeal is the basis for the invocation of the Court's appellate jurisdiction in dealing with an application for stay of execution pending appeal.

16. Earlier, the Court of Appeal in the case of *Equity Bank -Vs- Westlink MBO Limited* [2013] eKLR while commenting on Rule 5 (2) (b) of the Court of Appeal Rules, whose wording is substantially similar to Order 42 Rule 6 (1) of the Civil Procedure Rules, and on Order 42 Rule 6 (6) of Civil Procedure Rules, left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also *Balozi Housing Co-operative Society Limited -Vs- Captain Francis E. K. Hinga* [2012] eKLR). In the circumstances, the prayer seeking stay of execution of the judgment and decree in the lower court pending the hearing and determination of the appeal has no legal anchor. However, it is the court's further view that even if the said memorandum of appeal were deemed as proper and competent, the motion by the Applicants' motion would still fail on the merits, for the following reasons.

17. The cornerstone consideration in the exercise of the court's discretion in an application of the nature before the court 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."

18. The decision of Platt Ag JA, in the Shell case, in my humble view sets out two (2) 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)"

19. 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).

20. 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."

21. The Applicants' key grounds in support of the motion are that being aggrieved with the ruling delivered in Nairobi Milimani CMCC No. 4912 of 2016 on 17th September 2021 they have preferred an appeal which has a high chance of success; that it is in the interest of justice that the instant motion be allowed; that execution is imminent and the appeal if successful shall be rendered nugatory and an academic exercise if stay orders are denied at this stage. That the Applicants assert that they stand to suffer what they refer to as irreparable loss and damage if the stay orders are not granted.

22. With respect, the mere fact or likelihood of the commencement of the process of execution is not evidence of substantial loss. Execution in satisfaction of a decree of the Court is a lawful process, and the Applicants are duty bound to demonstrate specifically how substantial loss would arise, by showing, either that if the appeal were to succeed, the 1st Respondent would be unable to refund any monies paid to her under the decree, or that payments in satisfaction of the decree would occasion difficulty to the Applicants. The Applicants have not discharged this duty through the material placed before the court. As stated in the Kenya Shell case, without a demonstration of substantial loss, it would be rare that any other event would render the appeal nugatory and justify keeping the decree holder out of her money.

23. Secondly, the Applicants seek to stay execution of the judgment delivered on 12th October 2018 in Nairobi Milimani CMCC No. 4912 of 2016. However, the substantive appeal is premised on the ruling (s) delivered on 17th September 2021 and not the said judgment. The instant motion was filed on the 21st September 2021, after a lapse of about three years since the judgment. The Applicants, according to the copy of the judgment annexed to the motion, (see annexure "A") had filed a defence in the lower court suit on 15.09.2016 but the proceedings leading to the judgment were ex parte. Thus, the Applicants cannot be heard to feign ignorance or surprise concerning the proceedings in the lower court culminating in the 2018 judgment. Delay on their part in moving this court appears inordinate and is perhaps the consequence of dissipation of precious time through their filing of multiple applications in the lower court.

24. Finally, the Applicants have not evinced an intention to give security for the eventual performance of the decree, as evidenced by their failure to comply with the initial order of 26.04.2022 to deposit the sum of Shs. 800,000/- in 14 days. Even after the court reduced the sum on 11.05.2022 and extended time for compliance, the Applicants did not fully comply with the terms of the Court's order. There is an existing judgment in the Respondent's favour. Whereas the Applicants are entitled to pursue their appeal to finality, they cannot hope to enjoy stay of execution without offering to the Respondent some form of adequate security for the eventual performance of the decree she holds.

25. The court is obligated in an application of this nature to balance the rights of both parties. The Applicants' past conduct regarding security, if sanctioned by the court, would fly in the face of the counsel 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:

> " 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....."

26. In view of all the foregoing, the Court finds no merit in the motion dated 21st September 2021 and will dismiss it with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 4TH DAY OF AUGUST 2022.

C.MEOLI

JUDGE

In the presence of:

For the Applicants: Mr. Kamau h/b for Mr. King'ang'i

For the Respondent:Mr. Rabala

C/A: Carol