Kurumah & 2 others v Malonza (Civil Appeal 181 of 2021)
[2022] KEHC 13385 (KLR) (26 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13385 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 181 OF 2021

GV ODUNGA, J

SEPTEMBER 26, 2022

BETWEEN

MICHAEL KAMAU KURUMAH ..... 1ST APPELLANT

AUSTINE MUTARA VUNZA ..... 2ND APPELLANT

DOMINIC MWANGI THUO ..... 3RD APPELLANT

AND

AGNES MWIKALI MALONZA ..... RESPONDENT

RULING

1. On January 24, 2022, his Court granted a stay of execution of the subject decree pending the hearing and determination of this appeal on condition that the Applicants furnishes a Bank Guarantee for the decretal sum specific to this matter. The said condition was to be complied with within 30 days and in default the application would be deemed to have been dismissed with costs.

2. That order does not seem to have been complied with since the Applicant herein by a Notice of Motion dated February 22, 2022 moved this Court seeking the following orders:

    1. THAT this Application be certified urgent, service be dispensed with thereof and the same be heard ex parte in the first instance.

    2. THAT this Honourable Court be pleased to grant a stay of execution of the Judgment and/or Decree issued in Machakos Cmcc No 145 of 2020 on October 21, 2021 awarding the Respondents a decretal sum of Kshs 3, 105,261/- together with costs and interest pending the hearing and determination of this Application.

    3. THAT this Honourable Court do review/vary the conditions for stay of execution granted by the Honourable Judge on 24th January, 2022 that the Appellant/Applicant do furnish a Bank

guarantee for the decretal sum specific to this matter within the next 30 days from the date of ruling.

4. THAT this Honourable court be pleased to enlarge time within which the Appellants should comply with the court orders issued on January 24, 2022 and/or vary the said Ruling.

5. THAT this Honourable Court allow the Appellant/Applicant to furnish the Court with security in the form of a Bank Guarantee from the DTB Bank/ and or Family Bank Limited of Kshs 3,000,000/- which is the statutory limit for insurance companies.

6. THAT the Application be heard inter partes on such date and time as this Honourable Court may direct.

7. THAT The costs of this Application abide the outcome of the Appeal.

3. The application was supported by an affidavit sworn by Leah Gathenya an advocate of the High Court of Kenya practicing as such in the firm of M/s Kimondo Gachoka Advocates which is on record for the Appellant/Applicants.

4. According to the deponent, the Appellant/Applicants' insurer was informed of the orders of the court in regards to the stay conditions which responded that they could only manage to furnish the Court with security in the form of a Bank Guarantee from the DTB Bank/ and or Family Bank Limited of up to Kshs 3,000,000/- which is the statutory limit. However, the 30 days' period within which the condition was to be complied with has since lapsed hence the need to enlarge the same and/or vary the said Ruling.

5. It was deposed that the Appellant/Applicants' insurer was ready and willing to secure a limit of Kshs 3,000,000/- only (the Statutory limit) of the decretal amount by way of bank guarantee from a reputable bank (DTB/Family Bank) within the Republic of Kenya within 14 days.

6. It was however averred that the Appellant/Applicants are still interested in pursuing this appeal and will be highly prejudiced if the application is not allowed as the Respondent will be at liberty to execute and this appeal will be rendered nugatory. On the other hand, the Respondent will not be prejudiced in any way if the conditions of depositing the security are varied as the application will not occasion any prejudice to the Respondent.

7. In opposing the application, the Respondent relied on the replying affidavit sworn by Dominic Mulyungi the Respondent's advocate. According to him, the orders sought by the applicants are not available to them because the orders sought to be varied and the time to comply with them enlarge do not exist anymore as the application upon which they were issued having been deemed dismissed upon the lapse of the 30 days. Without an application seeking to reinstate the application, it was averred that the present application is an abuse of the court process.

8. It was further averred that the applicant has failed to disclose the reason for the delay since the Applicants' insurer has always been aware of its statutory limits. It was contended that the order for furnishing the bank guarantee was given at the instance and request of the applicants' insurer who did not indicate that the guarantee would be conditional to specific amount.

9. It was deposed that the Respondents stands to be prejudiced in light of the allegation that only Kshs 3,000,000.00 would be secured as the Appellants would not be able to pay the balance in the event that the appeal fails as the sum due to the Respondents is Kshs 3,377,001.53 exclusive of interest which is still accruing.

10. On without prejudice, the Respondent propose that the Applicants do provide security for the entire sum by a bank guarantee of Kshs 3,000,000/- by their insurers' bankers and a further guarantee of the balance of Kshs 377,001/53 as well as the accrued interests.

Determination

11. I have considered the application, the affidavits, both in support of and in opposition thereto and the submissions filed.

12. Order 50 rule 6 of the *Civil Procedure Rules* provides that:

> Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:
>
> Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

13. In this case the time for complying with the conditions was fixed by this court's order. Accordingly, this court has the discretion to grant the orders sought herein. The Respondent has taken the issue that since the conditional order lapsed, the application is deemed to have been dismissed and therefore no variation of the said order or enlargement of time can be granted unless the application is reinstated.

14. The deeming effect was discussed in *Prof Peter Anyan'g Nyong'o and 10 Others vs Attorney General of Kenya & Others EACJ Reference No 1 of 2006 [2007] 1 EA 5; [2007] 2 EA 5; [2008] 3 KLR (EP) 397* where it was held that:

> ' The word 'deemed' is commonly used both in principal and subsidiary legislation to create what is referred to as legal or statutory fiction and the legislature uses the word for the purpose of assuming the existence of a fact that in reality does not exist. The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.'

15. In my view since the said provision states that enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed, even though the earlier application is deemed as dismissed, nothing bars the court from entertaining an application for extension of time under the said rule whose effect if allowed would result in the revival of the deemed dismissed application. In this case the order that was issued on January 23, 2019 is the kind of order commonly referred to in legal parlance as 'unless order'. That is my understanding of the decision in *Samuels vs Linzi Dresses Ltd (1980) 1 ALL ER 803* where it was held that:

> ' A court has jurisdiction to extend time where 'unless' order has been made and not complied with, but the power is to be exercised cautiously and with due regard to maintaining the principle that orders are made to be complied with and whether to grant the extension or not is within the discretion of the Judge.'

16. However, the decision whether or not to do so is in the court's discretion. This being an exercise of judicial discretion, like any other judicial discretion must on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. This was the position of the Court of Appeal in *George W Omondi vs Guilders International Bank Limited [2015] eKLR* where the Court expressed itself as hereunder:

> ' We have duly considered the merits of this application. In our ruling of December 2, 2014, we stated that although the Court has power to vary or otherwise amend the terms and conditions upon which it has given relief, that power is to be invoked sparingly and only for good reason. It is not a power to be resorted to routinely or as a matter of course. We also stated that the overriding objective, which requires expeditious resolution of appeals, strongly militates against bogging the Court down with applications and counter applications for variation of terms that have been set after due consideration of all relevant facts. Apparently the applicant did not take those views seriously. We do not see any merit in the application for further variation of the terms upon which we granted the applicant stay of execution. As of now, the application for stay of execution already stands dismissed by the applicant's failure to meet the conditions.'

17. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so, since as was held in *Feroz Begum Qureshi and Another vs Maganbhai Patel and Others [1964] EA 633*, there is no difference between the words 'sufficient cause' and 'good cause'. It was therefore held in *Daphne Parry vs Murray Alexander Carson [1963] EA 546* that though the provision for extension of time requiring 'sufficient reason' should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles.

18. In this case, the ruling which set out the conditions was delivered on January 24, 2022. The applicants had 30 days from the said date to comply therewith which would have been by around February 25, 2022. This application was filed on February 29, 2022, just a few days after the last day. While I agree that the applicants have not explained the reason why there was a delay of those few days, I am not prepared to find that the delay was inordinate as to deny them the favourable exercise of the Court's discretion in these circumstances.

19. In this case the reason advanced for the revision of the conditions for stay is that the statutory limit is Kshs 3,000,000.00. That is an issue that the Applicant knew when the application for stay was sought and granted. Yet in the supporting affidavit sworn on November 4, 2021, the insured deposed that the insurer was ready, willing and able to furnish the Court with a Bank Guarantee from DTB Bank as security to the Court. The insurer now contends that its statutory liability is limited to Kshs 3,000,000/-. While it may well be that the statutory limited was well within the knowledge of the insurer, the fact that the supporting affidavit was deposed to by the insured may well explain the omission to set out this fact.

20. However, in this case, the insurer's liability is not the subject of this appeal. At this stage there is no order directing the Insurance Company to pay any sum. If its statutory limit is only Kshs 3,000,000.00 nothing bars it from giving a guarantee to the tune of its statutory limit and leaving the insured to guarantee the balance. However, it cannot seek to shield the judgement debtor from being executed against simply because, its statutory liability is limited. The insurance company ought to know that

the primary liability falls on the insured and whether or not the insurer has a statutory limit does not absolve the insured from meeting its liability to the decree holder. The issue of limitation of the insurer's liability only affects the insured. The third party, where the limitation is found to exist, is at liberty to pursue the insured for the balance. Accordingly, while the insurer may obtain stay against the decree holder, where the insured intends to execute against it for a sum more that it is statutorily liable to pay, it cannot bar the decree holder from executing against the judgement debtor simply because the insurer's liability is limited.

21. It, however, must be appreciated that in exercising its discretion this Court is enjoined to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the *Civil Procedure Act* are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See *Suleiman vs Amboseli Resort Limited [2004] 2 KLR 589*. This was the position of Warsame, J (as he then was) in *Samvir Trustee Limited vs Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997* where he expressed himself as hereunder:

> ' Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court. The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant. For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss. Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation. At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive

within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.'

22. In this Court's decision in *Machakos HCCC No 26 of 2018 - Winfred Mutheu Kiamuko & Titus Maundu Nzambu [suing as administrators of the estate of the late Evans Kyalo Maundu (Deceased) VS Icea Lion General Insurance Co Limited* the decision of Mulwa, J in *Peter Gichihi Njuguna vs Jubilee Insurance Co Ltd [2016] eKLR* was cited with approval and the Court expressed itself as hereunder:

> ' The Respondent seems to be of the view that the statutory limit of Kshs 3,000,000.00 includes costs and interests and that where the award exceeds that amount then the insurer is not obligated to settle any amount over and above the same including costs and interests. With due respect, I beg to differ. Section 5 aforesaid only deals with liability in respect of the principal award. It does not contemplate interest or costs which follow the event. Accordingly, where the insurer, knowing well that it is liable to pay the said sum fails to do so and proposes to do so in a manner that does not satisfy the decree in question, as a result of which the offer is rejected, then he cannot escape payment of costs and interests.'

23. In the premises, I find that to decline to vary the conditional terms that were issued herein and enlarge the period for doing so may lead to injustice for both the Applicants and the Respondents if it turns out that the Applicants are unable to make good the decretal sum. I am making determination while considering the principal sum together with the accrued interests and costs vis-à-vis the balance of the decretal sum.

24. Accordingly, I hereby vary the terms of the stay imposed vide the ruling made on January 24, 2022 and direct that the stay is granted on condition that the Applicants issue furnishes a Bank Guarantee for the sum of Kshs 3,000,000.00 together with interest and costs within 30 days. For avoidance of doubt in default the application would be deemed to have been dismissed with costs.

25. It is so ordered.

G V ODUNGA

JUDGE

RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 26TH DAY OF SEPTEMBER, 2022

M W MUIGAI

JUDGE

Delivered the presence of: