



Mbote & 3 others v Rousant International Ltd & another (Civil Appeal E120 of 2021) [2022] KEHC 14672 (KLR) (28 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14672 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E120 OF 2021
OA SEWE, J
OCTOBER 28, 2022**

BETWEEN

**WILLIE MBOTE 1ST APPELLANT
WILLIE MBOTE 2ND APPELLANT
SHIPSIDE GENERAL SERVICES LIMITED 3RD APPELLANT
SHIPSIDE GENERAL SERVICES LIMITED 4TH APPELLANT**

AND

**ROUSANT INTERNATIONAL LTD 1ST RESPONDENT
ROUSANT INTERNATIONAL LTD 2ND RESPONDENT**

JUDGMENT

1. Before the Court for determination is the Notice of Motion dated 23rd August 2021. It is expressed to have been brought under Section 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 42 Rule 6 of the Civil Procedure Rules for orders that:
 - (a) Spent
 - (b) Spent
 - (c) Pending the hearing and determination of the appeal, the Court be pleased to issue stay of execution of the warrants of attachment and sale issued on 12th August 2021 against the appellants for Kshs. 14,461,872.67;
 - (d) Costs be in the cause.
2. The application was predicated on the grounds that substantial loss and damage shall be visited on the appellants unless stay is granted; that the respondent company is registered in Hong Kong and



therefore upon success of the appeal, any monies paid to it may be irrecoverable; that no prejudice shall be occasioned to the respondent if the orders sought are made; that the instant application has been made without unreasonable delay; and that the respondent has already caused warrants of attachment and sale to be issued against the appellants. Consequently, the appellants contended that it is in the interest of justice that the orders sought be made.

3. The application was supported by the affidavit of the 1st appellant, sworn on 23rd August 2021. At paragraph 3 of that affidavit, the 1st appellant deposed that the lower court dismissed their application dated 29th December 2020 without considering its merits; and that the dismissal then paved the way for the execution in terms of the warrants of attachment and sale annexed to the Supporting Affidavit and marked Annexure WM 2. The 1st appellant further averred that the Memorandum of Appeal raises arguable points with great chances of success and therefore that they ought to be given an opportunity to have the same disposed of on merit before execution can issue. He added that the respondent company is incorporated in Hong Kong, and therefore that they stand to suffer substantial loss in the event of a successful appeal should execution be levied as proposed.
4. The application was resisted by the respondent and an affidavit to that effect sworn by its General Manager, Dunbar Crew-Brown. The respondent placed emphasis on the fact that the Court had allowed the appellants' application dated 2nd December 2020 but on terms; which terms the appellants failed to comply with. A copy of the ruling was annexed to the Replying Affidavit and marked Annexure "DCB-1" and it confirms that the appellants were indeed granted leave to defend the lower court suit, on condition, inter alia, that "...the applicant to deposit the entire decretal sum herein within 30 days hereof that is Kshs. 13,096,694.80 on or before 6/1/2021 with the court or advocates on record..."
5. It was therefore the averment of the respondent that, having failed to comply with the conditions set by the Court, the appellants had none but themselves to blame for not being accorded a hearing by the lower court on their 2nd application. The respondent conceded that it is indeed a company incorporated in Hong Kong; but added that that is no reason for it to be prevented from enjoying the fruits of its judgment, particularly at the instance of non-compliant litigants such as the appellants. The respondent further averred that the application was filed as an afterthought, and only after warrants of attachment and sale were taken out in the lower court matter.
6. In response to the assertions by the respondent, the 1st appellant filed a Further Affidavit on 25th January 2022. He denied that their second application raised the same issues as the 1st application dated 29th December 2020; or that they failed to abide by the terms given by the learned magistrate. At paragraph 6 of the Supplementary Affidavit, the 1st appellant averred that where they were unable to comply they sought further remedies. He also reiterated, at paragraph 9 of his Further Affidavit, that the appellants would be exposed unless an order of stay is granted, considering that the respondent has no registered office in Kenya. He denied that the instant application is an afterthought and added that, to the contrary, it was brought without undue delay.
7. Although directions were given herein on 9th November 2021 that the application be canvassed by way of written submissions, no submissions appear to have been filed on behalf of the appellants. Counsel for the respondent, on his part, filed his written submissions on 14th June 2022 wherein he proposed the following issues for determination:
 - (a) Whether the appellants stand to suffer substantial loss;
 - (b) Whether the application was made without unreasonable delay;



- (c) Whether the appellants have furnished security for the due performance of the decree being appealed from; and,
- (d) Whether the appeal is arguable.
8. On substantial loss, counsel for the respondent relied on *Nancy Musili v Joyce Mbete Katisi* [2020] eKLR, among others authorities, for the proposition that sufficient cause must be shown why a decree-holder should be kept out of his/her money; for instance, that the money is likely to be lost entirely in the event that it is paid out to the respondent. Counsel urged the Court to find that, in the instant case, the appellants failed to comply with a condition imposed by the lower court; and therefore that execution is inevitable.
9. While conceding that the application was filed without undue delay, counsel urged the Court to find that this appeal involves a money decree and that the appellants are yet to comply with the order issued by the lower court to deposit Kshs. 14,461,872.67 as a condition for setting aside the default judgment. Counsel cited *Okumu Constance & Another v Annab Moraa* [2020] eKLR, among other authorities, for the submission that the security envisaged under Order 42 Rule 6 of the *Civil Procedure Rules* ought to be one which achieves the object of satisfying such decree as may ultimately be binding on the appellant.
10. On whether the appeal is arguable, counsel for the respondent urged the Court to note that the appellants' defence was set aside for failure to comply with the orders of 2nd December 2020. He consequently submitted that the appellants have not satisfied the Court that their appeal is arguable. He relied on *Kenya Industrial Estate Limited & Another v Matilda Tenge Mwachia* [2021] eKLR and urged, that in balancing the rights and interests of the parties in the circumstances, it would only be fair and just for the Court to make an order that the sum of Kshs. 14,461,872.57 as decreed by the lower court be deposited in a joint interest earning account in the names of the advocates on record.
11. Having given careful consideration to the application, the issue that arises for determination of the matter herein is whether sufficient cause has been shown by the appellants to warrant the issuance of the order of stay of execution of the warrants of attachment and warrants of sale issued by the lower court on 12th August, 2021, pending hearing and determination of the appeal herein. The principles guiding the grant of stay of execution pending appeal are well settled. These principles are set out under Order 42 Rule 6 (2) of the *Civil Procedure Rules*, namely: -
- a) That the court must be satisfied that substantial loss may result to the applicant unless the order is made.
 - b) The application has been made without unreasonable delay.
 - c) That the applicant is ready and willing to offer security as the court orders for due performance of such decree or order
12. Moreover, in *Kenya Shell Limited v Benjamin Karuga Kibiru and another* [1986] eKLR, the Court of Appeal held that: -
- “...Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a 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...”
13. Thus, the appellants are apprehensive that should the warrants of attachment and sale be executed and the sums stated thereon paid to respondent, they will be unable to recover the same, granted



that the respondent is a company registered in Hong Kong, with no office in Kenya. In my view, this apprehension is not without basis as indeed, respondent conceded that it is a foreign registered company with no office in Kenya. I am therefore convinced that, in the circumstances of this case, the appellants stand to suffer substantial loss in the event of a successful appeal, should execution issue in the manner proposed by the respondent.

14. As the parties are in agreement that the appeal and the application were filed without undue delay, the last issue to consider is that of security. In this regard, Order 42 Rule 6(2) of the *Civil Procedure Rules* is explicit that stay will not normally be issued unless the applicant is willing to offer such security for the due performance of the decree as may be ordered by court. Before the trial court, an order was made that the appellants do deposit the sum Kshs. 13,096,694.80 on or before the 6th January, 2021, either with the court or advocates on record as a condition for setting aside the default judgment. The lower court having set aside the default judgment, it appears anomalous for it to set such terms with reference to the “decretal sum”. Thus, on 29th December, 2020 the appellants filed an application for stay of the conditional orders, an application they claim was dismissed without the considerations of the merits therein. They have appealed that decision in this appeal and it cannot be said that the grounds raised in the Memorandum of Appeal dated 23rd August, 2021 are frivolous, bearing in mind that, in the case of *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR, it was held that:

“An “arguable” appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court.”

15. In the result, I am satisfied that sufficient cause has been shown by the appellants to warrant the issuance of the orders sought. In the circumstances, the application dated 23rd August, 2021 is hereby allowed and orders granted as hereunder:
- (a) That pending the hearing and determination of this appeal, stay of execution be and is hereby granted in respect of Mombasa CMCC No. 812 of 2019: Rousant International Limited v Willie Mbote & Shipline General Services Limited; and in particular the warrants of attachment and sale issued on 12th August 2021 against the appellants for Kshs. 14,461,872.67;
- (b) That costs of the application to abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF OCTOBER, 2022.

OLGA SEWE

JUDGE

