Kenya Alliance Insurance Co. Ltd & another v Kagambo (Civil Appeal E145 of 2022) [2022] KEHC 14519 (KLR) (Civ) (27 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14519 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E145 OF 2022

CW MEOLI, J

OCTOBER 27, 2022

BETWEEN

KENYA ALLIANCE INSURANCE CO. LTD ..... 1ST APPLICANT

INVESCO ASSURANCE CO. LTD ..... 2ND APPLICANT

AND

SAMUEL KANGETHE KAGAMBO ..... RESPONDENT

RULING

1. The motion dated March 10, 2022 by Kenya Alliance Insurance Co Ltd (hereafter the 1st applicant) seeks an order to stay execution of the summary judgment and resultant decree in Nairobi Milimani Chief Magistrate commercial suit No E529 of 2020 pending the hearing and determination of the appeal. The motion is expressed to be brought under sections 1A, 1B & 3A of the *Civil Procedure Act* and order 40 & 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 Catherine Njogu, counsel for the 1st applicant.

2. To the effect that being aggrieved and dissatisfied with the ruling of the lower court in Nairobi Milimani Chief Magistrate commercial suit No E529 of 2020 delivered on February 28, 2022 the 1st applicant has preferred an appeal and is apprehensive that Samuel Kangethe Kagambo (hereafter the respondent) will at any time commence execution. That the 1st applicant stands to suffer irreparable loss and damage in the event that execution proceeds and the appeal subsequently succeeds. She asserts that the respondent has no known means of income sufficient to refund the decretal sum if paid over. In conclusion counsel contends that it is in the interest of justice that the motion be allowed.

3. The respondent opposes the motion by way of a preliminary objection dated April 5, 2022 on grounds that the order made by the lower court on February 28, 2022 dismissing the motion dated December 9,

2021 could only be appealed with leave of the court. That no leave has been obtained to appeal from the order and hence the appeal herein is incurably incompetent and is for striking out; and consequently, the motion dated March 10, 2022 as anchored on an incompetent appeal and must also suffer the same fate.

4. The motion was canvassed by way of written submissions. As regards the applicable principles with respect to the instant motion, counsel for the 1st applicant anchored his submissions on the provisions of order 42 rule 6 of the *Civil Procedure Rules* and the decision in *Butt v Rent Restriction Tribunal* [1982] KLR 417. He asserted that a party seeking stay of execution pending appeal need not persuade the court that the intended appeal has a high probability of success but rather demonstrate arguability of the appeal. Addressing the court on substantial loss, counsel asserted that the 1st applicant's assets are likely to be attached in execution if stay is not granted whereas the respondent has no known means of income to enable him to refund the decretal sum upon a successful appeal by the 1st applicant. Counsel further expressed the 1st applicant's willingness to provide security as the court may direct and stated that the instant motion was filed without undue delay. The court was urged to allow the motion.

5. On behalf of the respondent, counsel submitted that the instant appeal is not against the order issued by the lower court on December 9, 2021 but rather the order issued on February 28, 2020 refusing to set aside the order issued on December 9, 2021. That under the provisions upon which the 1st applicant based its motion leading to the ruling dated February 28, 2022, there is no automatic right of appeal. It was contended that in the absence of leave to appeal from the order of February 28, 2022 the appeal and motion herein are both incompetent.

6. The court has considered the material canvassed in respect of the motion. Before venturing into the merits of the motion, the court will first determine the preliminary issue raised by the respondent. By the preliminary objection dated April 5, 2022 the respondent contends that the order made on February 28, 2022 dismissing the motion dated December 9, 2021 could only be appealed with leave of the court. That by dint of the provisions of under which the said motion had been brought, an appeal does not lie as of right from the ruling of the lower court and the appeal filed without leave is incompetent. The 1st applicant did not address the court on the matter at all.

7. It is trite that the question whether an appeal lies as of right or by leave goes to the jurisdiction of the appellate court to entertain an appeal before it. This court associates itself with the sentiments of Sewe J, in *Edith Wairimu Njoroge v Brooks Holdings Co Ltd* [2018] eKLR that where an appeal does not lie as of right from an order but only with leave, such leave "was a prerequisite to the assumption of jurisdiction by this court on appeal." In the case of *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR the Court of Appeal held that the right of appeal goes to the appellate court's jurisdiction, is a fundamental matter and that a question regarding the absence of statutory conferment of such right is not a mere technicality.

8. The same court held in *Peter Nyaga Muvake v Joseph Mutunga* [2015] eKLR, civil appeal No (Nairobi) 86 of 2015 that:-

> "Without leave of the High Court, the appellant was not entitled to give notice of appeal where, as in this case, leave to appeal is necessary by dint of section 75 of the *Civil Procedure Act* and order 43 of the Civil Procedure Rules; the procurement of leave to appeal is sine qua non to the lodging of the notice of appeal. Without leave, there can be no valid notice of appeal. And without a valid notice of appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water."

9. The provisions of section 75(1)(h) of the *Civil Procedure Act* as read with order 43 rule 1 & 2 of the *Civil Procedure Rules* spell out the orders from which appeals lie as of right, or by leave of the court. Order 43 rules 1 and 2 of the *Civil Procedure Rules* is in the following terms: -

> "(1) An appeal shall lie as of right from the following orders and rules under the provisions of section 75(1)(h) of the Act—
>
> (a) ...
>
> (b) .....
>
> (c) .....
>
> (d) ....
>
> (e) ...
>
> (f) ...
>
> (g) ....
>
> (h) Order 12, rule 7 (setting aside judgment or dismissal for non-attendance) ....."
>
> (2) An appeal shall lie with the leave of the court from any other order made under these rules."

10. From the 1st applicant's affidavit material, the motion that led to the ruling delivered on February 28, 2022 was exhibited as annexure CN1 and the ruling itself as annexure CN2. The motion was expressed to be brought under the provisions of order 51 rule 1, order 10 rule 11 and order 42 rule 6 of the *Civil Procedure Rules*. The key prayers in the motion sought that:

> "... the summary judgment entered against the defendants on December 9, 2021 and all consequential proceedings be set aside, and the defendants be granted unconditional leave to defend the suit in terms of the defence....
>
> .... this honorable court be pleased to reinstate the 1st defendant's statement of defence dated June 14, 2021".

11. The bare affidavit material tendered in support and opposition of the said motion, makes it difficult in the absence of the entire record of proceedings before the lower to ascertain the exact events before the trial court. However, looking at the key prayers in the motion, the supporting affidavit and the substance of the ruling delivered on February 28, 2022, it appears that the 1st applicant's motion was specific to the *ex parte* proceedings of December 9, 2021 in which a motion to strike out the defence was allowed *ex parte* and summary judgment entered against the said applicant. Therefore, in spite of the apparently erroneous invocation of the provisions of order 10 rule 11 of the *Civil Procedure Rules* as cited on the face of the motion marked annexure CN1, what the 1st applicant was effectively seeking by its motion was the setting aside of the judgment resulting from *ex parte* proceedings. Such setting aside would fall under order 12 of the *Civil Procedure Rules* which is entitled "hearing and consequence of non-attendance". Rule 7 thereof provides that: -

> "Where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

12. That being the case, it is clear that pursuant to the provisions of order 43 rule 1(h) an appeal lay as of right from the ruling delivered on February 28, 2022. Consequently, the preliminary objection raised by the respondent must fail.

13. Moving on to the substantive issue for determination, the principles governing the grant of stay pending appeal are settled. It is also pertinent to state that at this stage the court is not concerned with the merits of the appeal. The power of the court to grant stay of execution of a decree pending appeal is discretionary, however the discretion should be exercised judicially. See *Butt V Rent Restriction Tribunal* [1982] KLR 417

14. The 1st applicant's prayer for stay of execution pending appeal, is brought under order 42 rule 6 of the *Civil Procedure Rules* 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".

15. The cornerstone consideration in the exercise of the discretion is whether the 1st applicant has 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."

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

17. 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)

18. 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 v 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."

19. The 1st applicant has expressed apprehension that it stands to suffer what is referred to as irreparable loss and damage, which I take to mean substantial loss, as the respondent's capacity to refund any sums paid out, in the event the appeal succeeds is unknown. The respondent did not place before the court any affidavit material to controvert the assertion. In the oft-cited case of *National Industrial Credit Bank Ltd* the Court of Appeal stated that:

> "This court has said before and it would bear repeating that while the legal duty is on an applicants 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 applicants to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear 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 – see for example section 112 of the *Evidence Act*, chapter 80 Laws of Kenya."

20. Thus, the 1st applicant has demonstrated its reasonable apprehension concerning the respondent's financial ability to reimburse any decretal sum paid out should the appeal be successful. And the burden shifted on the respondent to controvert the assertion by proving his own means. He has not tendered evidence of his means or at all. The judgment sum is substantial. In the scenario, it appears likely that the 1st applicant stands to suffer substantial loss and its appeal rendered nugatory if stay is not granted. As stated in the Shell case, substantial loss in its various forms, is the cornerstone of the court's jurisdiction for granting stay, and what has to be prevented.

21. Concerning security, it is trite that the court is obligated to balance the rights of both parties. The words of the court in *Nduhiu Gitahi & another v Anna Wambui Warugongo* [1988] 2 KAR, citing the decision of Sir John Donaldson M. R in *Rosengrens v Safe Deposit Centres Limited* [1984] 3 ALLER 198 and others, are apt:

> " 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....."

22. In view of all the foregoing, the court is persuaded to grant the 1st applicant's motion on condition that the applicant deposits into court the sum of Kes 500,000/- (five hundred thousand) within 30 days of this ruling. Costs of the motion will be in the cause.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 27TH DAY OF OCTOBER 2022

C.MEOLI

JUDGE

In the presence of:

For the Applicant: N/A

For the Respondent: Mr. Kaburu

C/A: Carol