Kimani v Njuki (Civil Appeal E559 of 2021)
[2022] KEHC 14606 (KLR) (Civ) (27 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14606 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E559 OF 2021

CW MEOLI, J

OCTOBER 27, 2022

BETWEEN

DAVID KABAA KIMANI ..... APPLICANT

AND

DAVID NAMU NJUKI ALIAS DAVID KINYUA ..... RESPONDENT

(Order to stay execution of the judgment delivered in Nairobi Milimani CMCC No. 8337 of 2019)

RULING

1. The motion dated September 8, 2021 by David Kabaa Kimani (hereafter the Applicant) is seeking an order to stay execution of the judgment delivered in Nairobi Milimani CMCC No. 8337 of 2019 pending hearing and determination of the appeal. The motion is expressed to be brought under Order 42 Rules 6 and Order 51 Rule 1 of the *Civil Procedure Rules*, *inter alia*, on grounds on the face of the motion as amplified in the supporting affidavit sworn by Applicant. To the effect that being aggrieved and dissatisfied with the whole judgment of the lower court delivered in favour of Davis Namu Njuki alias David Kinyua (hereafter the Respondent) on August 6, 2021, the Applicant has preferred an appeal and is apprehensive that the Respondent may obtain a decree at any time and proceed with execution. He deposes that if execution is not stayed, he is likely to suffer substantial loss as the Respondent is a person of straw and will not be able to refund any monies paid on the decree in the event of the appeal succeeding an outcome that would render the appeal nugatory, and whereas the Respondent will not suffer any prejudice should the motion be allowed. In conclusion he asserts that it is in the interest of justice that the stay of execution be granted pending hearing and determination of the appeal.

2. On the part of the Respondent, the court notes that the motion was opposed by way of a replying affidavit. However, the said response as filed was incomplete with some pages missing as such this court was at a disadvantage of knowing when it was deposed, whether the affidavit was statutorily compliant and the contents of the Respondent's depositions in opposition to the Applicant's motion.

3. The motion was canvassed by way of written submissions. As regards the applicable principles, the Applicant anchored his submissions on the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*. Counsel contended that the Applicant ought to be granted unconditional stay of execution pending appeal on grounds that if the decretal sum is paid to the Respondent, he may not be able to make a refund should the appeal succeed, and hence his appeal may be rendered nugatory; that the Respondent has not disclosed his means; and that the intended appeal is arguable and not frivolous. Citing the decision in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR it was submitted that the duty of the court is to balance the interest of parties by safeguarding the interest of the decree holder while also ensuring that that the appeal is not rendered nugatory.

4. On behalf of the Respondent, similarly, citing the applicable principles under the provisions of Order 42 Rule 6 (2) of the *Civil Procedure Rules*, counsel submitted that the relief sought is discretionary and the discretion must be exercised judicially, on the basis of principles of law and not capriciously or whimsically. On the issue of substantial loss counsel placed reliance on the decision in Civil Appeal No. E121 of 2021 *Shoko Molu Beka & Another v Augustine Gwaro Mokamba* to argue that substantial loss is a factual issue which must be raised in the supporting affidavit and the Applicant has failed to place before the court evidential material to demonstrate the likelihood of substantial loss if stay is not granted. Concerning provision of security counsel cited the decision in *Edward Kamau & Another v Hannah Mukui Gichuki* Misc. 78 of 2015 to assert that the Respondent is entitled to equal treatment before the law, and it is in the interest of justice that the court orders the Applicant to furnish security. Counsel concluded by asserting that the court ought to find a balance between the rights of both parties as the Respondent who has a lawful judgment.

5. The court has considered the material canvassed in respect of the motion. And as earlier noted, the court did not have the benefit of reviewing the Respondent's depositions in opposition to the instant motion. That said, the legal and logical hurdles to be surmounted by the Applicant to succeed in the instant motion are well spelt out in the law. It is pertinent to state that at this stage, the Court is not concerned with the merits of the appeal. It is trite that 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

6. The 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".

7. The cornerstone consideration in the exercise of the discretion 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."

8. The decision of Platt Ag JA, in the *Shell case*, in my humble view set 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)"

9. 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)

10. 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."

11. In his affidavit, the Applicant expresses apprehension that asserts that if execution is not stayed, he is likely to suffer substantial loss if the appeal is eventually allowed. Because the Respondent will not be able to refund any monies paid out under the decree. As earlier observed, the court did not have the benefit of the Respondent's rebuttal to the foregoing. In the often 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."

12. Contrary to the Respondent's assertions, the Applicant has demonstrated through his uncontroverted affidavit material apprehension concerning the Respondent's capacity to reimburse the decretal sum if paid out, upon the appeal succeeding. The judgment of the lower court was for a sum of Kshs. 2,500,000/- with costs & interest. This is a substantial sum. Upon the Applicant expressing apprehension about the Respondent's capacity to repay, the burden shifted on the Respondent to controvert the assertion by proving his own means. He has not tendered evidence of his means. In the circumstances, it seems likely that the Applicant stands to suffer substantial loss and his 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 must be prevented.

13. The Applicant did not express any willingness to furnish reasonable security for the performance of the decree and urged, contrary to established principles and without solid reasons that stay be granted unconditionally. On October 7, 2021 this court extended the interim stay orders on condition that the Applicant deposits Kshs. 300,000/- into court within twenty-one (21) days from the date thereof. On November 30, 2021 counsel appearing for the Applicant indicated to the court that they has duly complied with the court's directions earlier issued. However, the Applicant did not evince any material confirming compliance. This court upon reviewing the online filing system and has confirmed that

indeed the Applicant complied with this court's order on October 26, 2021. Ultimately, the court must balance the rights of both parties.

14. 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 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....."

15. In view of all the foregoing, that the Applicant's motion is merited and is allowed subject to the Applicant depositing within 45 days of this ruling into an interest earning account in the joint names of the parties' respective advocates, the sum of Kes. 1,500,000/- (One million Five Hundred Thousand) inclusive of the sum already deposited in court which shall forthwith be released to the depositor for this purpose. Costs 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: Mr. Kiranga

For the Respondent: Ms. Sego h/b for Mr. Onyango

C/A: Carol

HCCA No. E559 of 2021 Page 4 .