Mjomba Agencies Limited v Leonard Munyua & Grace Simalo Sakunta t/ a Munleo Hardware & Metal Fabricators (Civil Appeal E501 of 2021) [2022] KEHC 14496 (KLR) (Civ) (26 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14496 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E501 OF 2021

JN NJAGI, J

OCTOBER 26, 2022

BETWEEN

MJOMBA AGENCIES LIMITED ..... APPLICANT

AND

LEONARD MUNYUA & GRACE SIMALO SAKUNTA T/A MUNLEO HARDWARE & METAL FABRICATORS ..... RESPONDENT

RULING

1. The applicant herein has filed a Notice of Motion dated August 25, 2021 seeking for stay of execution of the judgment of Edgar Kagoni, Principal Magistrate, in Nairobi Chief Magistrate`s `Court case No.469 of 2019.

2. The application is based on grounds on the face of the application and supported by the affidavit of the director of the applicant, Urbanus Muli Maingi. The said deponent deposes in his affidavit that the applicant has preferred an appeal against the judgment of the learned magistrate. That they have a meritorious appeal with overwhelming chances of success. That the applicant is a stable company with ability to settle the decree in the unlikely event of losing the appeal. That they are ready and willing to abide by such conditions as the court may impose.

3. The application was opposed by the respondent vide the replying affidavit of their advocate, Rosemary W. Chege, wherein she deposes that the application does not meet the threshold for stay of execution. That the judgment in issue is a money decree which is recoverable in the unlikely event that the appeal will be successful. That the stay of execution is a denial to the respondent of the proceeds of the judgment and is an infringement of their legitimate expectation.

4. The appeal was canvassed by way of written submissions. The advocates for the appellant, Kalove & Co Advocates, submitted that the application was filed within a month after the delivery of the judgment. Therefore, that there was no unreasonable delay in filing the application.

5. It was submitted that the decree is for a sum of Ksh.548,000/=. That the financial status of the respondent is not known. That there is nothing on record to show that it will be capable of reimbursing the money when the appeal succeeds. That a loss of the stated sum is substantial loss. The applicant relied on the case of *Mt View Maternity & Nursing Home v Miriam Maalim* (2015) where it was held that:

> ..substantial loss need not be loss of a lot of money. The applicant will have to undergo hardship of instituting proceedings to recover the money.

6. On the issue of security, the applicant submitted that they will endeavour to comply with any order that the court may make on the same.

7. The advocates for the respondent, R.W.Chege Associates, on the other hand submitted that what is in issue is money that is capable of compensation by way of refund. That the applicant never averred that the respondents are incapable of paying back the money in the unlikely event that the appeal would be successful. That the respondents have the means to refund the money. The respondents relied on the decision in the case of *Machira t/a Machira & Co. Advocates v East African Standard* (2002) eKLR, where the court stated that to demonstrate that the applicant will likely suffer substantial loss, he is under a duty to do more than merely repeating words of the relevant statutory provision or rule or general words, and that it is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory.

8. I have considered the application, the pleadings, the grounds in opposition thereto and the submissions by the respective advocates for the parties. The application is brought under Order 42 Rule 6 of the *Civil Procedure Rules*, 2010. For the court to grant the application, the applicant has to meet the conditions set in that Rule which are:

   (a) That substantial loss may result unless the order is made.

   (b) That the application has been made without unreasonable delay.

   (c) Such security as the court orders for the due performance of the decree has been given by the applicant.

9. The court is alive to the fact that the power of the court to grant stay of execution pending appeal is discretionally and like the exercise of every discretionary power it has to be done judicially. In the case of *Butt –v- Rent Restrictions Tribunal* [1982] KLR 417 the court stated the principles to be considered in such an application and stated as follows: -

   1. "The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

   2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

   3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

10. The applicant has in the first place to show that the application was filed without unreasonable delay. The judgment in the case was delivered on the 29/7/2021 and the memorandum of appeal filed on 13/8/2021. The instant application was filed on 25/8/2021 which was within a month of the delivery of the judgment. The application was thus filed without unreasonable delay. This condition has therefore been met.

11. In an application for stay of execution pending appeal, an applicant has to demonstrate that it will suffer substantial loss unless stay is granted. The director of the applicant in his supporting affidavit did not raise the issue of the applicant suffering substantial loss if the prayers sought are not granted. It has been severally held that in an application of this nature what the court has to prevent is a party suffering substantial loss. In the case of *Shell Ltd v Kibiru and another* (1986) KLR Platt JA stated as follows:

> .....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.

12. The issue of substantial loss has to be shown through affidavit evidence or some other ways. In *Machira t/a Machira & Co. Advocates v East African Standard* (*supra*) the court stressed that:

> In this regard, this process means that in order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavit or on some other proper evidential material, that substantial loss may result to him out of all proportions in relation to the interests of justice and fairness, unless suspension or stay is ordered and the parties' positions so regulated and ordered that injustice is averted.

13. Putting into mind the above legal principles, I find that the applicant has not demonstrated that they will suffer substantial loss if stay is not granted. This condition for grant of stay of execution has not been met.

14. The third condition that an applicant has to satisfy is provision of security for due performance of the decree. In the case of *Gianfranco Manenthi & another v Africa Merchant Assurance Co. Ltd* [2019] eKLR the court observed that:

> "The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the *Civil Procedure Rule*s, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

> Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....
>
> Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree."

15. Similarly in *Arun C. Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR the court stated that:-

> " The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the *Civil Procedure Rules* acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."

16. The applicant herein did not offer any security but stated that they are ready to abide by any conditions that the court may impose. In granting an application for stay of execution the court has to do a balance act between the rights of the two parties. It has to balance the right of the applicant to appeal against the judgement and the right of the respondent who should not be denied the fruits of his judgment without a justifiable cause. In the case of *Mohammed Salim t/a Choice Butchery v Nasserpuria Memon Jamat* (2013) eKLR where the court upheld the decision of *Portreitz Maternity v James Karanga Kabia* Civil Appeal No 63 of 1991 and stated that:-

> " That right of appeal must be balanced against an equally weighty rigid right that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right."

17. Though the applicants herein did not in their supporting affidavit raise the issue of them suffering substantial loss if stay is not granted, they submitted that they may not be able to recover the money if paid to the respondent before the appeal is heard and determined. The respondents stated in their submissions that they are capable of refunding the money even though they never adduced evidence to show their financial ability. In *Century Oil Trading Company Limited v Kenya Shell Limited Nairobi* (2008) eKLR, it was stated as follows: -

> " Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant

is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment".

18. In this case, it is doubtful whether the respondents are in a position to refund the money in the event that the appeal will go against them. The decretal sum is over half-a-million Kenya shillings. This is not a small amount of money. Balancing the rights of the parties, it is my considered view that the applicant should be allowed to exercise their right of appeal if they can meet the following condition so as to cater for the interests of the respondent. I grant the application for stay of execution on condition that the applicant deposits the decretal sum in court within one month from the date of delivery of this ruling, failure to which the application will stand dismissed.

The costs of the application to abide by the outcome of the appeal.

Delivered, dated and signed at NAIROBI this 26th day of October 2022.

J. NYAGA NJAGI

JUDGE

In the presence of:

Mr. Muinde for Applicant

Miss Chege for Respondent

Court Assistant: Miss Mumo

30 days R/A