



**Mugo & another v Mwaura (Civil Appeal E558 of 2021)
[2022] KEHC 14244 (KLR) (Civ) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14244 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E558 OF 2021

CW MEOLI, J

OCTOBER 21, 2022

BETWEEN

PAUL MBUGUA MUGO 1ST APPLICANT

DAVID KAMAU IRUNGU 2ND APPLICANT

AND

JAMES GICHURU MWAURA RESPONDENT

RULING

1. The motion dated September 4, 2021 by Paul Mbugua Mugo and David Kamau Irungu (hereafter the 1st and 2nd Applicant/Applicants) primarily seeks an order to stay execution of the judgment delivered by the by the trial court in Nairobi Milimani CMCC No 8296 of 2018 pending hearing and determination of the appeal. The motion is expressed to be brought under Section 1A, 1B, 3A & 3B of the *Civil Procedure Act* and Order 42 Rules 4, 6 & 7 of the *Civil Procedure Rules*, inter alia, on grounds on the face of the motion amplified in the supporting affidavit sworn by Janerose Nanjira, counsel for the Applicants.
2. The deponent swore that judgment was entered in Nairobi Milimani CMCC No 8296 of 2018 on August 6, 2021 in favour of James Gichuru Mwaura (hereafter the Respondent) in the sum of Kshs 862,000/- as general damages which is inordinately high in the circumstance. That the Applicants have since lodged an appeal and unless stay of execution is granted the Respondent will proceed to execute thus rendering the appeal nugatory exposing the Applicants to irreparable loss and damage. Counsel expresses the Applicants willingness to provide a bank guarantee as security for the eventual performance of the decree.
3. The Respondent opposes the motion through grounds of opposition dated September 20, 2021, to the effect that there was no evidence of payment of court fees for the appeal; that there was no evidence



of substantial loss; that a bank guarantee would mean the Applicants continues to keep and to trade with the Respondent's award of damages which is most unjust; and that a deposit into court or a joint account would be a more equitable security.

4. The motion was canvassed by way of written submissions. As regards the applicable principles, the Applicants anchored their submissions on the provisions of Order 42 Rule 6 of the Civil Procedure Rules, Article 48 and 50 of the Constitution of Kenya 2010. Concerning viability of the appeal the Applicants cited Kenya Revenue Authority v Sidney Keitany Changole & 3 Others [2015] eKLR to assert that in an application of this nature before the High Court, it is not a requirement to show that the appeal has a high chance of success. Nevertheless, stating that the instant appeal raises arguable and serious issues that warrants the court's consideration. Submitting on the question of substantial loss counsel, relied on National Industrial Credit Bank Limited v Aquinas Francis Wasike – Court of Appeal Civil Application No 238 of 2005 and Tabro Transporters Ltd v Absalom Dova Lumbasi [2012] eKLR to argue that in the absence of an affidavit of means the Respondent's financial status is unknown and as such there is a likelihood that the Respondent has no means to refund the decretal amount if paid out. Counsel went on to assert that the impugned judgment was delivered on August 6, 2021 whereas the instant motion was filed a month later hence there was no inordinate delay. In conclusion while calling to aid the decision in Selestical Limited v Global Rock Development [2015] eKLR counsel reiterated the Applicants' willingness to furnish security by way of a bank guarantee and asserted that all conditions for granting of an order to stay execution pending appeal had been met.
5. On behalf of the Respondent, it was contended that the appeal lacks merit as it solely challenges the trial court's award on quantum. That to succeed the Applicants must prove substantial loss and moreover that the deponent to the supporting affidavit has not demonstrated that she had authority from the Applicants to swear on their behalf, thus rendering the affidavit incurably defective. Citing the decision in Kenya Shell Ltd v Kibiru & Another [1986] KLR 410, Counsel argued that substantial loss is the cornerstone of the jurisdiction to grant stay of execution pending appeal and without it an appeal cannot possibly be rendered nugatory. In conclusion it was submitted that the motion lacks merit and ought to be dismissed.
6. The court has considered the material canvassed in respect of the motion. The Respondent has raised the objection that the affidavit in support of the motion is defective having been deposed by counsel who does not state to have authority from the Applicants to do so on their behalf. The Applicants did not address the objection. However, the deponent of the disputed supporting affidavit states at paragraph 1 that: -

 ' THAT I am an advocate of the High Court of Kenya practicing in the firm of Kimondo Gachoka & Company Advocates and I am conversant with the issues relating to this suit and I am duly authorized and competent to make this affidavit.'
7. This deposition though imprecise has not been controverted by the Respondent and in my view is adequate for the circumstances of the case. See Makupa Transit Shade Limited & Another vs Kenya Ports Authority & Another [2015] eKLR. As such the Respondent's objection must fail.
8. Moving on to the substantive issue for determination, 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.



9. The Applicants 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'.

10. 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.'

11. 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.'

12. 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.'

13. 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.'

14. Counsel for the Applicant deposes that unless the order to stay execution is granted, the motion and memorandum of appeal will be rendered nugatory, and the Applicants will suffer irreparable loss and damage. The Respondent on his part argued in his submissions quite correctly that there is no demonstration in the affidavit of the Applicants as to how what they call 'irreparable loss' will occur. The mere fact that the process of execution is likely to be or has been initiated by the Respondent is not evidence of substantial loss. Execution in satisfaction of a decree is a lawful process, and the Applicants were duty bound to demonstrate how substantial loss would arise in this instance, by showing, either that if the appeal were to succeed, the Respondent would be unable to refund any monies paid to him under the decree, or that payments in satisfaction of the decree would occasion difficulty to the Applicants. The affidavit is silent on this aspect.

15. Therefore, the Applicants have not discharged their duty to demonstrate substantial loss. As stated in the Shell case, without a demonstration of substantial loss, it would be rare that any other event would render the appeal nugatory and justify keeping the decree holder out of her money. Claims in the Applicants' submissions that the onus had shifted to the Respondent to demonstrate his means are without basis; the burden only shifts to the respondent after an applicant has demonstrated the apprehension that the Respondent is incapable of refunding any sums paid out in the event that the appeal succeeds. See National Industrial Credit Bank Limited v Aquinas Francis Wasike & Anor (2006) eKLR.

16. It is not enough for the Applicants to casually aver that execution will render the appeal nugatory. Substantial loss in its various forms, is the cornerstone of the jurisdiction for granting stay pending appeal. That is what must be prevented. Therefore, without this evidence, it is difficult to see why the



execution process should be stayed. In the court's view, the Applicants have not demonstrated the twin aspects of the likelihood of substantial loss and the appeal being thereby rendered nugatory. In the circumstances, the motion dated September 4, 2021 is devoid of merit and is dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 21ST DAY OF OCTOBER 2022.

C. MEOLI

JUDGE

In the presence of:

For the Applicants: Ms. Sagini

For the Respondent: Mr. Kaburu

C/A: Carol

