Karanja & another v Gikonyo (Civil Appeal E448 of 2021)
[2022] KEHC 16789 (KLR) (Civ) (22 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16789 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E448 OF 2021

CW MEOLI, J

DECEMBER 22, 2022

BETWEEN

DICKSON MUKARU KARANJA ..... 1ST APPLICANT

PETER KARIUKI NGUGI ..... 2ND APPLICANT

AND

DANIEL KIMANI GIKONYO ..... RESPONDENT

(Originating from Nairobi Milimani SCC No. 088 of 2021)

RULING

1. The motion dated 28th July 2021 by Dickson Mukaru Karanja and Peter Kariuki Ngigi (hereafter the 1st and 2nd Applicant/Applicants) seeks to stay of execution of the judgment issued in Nairobi Milimani SCC No 088 of 2021 in favour of Daniel Kimani Gikonyo (hereafter the respondent) pending hearing and determination of the intended appeal. The motion is expressed to be brought under order 42 rules 4, 6 & 7 and order 51 rule 1 & 3 of the *Civil Procedure Rules*, *inter alia*, on grounds on the face of the motion as amplified in the supporting affidavit sworn by 1st applicant, who claims to be duly authorized by the 2nd applicant to swear the affidavit.

2. To the effect that being aggrieved with the whole judgment of the small claims court delivered on June 28, 2021 the applicants have preferred an appeal. He asserts that unless stay of execution is granted, the appeal will be rendered nugatory, and the applicants will suffer irreparable loss and damage. The deponent expresses the willingness to furnish security by way of a bank guarantee or any other form the court may deem fit.

3. The motion is opposed through the replying affidavit of the respondent. He views the motion as brought in bad faith to deny him the fruits of judgment. The respondent contends that the appeal

lacks merit and the applicants have not demonstrated the loss they will suffer should the orders of stay of execution be denied; and that the court ought to dismiss the motion but if the court is inclined to allow the same, to require the applicants to provide security for eventual performance of the decree.

4. The motion was canvassed by way of written submissions. The applicants anchored their submissions on the provisions of order 42 rule 6 of the *Civil Procedure Rules*. Counsel submitted that the applicants have demonstrated through their memorandum of appeal that they have an arguable appeal with a high chance of success. Relying on the decisions in *GN Muema p/a (sic) Mt View Maternity & Nursing Home v Mirima Maalim Bishar & Another* [2018] eKLR and *Amal Hauliers Limited v Abdulnasir Abubakar Hassan* [2017] eKLR counsel submitted that the applicants were condemned unheard before the lower court and if the decretal sum were to be settled, the respondent whose financial status is unknown may be unable, upon the appeal succeeding, to refund such monies exposing the applicants to substantial loss and rendering the appeal nugatory. Concerning delay, it was argued that the applicants wasted no time in filing the instant motion. In conclusion while calling to aid the decision in *Focin Motorcycle Co Limited v Ann Wambui Wangui & Another* [2018] eKLR counsel reiterated the applicants willingness to furnish security by way of a bank guarantee for the entire decretal sum.

5. 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 herein is discretionary and the discretion must be exercised judicially, meaning upon defined principles of law and not capriciously or whimsically. On the issue of substantial loss, he placed reliance on the decision in Civil Appeal No E121 of 2021 *Shoko Molu Beka & Another v Augustine Gwaro Mokamba* to assert that substantial loss is a factual issue which must be raised in the supporting affidavit and the Applicants have failed to depose thereto. Regarding security counsel cited the decision in *Edward Kamau & Another v Hannah Mukui Gichuki* Misc 78 of 2015 to submit that the respondent is entitled to equal treatment before the law. Counsel concluded by asserting that the court ought to ensure a balancing act between the rights of both parties particularly the respondent who has lawful judgment and urged the court to dismiss the motion with costs.

6. The court has considered the material canvassed in respect of the motion. However, 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* (Supra).

7. 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".

8. 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.
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> 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.
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> 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."

9. The decision of Platt Ag JA, in the Shell case, in my humble view sets out two (2) different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. 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)"

10. 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)

11. 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."

12. The deponent to the affidavit supporting the motion has sworn that unless stay of execution is granted, the appeal will be rendered nugatory and the applicants likely to suffer what is described as irreparable loss and damages. The respondent on his part asserts that the applicants have not demonstrated the loss they will suffer should the orders of stay of execution not be granted and that the existence of an appeal is not an automatic stay of execution.

13. Execution in satisfaction of a decree is a lawful process, and the applicants were duty bound to demonstrate specifically how substantial loss would arise, by showing, either that if the appeal were to succeed, the respondent would be unable to refund any monies paid to her under the decree, or that payments in satisfaction of the decree would occasion difficulty to the applicants.

14. The applicants have not discharged this duty. The applicants have only alluded to the issue belatedly in their submissions. 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 his money.

15. It is therefore not enough for the applicants to casually aver that stay of execution ought to be granted to ensure that the appeal is not rendered nugatory. Substantial loss in its various forms, is the cornerstone of the jurisdiction for granting stay of execution. 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 substantial loss and the likelihood of the appeal being rendered nugatory. In the circumstances, the motion dated July 28, 2021 is devoid of merit and is dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 22ND DAY OF DECEMBER, 2022.

C.MEOLI

JUDGE

In the presence of:

For the Applicants: No appearance

For the Respondents: Mr. Odhiambo h/b for Mr. M. Mbiti

C/A: Adika