Maina & another v Erick (Civil Appeal E424 of 2021)
[2022] KEHC 16741 (KLR) (Civ) (22 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16741 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E424 OF 2021

CW MEOLI, J

DECEMBER 22, 2022

BETWEEN

MICHAEL DENNIS IRUNGU MAINA ..... 1ST APPLICANT

JOHN MWANGI MUNGAI ..... 2ND APPLICANT

AND

MWANGI ERICK ..... RESPONDENT

RULING

1. The motion dated October 27, 2021 by Michael Dennis Irungu Maina and John Mwangi Mungai (hereafter the 1st and 2nd applicant/applicants) seeks to stay of execution of the judgment and decree issued in Nairobi Milimani CMCC No 6379 of 2017 in favour of Mwangi Erick (hereafter the respondent) pending hearing and determination of the instant appeal. The motion is expressed to be brought under section 3 & 3A of the *Civil Procedure Act*, order 42 rules 4 & 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 1st applicant, on his own behalf and on behalf of the 2nd applicant to depose thus competent to swear the affidavit.

2. To the effect that being aggrieved with the judgment in Nairobi Milimani CMCC No 6379 of 2017 delivered on June 18, 2021 the applicants have preferred an appeal of which has a high chance of success. He contends that delay in filing the instant motion upon delivery of the judgment was occasioned by the fact that counsel having conduct of the matter was taken ill and was placed on mandatory bed rest. That there is reasonable apprehension that the respondent may levy execution. And that if the decretal sum is paid over, the respondent would not be in no position to refund the same, having failed to disclose or furnish the court with any documentary evidence of his financial standing and hence the likelihood of substantial loss and the successful appeal being rendered nugatory.

3. He goes on to depose that the motion has been made in good faith and will not occasion any prejudice to the respondent. In conclusion the deponent expresses willingness to furnish security by way of a bank guarantee.

4. The motion is opposed through the replying affidavit deposed by the respondent who views the motion as brought in bad faith to deny him the fruits of judgment. The respondent contends that the appeal lacks merit while the applicants have not demonstrated the loss, they will suffer should the orders of stay of execution not be granted. Further that the appeal does not operate as an automatic stay of execution of the lower court judgment. He concludes by asserting that the court ought to dismiss the motion and in the alternative if otherwise persuaded, to require the applicants to provide security for due performance of the decree.

5. 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*. Counsel submitted that the applicants have demonstrated that they have an arguable appeal with a high chance of success. Counsel made somewhat lengthy submissions on the point.

6. Concerning substantial loss he placed reliance on the decisions in *Edward Kamau & another v Hannah Mukui Gichuki* [2015] eKLR, *National Industrial Credit bank Ltd v Aquinas Francis Wasike* Court of Appeal Civil Application No 238 of 2005 and *Tarbo Transporters Ltd v Absalom Dova Lumbasi* [2012] eKLR to assert that the decretal sum is substantial and there is a reasonable apprehension the respondent has no means to refund it if paid out. That such event would render the appeal nugatory. In concluding, counsel cited the case of *Selestical Limited v Global Rock Development* [2015] eKLR to reiterate the applicants' willingness to furnish security and implored the court to allow the motion.

7. On behalf of the respondent, counsel similarly citing the applicable principles under the provisions of order 42 rule 6 (2) of the *Civil Procedure Rules* submitted that the relief sought herein is discretionary and that the discretion must be exercised judicially upon defined principles of law and not capriciously or whimsically. Counsel pointed out that while the motion was brought five months after the judgment was delivered, the applicants have not explained the delay satisfactorily.

8. He relied on Civil Appeal No E121 of 2021 *Shoko Molu Beka & another v Augustine Gwaro Mokamba* to assert that substantial loss is a factual matter which must be raised in the supporting affidavit and that the applicants have failed to present evidential material thereof. Lastly, concerning provision of security counsel cited the decision in *Edward Kamau & another v Hannah Mukui Gichuki* Misc 78 of 2015 to state that the respondent is entitled to equal treatment before the law and the court ought to require the applicants to furnish security. Counsel urged the court to strike a balance between the rights of both parties and particularly the respondent who has lawful judgment. He otherwise dismissed the motion as an abuse of the court process and urged the court to dismiss it with cost.

9. 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*).

10. 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".

11. 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."

12. 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)"

13. 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)

14. 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."

15. The applicants affidavit material asserts reasonable apprehension that if execution proceeds, and the decretal sum is paid over, the said respondent would not be in no position to refund the same, having failed to his means. That such event would cause irreparable loss to the applicant and render the appeal nugatory. The respondent did not to specifically counter the foregoing assertion.

16. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike and another* [2006] eKLR 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."

17. The applicants having made out a reasonable apprehension, the burden shifted on him to controvert the assertion by proving his own means. He has not tendered evidence of his means and his bare depositions that the applicants have not demonstrated the loss they are likely to suffer are of no consequence in the circumstances. It seems likely that the applicants stands to suffer substantial loss and the 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.

18. Concerning security the applicants expressed willingness to furnish reasonable security by way of a bank guarantee. As correctly urged by the respondent, the court must balance the competing interests

of the parties so as not to prejudice the matter pending appeal. In that regard, the words stated 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 All ER 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....."

19. Finally, the instant motion was filed roughly four months after judgment was delivered. The respondent's explanation appears casual in the absence of supporting evidence, but in the court's view, the delay herein is not so inordinate as to unduly prejudice the respondent. In view of all the foregoing, that the applicants motion dated October 27, 2021 is allowed on condition that the applicants shall deposit the entire decretal sums into a joint interest earning account within 30 days of today's date construed in accordance with the provisions of order 50 rule 4 of the *Civil Procedure Rules*. Costs in the cause.

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 Respondent: Mr. Odhiambo h/b for Mr. Musili Mbiti

C/A:Adika