Njeru & another v Musau (Civil Appeal E179 of 2021)
[2021] KEHC 9788 (KLR) (27 July 2021) (Ruling)

Neutral citation: [2021] KEHC 9788 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E179 OF 2021

GV ODUNGA, J

JULY 27, 2021

BETWEEN

VICK MURIUKI NJERU ..... 1ST APPELLANT

DOMINIC BORORE ..... 2ND APPELLANT

AND

BARNUBUS KITONGA MUSAU ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. Bernard Kasavuli (Mr.) Principal Magistrate delivered on 4 October, 2021 in Mavoko CMCC No. 609 of 2020)

RULING

1. By a Notice of Motion dated 3rd November, 2021, premised on order 42 rule 6 of the *Civil Procedure Rules,* 2010 and section 1A, 1B and 3A of the *Civil Procedure Act*, the 1st and 2nd Appellants herein seek orders that the court grants them stay the execution of the judgment delivered on 4th October, 2021 in Mavoko CMCC No. 609 of 2020 pending the hearing and determination of the Appeal.

2. The application was supported by an affidavit sworn by the 2nd Appellant herein on even date. According to the deponent, the stay of execution order granted by the Trial Magistrate on 4th October, 2021 during the delivery of the Judgment was lapsing on 4th November 2021. He was therefore apprehensive that the Respondent would proceed to execute the judgment due to lack of stay of execution order thus rendering this Appeal rendered nugatory and a mere academic exercise. According to the deponent, the Appellants will be irreparably and substantially harmed since they will be unable to recover a substantial decretal sum of Kshs. 2,023,100/- together with costs paid to the Respondent in the event that the appeal, which in their view, has a high chance of success, is eventually successful. It was their view that they ought to be given an opportunity to ventilate the appeal otherwise they would forever be driven from the seat of justice.

3. According to the deponent, the Respondent does not stand to suffer any prejudice which cannot be satisfied by an award of costs and/or interest since they were are ready and willing to comply with any orders for granting security as the Court may deem fit to grant. It was averred that the Applicant had approached this court with sufficient promptitude.

4. In support of Appellants application, the Applicants relied on the provisions of order 42 of the *Civil Procedure Rules* and the case of *Tabro Transporters Ltd v Absalom Dova Lumbasi* [2012] eKLR as well as the holding by the Court of Appeal in *Mukuma v Abongo* [1988] KLR 645.

5. Regarding the first condition, whether the Appellants will suffer substantial loss unless the orders sought are granted, it was submitted that it is improbable for the Respondent to refund the decretal sum if paid to him since the Appellant does not know the Respondent's financial means which are within the Respondent's special knowledge. According to the Applicants, the Respondent has no assets which will be liquidated in the event the appeal is successful and has not provided any account statements showing his financial position or a guarantee from a reputable bank to prove that he will be able to refund the partial decretal sum. Reliance was placed on *Stanley Karanja Wainaina & Another vs. Ridon Anyangu Mutubwa* [2016] eKLR and *Tabro Transporters Limited* (supra).

6. According to the Appellants, they will be at a loss if they are directed to settle the whole decretal sum pending the hearing and determination of the present appeal. They submitted that on a balance of probabilities, the scales of justice tilt in favour of the Appellants being protected from suffering substantial loss. On the other hand, the Respondent will not suffer any prejudice since the decretal sum is generating interest.

7. It was contended that since this application was filed less than 30 days on 3rd November, 2021 after the delivery of the judgment, the period was very reasonable.

8. It was the Applicants' view that since the Respondent had asked the court to order a deposit of the decretal sum in a joint interest earning account, he was therefore not opposed to the granting of stay of execution as long as there is a provision of security. The Appellants therefore urged the court to allow the application on this ground.

9. In response to the application, the Respondent's advocate Evans M. Mochama swore a replying affidavit on 9th November, 2021 in which he deposed that the appeal is unmerited and has no slightest chance of success. He averred that the Appellants have failed to satisfy the court of the substantial loss likely to be occasioned in the event the stay order is not granted. According to the deponent, the appeal is only aimed at wasting the court's precious time and denying the Respondent his right to enjoy the fruits of the judgment.

10. According to the deponent, in the event that the court grants the orders sought, it should impose a conditional stay that half the decretal sum be released to the Respondent's advocate on record and the balance be deposited in a joint interest earning account of both advocates on record till the final determination of the appeal. In the alternative, the deponent averred that the whole decretal sum be deposited in court or any other bank in joint names of both advocates on record.

11. It was submitted on behalf of the Respondent that the Appellants have not demonstrated to the court that the appeal has arguable grounds save for the ground that the Trial Magistrate erred in finding them 100% liable and the quantum of damages awarded was inordinately high and excessive which according to the Respondent must fail since the Appellants did not challenge his evidence on record which was sufficient and uncontroverted.

12. As to what is an arguable appeal, reliance was placed on the case Civil Application No. 74 of 2019 - Alfred Mincha Ndubi vs. The Standard Limited, and it was submitted that the appeal is based on mere allegations to which the Appellants had an opportunity to controvert at the trial stage.

13. On whether substantial loss would be occasioned if stay of execution is granted, it was submitted that this matter has been in court since 2020 and therefore granting the orders sought by the Appellants would occasion the Respondent substantial loss and infringement of his fundamental rights to an expeditious process. According to the Respondent, the Appellants have not demonstrated that they will suffer any substantial loss should the orders are not granted and reliance was placed on the case of MNM vs. CCM Civil Appeal No.38 of 2021 quoted in *Antoine Ndiaye vs. African Virtue University,* Nairobi Civil Suit No. 422 of 2006.

14. According to the Respondent, the Appellants allegations are only aimed at prejudicing and degrading the Respondent's dignity. It was disclosed that the Respondent's advocate is a person of means having practiced for 23 years hence capable and willing to satisfy any substantial loss is undisputed. Reliance was placed on the case of V*ictory Construction vs. B (A minor suing through Next Friend PMM)* (2019) eKLR where the court adopted the decision of Kimaru J. in *Century Oil Trading Company Ltd vs. Kenya Shell Ltd* Milimani HCMA No.1561 of 2007 on what amounts to substantial loss. It was submitted that the mere fact that the Appellants would have to pay the decretal sum does not amount to a substantial loss on their part. According to the Respondent, the orders would prejudice his entitlement to the fruits of the judgment as well as his right to put to an end the litigation.

15. Regarding the security to be furnished by the Appellants, it was submitted that there are two competing interest that must be considered in granting stay of execution, that is the successful party should not be denied the fruits of the judgment and the unsuccessful party's undoubted right of appeal. Reliance was placed on the case of *Kenya Commercial Bank Limited vs. Sun City Properties Limited & 5 Others* (2012) eKLR and C*entury Oil Trading Limited Co. Ltd vs. Kenya Shell Limited (supra).*

16. According to the Respondent, the judgment was for monetary value hence some payments should be released to him. The Respondent urged the court to, within 30 days, order the release of half the decretal sum to his advocates and the balance be deposited in a joint interest earning account of both advocates until the appeal is heard and fully determined.

Determination

17. I have considered the application, the affidavit both in support of the application and in opposition, the submissions filed as well as the authorities relied upon.

18. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows:

> 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.

19. In *Vishram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal

is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. According to section 1A(2) of the *Civil Procedure Act* "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

20. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the *Civil Procedure Act* are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See *Suleiman vs. Amboseli Resort Limited* [2004] 2 KLR 589.

21. The same position was adopted by Kimaru, J in *Century Oil Trading Company Ltd vs. Kenya Shell Limited* Nairobi (Milimani) HCMCA No. 1561 of 2007 where he stated that:

> " The word "substantial" cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words "substantial loss" must mean something in addition to all different from that...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 judgement."

22. This was the position of Warsame, J (as he then was) in *Samvir Trustee Limited vs. Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997 where he expressed himself as hereunder:

> " Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions."

23. On the first principle, Platt, Ag. JA (as he then was) in *Kenya Shell Limited v Kibiru* [1986] KLR 410, expressed himself as follows:

> " 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 corner stone of both jurisdictions for granting a 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".

24. On the part of Gachuhi, Ag.JA (as he then was) at 417 held:

> " It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it

were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement."

25. Dealing with the contention that there was no evidence that the 1st Respondent would be able to refund the decretal sum if paid over to the Respondent, Hancox, JA (as he then was) in the above cited case when he expressed himself as follows:

> " I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age."

26. Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him being barred from benefiting from the fruits of his judgement. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In *Machira T/A Machira & Co Advocates vs. East African Standard (No 2)* [2002] KLR 63 it was held that:

> " to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

27. Where the allegation is that the respondent will not be able to refund the decretal sum if paid to him in satisfaction of the decree, the burden is upon the applicant to prove that that is the position. See *Caneland Ltd. & 2 Others vs. Delphis Bank Ltd.* Civil Application No. Nai. 344 of 1999.

28. What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In my view even if it were shown that the respondent is a man of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person's right to enjoy the fruits of his success since lack of means per se is not necessarily a ground for granting stay. As was held in *Stephen Wanjohi vs. Central Glass Industries Ltd*. Nairobi HCCC No. 6726 of 1991, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income. Suffice to state that the respondent, at this moment, is the successful party and in order to deny him the fruits of his success, it is upon the applicant to prove that he is unlikely to make good whatever sum he may have received in the meantime.

29. In this case it was the applicant's case, from the replying affidavit, was that unless the stay is granted, they will be irreparably and substantially harm since they will be unable to recover a substantial decretal sum of Kshs. 2,023,100/- together with costs paid to the Respondent in the event that the appeal succeeds. The supporting affidavit did not disclose the basis for believing that the Respondent would be unable to refund the said sum. However, in their submissions, it was contended that it is improbable for the Respondent to refund the decretal sum if paid to him since the Appellant does not know the Respondent's financial means which are within the Respondent's special knowledge. According to the Applicants, the Respondent has no assets which will be liquidated in the event the appeal is successful and has not provided any account statements showing his financial position or a guarantee from a reputable bank to prove that he will be able to refund the partial decretal sum. Again the submissions do not indicate the basis for believing that the Respondent would be unable to refund the decretal sum if paid over to them. The burden, in such matters falls squarely on the Applicant and where it is not discharged the Respondent has no obligation to disclose his financial standing or ability. If the Applicant fails to lay a basis for believing that the Respondent will not refund the sum in question, the Respondent is properly and within his right to keep silence as regards his standing financially since the law presumes that he ought to enjoy the fruits of his judgement without any hindrance.

30. There may, however, circumstances which the Court may properly take judicial notice of without the Applicant alluding to the same such as the amount involved and the Respondent's legal capacity whether or not the Respondent is suing in a representative capacity.

31. I agree with the position adopted in Bungoma High Court Misc Application No 42 of 2011 - *James Wangalwa & Another vs. Agnes Naliaka Cheseto* that:

> " The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail."

32. In this case however, the replying affidavit was sworn, not by the Respondent, but by his advocate. In the said affidavit, the advocate disclosed that he is an advocate of 23 years standing hence there will be no difficulty in refunding the decretal sum. However, the person who will be required to refund the amount in question is not the Respondent's advocate but the Respondent himself. Accordingly, the financial ability of the Respondent's advocate is irrelevant in matter of this nature. What is required is for the Respondent to aver that he is in a position to refund the sum being claimed.

33. In matters dealing with one's financial status, the law appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then, in those circumstances, where the applicant has reasonable grounds which grounds must be disclosed in the application that the Respondent will not be in a position to refund the decretal sum if the appeal succeeds, have shifted to the Respondent to show that he would be in a position to refund the decretal sum. See *Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua* Civil Application No. Nai. 367 of 2001; *ABN Amro Bank, N.K. vs. Le Monde Foods Limited* Civil Application No. 15 of 2002.

34. The same sentiments were expressed in Civil Application No. 238 of 2005; National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike in which the Court of Appeal expressed itself at Page 3 Paragraph 2 as follows:-

> " This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant 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."

35. I therefore appreciate the sentiments expressed by the High Court in *John Gachanja Mundia v Francis Muriira Alias Francis Muthika & Another* [2016] eKLR that:

> " There is doubt the Applicant has shown that substantial loss would occur unless stay is granted. However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in *the Constitution* as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief."

36. Having considered the instant application, it is my view that this a case where a stay ought to be granted but on conditions. Accordingly, the order which commends itself to me and which I hereby grant is that there will be stay of execution pending the hearing of this appeal on condition that the Appellant pays half of the decretal sum to the respondent and deposits the balance in a joint interest earning account in the names of the advocates for the respective parties in Kenya Commercial Bank, Machakos. Both conditions to be complied with within 30 days from the date of this ruling and in default this application shall be deemed to have been dismissed with costs to the Respondent.

37. The costs of this application are awarded to the Respondent in any event. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 27TH DAY OF JULY, 2021.

G V ODUNGA

JUDGE

In the presence of:

Mr Mochama for the Respondent

CA Susan