Milestone Construction Limited v Mukoyani (Civil Appeal 42 of 2024) [2025] KEHC 1534 (KLR) (19 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1534 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 42 OF 2024

S MBUNGI, J

FEBRUARY 19, 2025

BETWEEN

MILESTONE CONSTRUCTION LIMITED ..... APPELLANT

AND

SELIPHER MAKONJO MUKOYANI ..... RESPONDENT

RULING

1. The appellant filed a motion dated 27.2.2024 under Certificate of Urgency seeking the following orders: -

    a. Spent.

    b. Spent.

    c. Spent.

    d. There be an order of stay of Judgment delivered on 30.1.2024 by Hon. R. S Kipng'eno in Butali PMCC No. 205 of 2020 ; Selipher Makonjo Mukoyani Vs Milestone Construction Limited pending the hearing and determination of this appeal.

    e. The costs of this application be in the cause.

2. The application was premised on the following grounds: -

    i. The lower court entered judgment for the Respondent against the Appellant on 30.1.2024 .

    ii. The Appellant being dissatisfied with the judgment preferred an appeal before this Honorable court.

    iii. The appeal filed has merits, raises triable issues and has high chances of success.

iv. There are no orders of stay of execution in place and the Appellant is apprehensive that the Respondent may resort to executing the decree anytime now.

v. In the event that execution is levied against the Appellant the appeal filed will be rendered nugatory and the Appellant will suffer irreparable loss.

vi. That the Applicant is ready and willing to offer security preferably in form of bank guarantee as a security for due performance of the decree and abide by such condition as this court may impose as a condition for stay of execution.

vii. The respondent is not a person of means and will not be able to refund the decretal amount if the appeal is successful.

viii. That orders of stay will not prejudice the respondent in any way and in any event he can be compensated by payment of costs.

ix. The Application has been brought in good faith and at the earliest opportune time and without any undue delay .

3. The application was supported by an affidavit sworn by one Mahammud Hersi Moghe .

4. The Application was to be canvassed by way of written submissions but at the time of writing the ruling no submissions had been filed, later the respondent counsel intimated to the court that he was to rely on replying affidavit. Since the Applicant did not file submissions I also take that it is relied on the pleading only.

Applicant's Case.

5. I have looked at the supporting affidavit what is deponed therein, mirrors the grounds in support of the application which I have enumerated in above Paragraph *(2)*.

Respondent's Case.

6. The respondent filed a replying affidavit sworn by Selipher Makonjo Mukoyani dated 30.07.2024 and averred that the Application was an after though only meant to rely in the foots of mitigation, that the Applicants appeal has not chances of success, the Applicant has not demonstrated the loss he will suffer if the stay orders are not granted, applicant has not demonstrated that there is a danger of execution against it, and that he had not offered any security for due performance of the decree.

Analysis and Determination.

7. I have looked at the application, supporting affidavit and the replying affidavits filed by the respondent.

8. The Lower Court in its Judgment awarded the Respondent Kshs. 883,500/= plus costs and interest.

9. The main issue for determination is whether this court should issue stay of execution to the applicant.

10. Order 42 rule 6 of the *Civil Procedure Rules* states as follows: -

Stay in case of appeal [Order 42, rule 6.]

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

11. The power of a court to grant stay of execution is discretionary. This discretionary power must not be exercised capriciously or whimsically but must be exercised in a way that does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the appeal overturn the trial court's decision. (see *Butt vs. Rent Restriction Tribunal* [1979]).

12. The judgment in the trial court was delivered on 30.1.2024. The appellant filed a memorandum of appeal in this court on 27.2.2024 and this application filed on 27.2.2024 thus I find that there was no inordinate delay in filing.

13. Secondly, the applicant has stated that it stands to suffer loss if the orders sought are not granted, the loss to be suffered it must be demonstrated. In the case of *Good News Church of Africa v Board of Management Eldoret Secondary School* [2021] eKLR the court stated as follows -:

> " Substantial loss is a key consideration in an application for stay of execution and stay of proceedings. The applicant must establish the loss which he/she will suffer if such orders are not granted."

14. The Applicant says that the respondent is not a man of means, thus if the appeal succeeds he will not be able to refund the money. It was incumbent upon the respondent to file an affidavit of means to rebut this assertion by the application , I have not seen any.

15. On the issue of security, the applicant has also deponed its willingness and readiness to comply with the directions to be given by this honorable court. In the case of Joseph Schmaderer (supra), the court stated as follows with regard to security: - "... On the other hand, the Applicant's in their Supporting Affidavit at paragraph *8* have stated that they are ready to furnish such reasonable security as shall be ordered by court. 33. The offer of security by the Applicant is bona fides that the stay application is

not a mere exercise to deny the Respondent the fruits of its judgments. The offer for security therefore satisfies a ground for stay. This is as was held in the case of F*ocin Motarcycle Co. Limited v Ann Wambui Wangui & another* (2018] Eklr..."

16. The court in the case of Richard Muthusi (supra), stated as follows on the issue: "...It is deposed in supporting Affidavit that applicants are ready and willing to offer such security as the court may deem fit, proper and just in the circumstances, including depositing the decretal sum in a joint interest earning account by the corresponding firm of advocates pending the outcome of the present appeal. 19. This will secure the interests of both parties without and bias. The Defendants/Applicants have satisfied the threshold required for an application to be allowed."

17. The court has to balance the interests of the Applicant/Appellant who seeks preserve the status quo pending hearing of the appeal and to ensure the Appeal is not rendered nugatory and interests of the Respondent taking into account that a successful litigant has a right to enjoy fruits it his/her litigation.

18. The above analysis makes me find that the applicant has made out a case to warrant this court to exercise its discretion in its favor. And I will allow the prayer for stay of execution in following terms:-

    a. That an order of stay of execution in a judgment /decree issued in BUTALI PMCC 205 OF 2020 is hereby granted pending the hearing and determination of this Appeal on condition that the Applicant pay 1/3 of the decretal amount and provide a bank guarantee to the balance of the decretal amount which bank guarantee will be specific to this appeal and shall be valued for the entire duration of the appeal.

    b. The Applicant shall have 60 days within which to comply with order (a) above and in default the order staying execution of the decree shall lapse and the respondent shall be a liberty to execute.

    c. The costs of this Application shall be in cause.

19. Right of Appeal 30 days explained.

20. Mention 7.5.2025 for further directions on the appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 19TH DAY OF FEBRUARY, 2025.

S.N MBUNGI

JUDGE

In the presence of :

Advocates, Absent

Mr. Solomon Chepkwony manager for Applicant present online.

Appellant/applicant – Absent

Respondent – Absent

Court Assistant – Elizabeth Ang'onga