Michui v Ikwinga (Civil Appeal E335 of 2024)
[2025] KEHC 3619 (KLR) (20 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3619 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL E335 OF 2024

HM NYAGA, J

MARCH 20, 2025

BETWEEN

JERUSHA MICHUI ..... APPELLANT

AND

MARY MWANGILI IKWINGA ..... RESPONDENT

RULING

1. The application coming for determination is the Notice of motion dated 23rd November, 2024, which seeks the following orders:-

    a. Spent

    b. Spent

    c. Spent.

    d. That the Honourable Court be pleased to issue an order for stay of execution of judgment in SCCCOMM E584 of 2024 pending the hearing and determination of this appeal against the judgment made by Hon. H. Nyamweya on 31st October 2024.

    e. That the costs of this application be provided for.

    f. That the Honourable Court be pleased to issue any other relief as shall meet the ends of justice

2. The Application is supported by the grounds set out on its face and the affidavit of the Applicant

3. In a nutshell, the Applicant states that judgement was delivered in the lower court on 31st October 2024, in which the court awarded the respondent Ksh. 200,000/- plus costs and interest. That aggrieved by the said judgment, the applicant has preferred the appeal herein.

4. The Applicant further avers that she will suffer substantial loss if the orders sought are not granted, and if the decretal sum is paid she may not recover the same. That this application has been brought timely and without inordinate delay. That the Respondent shall not suffer any prejudice if the orders are granted. That the applicant is willing to abide by any conditions of the court regarding security.

5. The Respondent opposed application vide a replying affidavit sworn on 7th January 2025.

6. In summary, the Respondent argues that the trial court found her evidence to be sufficient and delivered a judgment in her favour. That no irreparable loss will be incurred if the applicant pays the decretal sum to her. That the appeal is a mere waste of time and has no chance of success.

7. Parties appeared in court for directions and they agreed to canvass the application by way of written submissions. It suffices to state that I have duly considered them and will where necessary refer to them.

Analysis and determination

8. The sole issue for determination, in my view, is whether the applicant has laid sufficient grounds to warrant a grant of the orders sought.

9. The question is whether the applicant has met the threshold set out under order 42 Rules 6 of the *Civil Procedure Rules* (CPR). The said Rule states as follows:-

    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 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 of stay shall be made under sub rule (1) unless-

        a. The court is satisfied that substantial loss may result to the applicant unless the order is made and 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. Thus under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:

    a. Substantial loss may result to him/her unless the order is made;

    b. That the application has been made without unreasonable delay; and

    c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

11. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1979] eKLR where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -

    a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.

b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.

c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

12. I have noted that the averment that the respondent intends to execute the judgment has not been rebutted. As to what amounts to substantial loss, this has been the subject of consideration by courts. In *James Wangalwa & another vs Agnes Naliaka Cheseto* [2012] eKLR, the court stated;

> " No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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.... The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory"

13. It is my view that it is the Applicant who stands to suffer substantial loss if execution proceeds. There is really no prejudice to the respondent, who can be compensated by costs and interest if the appeal is unsuccessful.

14. I have looked at the memorandum of appeal vis-à-vis the judgment of the lower court. The question is whether the applicant has an arguable appeal.

15. I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case as that is under the purview of the appellate court after hearing the merits of the same.

16. An arguable appeal is not that which must succeed. In *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR the Court described an arguable appeal in the following terms:

> " An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.
>
> In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal."

17. A look at the Memorandum of Appeal shows that the grounds raised therein are arguable, and not frivolous.

18. On the question of delay, I note that the judgment was delivered on 30th October 2024. The memorandum of appeal and the application in question filed on 23rd November 2024, within the time prescribed for lodging of appeals. I find that there was no delay in filing the appeal and the application.

19. On Security the applicant has stated that she is willing to abide by conditions that the court may impose. I had ordered that she deposits Ksh.100,000/- in court as security, which she has done. That in my view is sufficient to meet the threshold under order 42 Rule 6 of the *CPR*.

20. To succeed, an applicant in the circumstances of the applicant herein must satisfy all the three conditions for grant of stay. The court in *Trust Bank Limited vs Ajay Shah & 3 Others*, [2012] eKLR at page 23 stated that: -

> " The conditions set out in Order 42 Rule 6(2) (a) and (b) are cumulative. All the three must be satisfied before a stay can be granted. The Applicant only satisfied one condition and failed to satisfy the others. For the foregoing reasons, I find that the Plaintiff's Notice of Motion dated 24th April, 2012 it without merit."

21. I am satisfied that the applicant has satisfied all the three requirements for the grant of a stay of execution.

22. After considering all the factors, I grant the following orders:-

    a. There shall be a stay of execution of the decree of the Lower Court pending hearing and determination of the appeal.

    b. The Applicant is to file her record of appeal, if she has not done so, and serve it within 21 days from the date of this ruling. In default, these stay orders shall lapse automatically.

    c. Costs of the application shall abide by the outcome of the appeal.

DATED, SIGNED & DELIVERED AT MERU THIS 20TH DAY OF MARCH, 2025.

H.M. NYAGA

JUDGE