Mwema v Murangasha (Civil Suit E247 of 2024) [2025] KEHC 5796 (KLR) (7 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5796 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL SUIT E247 OF 2024

SM MOHOCHI, J

MAY 7, 2025

BETWEEN

PIUS MUTAI MWEMA ..... APPLICANT

AND

KIHORO MWANGI MURANGASHA ..... RESPONDENT

RULING

BACKGROUND

1. Before me is a Notice of Motion Application dated 11th November 2024 filed pursuant to Order 42 Rule 6 seeking inter alia the following reliefs;

    1. Spent

    2. That, pending the hearing and determination of this application interpartes, the Honourable Court be pleased to issue an order of stay of execution of the ruling and all consequential orders issued pursuant to the ruling delivered on the 18th October, 2024 ordering that the Applicant herein to settle the decretal sum in Nakuru CMCC No. 546 of 2019 within thirty days from the date thereof and in default execution to issue against the Applicant by way of committal to civil jail.

    3. That, pending the lodging, hearing and determination of the appeal, the Honourable Court be pleased to issue an order of stay of execution of the ruling and all consequential orders issued pursuant to the ruling delivered on the 18th October, 2024 ordering that the Applicant herein to settle the decretal sum in Nakuru CMCC No. 546 of 2019 within thirty days from the date thereof and in default execution to issue against the Applicant by way of committal to civil jail.

    4. That, Costs of this application be provided for.

2. The Application is supported by the sworn affidavit by the Applicant evenly dated and is anchored on the following grounds;

a. That, judgment was entered against the Applicant on the 5th March, 2021.

b. That, the Applicant filed a declaratory suit against his insurer, Invesco Assurance Company Limited, and judgment was entered against the said insurer where the Court ordered that the insurer fully satisfies and pays the total decretal sum, taxed costs and interest therein.

c. That, the Applicant's insurer has since been placed on statutory management on 14th August, 2024 and as such there is an existing moratorium on payments by the said insurer to its policyholders and all other creditors for a duration of six months.

d. That, the Respondent went ahead and applied for notice to show cause why the Applicant should not be committed to civil jail.

e. That, ruling on the said notice to show cause was delivered on the 18th October, 2024 and the Court ordered that the Applicant to settle the said decretal sum within thirty days failure to which the Respondent to proceed with execution by way of committal of the Applicant to civil jail. That, in these circumstances, it is clear that unless this Honourable Court intervenes, the Applicant stands to be committed to civil jail.

f. That, the Applicant herein has a very good appeal with a high probability of success.

g. That, this application has been made without undue delay. That, the Respondent will not suffer any prejudice if the orders sought are granted

h. That, the Applicant is willing and ready to abide with any conditions that the Honourable Court may impose pursuant to this application.

Applicants Case

3. It is the Applicants case that, the instant matter, the Applicant stands to suffer great prejudice if the Respondent proceeds with execution of the decree. He stands to be committed to civil jail. The Applicant has a valid decree against his insurer (Invesco Assurance Company Limited) who is mandated to settle the entire decretal sum awarded in Nakuru CMCC No. 546 of 2019. That decree has not been appealed against. The Applicant has a meritorious appeal which raises triable issues and has a high probability of success.

4. In his further Affidavit sworn on the 17th December 2024 the Applicant deposes that;

i. It is not true that he has not paid a single cent towards settlement of the decretal sum as the Respondent is alleging and, on the 29th October, 2024, he paid a sum of Kshs. 5,000/= via the Respondent's advocates Mpesa till number which he exhibited and further paid a sum of Kshs. 98,000/= via banker's cheques and another Kshs. 5,000/= vide till advocates Mpesa till number which the Respondent's advocates acknowledged receipt in the letter dated 26th November, 2024, that in addition, he has engaged the Policyholders Compensation Fund and the funds will be processed by March, 2025.

ii. That it is his wish to pay the outstanding decretal sum in instalments but the lower Court ordered that he pays the full sum within 30 days.

iii. That he is ready and willing to pay Kshs. 5,000/= till the decretal amount is settled.

iv. That, he did not dispose of the suit motor vehicle but the same was repossessed by the seller, one Ibrahim Kimani Njuguna, since he had not finished paying the purchase price.

5. That, the power to grant or not to grant stay of execution pending appeal is a discretionary power which should be exercised judiciously in the matter of Justice. We rely on the case of Butt v. Rent Restriction Tribunal (1982) KLR 417 where the Court held that discretion ought to be exercised in a manner that would not prevent an appeal.

6. The Applicant is apprehensive that the Respondent will proceed and execute the decree thus rendering the intended appeal a nugatory and, in the chances, that it succeeds, the Applicant will be subjected to suffer substantial loss which cannot be remedied by way of damages. Reference is made to the case of Jason Ngumba Kagu & 2 Others v Intra Africa Assurance Co. Limited [2014] eKLR where it was held that:

> " . the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process."

7. That the order for stay of execution will preserve the substratum of the appeal and will allow parties to canvass the appeal to a logical conclusion. Your Lordship, the Applicant has answered the first condition in the affirmative that he will suffer substantial loss should the Respondent be allowed to proceed with the execution process. On the whether the Applicant has brought this application without inordinate delay, we submit in the affirmative. Ruling was delivered on the 18th October, 2024 and this application was filed on the 12th November, 2024.

8. The Applicant submits that, his application was filed promptly and as such the same ought to be allowed.

9. The last condition is whether sufficient security has been offered for the due performance of the order. Reference is made to the case of Sankale Ole Kantai T/a Kantai & Co. Advocates Vs Husing Finance Co. (K) Ltd [2014] eKLR (supra) the Court stated that the type of security to be given depends on the circumstances of the case and the judicious exercise of judicial discretion based on defined legal principles. The Applicant has indicated and is willing to deposit any form of security as may be directed by this Honorable Court as such humbly prays that this application be allowed.

Respondent's Case

10. The Application is opposed vide Preliminary Objection dated 16th April, 2025 on the grounds that the High Court lacks original jurisdiction to hear and determine this matter on account of pecuniary value of the dispute in question and/or the value of the properties.

11. That the dispute arises from a judgment delivered on 5th March 2021 in Nakuru MCCC 546 of 2019, in which the trial Court entered judgment in favor of the Respondent.

12. The Applicant, having unsuccessfully sought relief before the lower Court, now moves this Court for stay orders pending appeal which application is opposed by the Respondents replying affidavit sworn on 19th November 2024.

13. That granting of stay of execution pending appeal by the High Court is governed under Order 42 Rule 6 of the Civil Procedure Rules. It is grantable at the discretion of the Court on sufficient cause being established by the Applicant. Sufficient cause being a technical as well as a legal requirement will depend entirely on the Applicant satisfying the Court that:

a. Substantial loss may result to the Applicant unless the order is made,

b. The application has been made without unreasonable delay, and

c. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the Applicant has been given by the Applicant.

14. That these conditions are the essence of Order 42 Rule 6 CPR and share an inextricable bond such that the absence of one will affect the exercise of the discretion of the Court in granting stay of execution.

15. The respondent has refined the following four (4) issues for determination by this Court:

i. Firstly, whether the Applicant has demonstrated that substantial loss will occur if execution proceeds.

ii. Secondly whether the Applicant has filed the application without unreasonable delay.

iii. Thirdly whether the applicant has offered sufficient security to demonstrate goop faith and ensure due performance of the decree. And

iv. Whether the Respondent's right to the fruits of judgment should prevail over the Applicant's request for stay of execution.

16. On the first issue the Respondent contends that the Applicant claims that he will suffer substantial loss if execution proceeds, but this claim is unsupported by credible evidence. The principle of substantial loss was defined in Tropical Commodity Suppliers Ltd & Others v International Credit Bank Ltd (2004) cited with approval in the case ofNesco Services Limited v Cm Construction (EA) limited [2019] KLR where the Court held that:

> "Substantial loss.....is a qualitative concept referring to loss of real worth or value not nominal loss..."

17. That, while the Applicant attempts to elaborate on this claim in his submissions, he fails to provide verifiable proof that execution will result in irreparable harm. Notably, his liability is covered by Investor Assurance Company Limited, which is contractually obligated to settle the decretal sum.

18. That the Applicant's failure to seek indemnification from his insurer invalidates his alleged financial distress. Furthermore, the Applicant has deliberately transferred his properties to third parties during the pendency of the suit, a clear attempt to evade execution. Reference is made to the Court of Appeal case in Owino v Ogolla & 2 others [2023] KECA 1370 (KLR) held that:

> "He who comes to equity must come with clean hands, and since the applicant has approached with soiled hands, then the remedy sought is not available...."

19. That, since a stay of execution is an equitable remedy, the Applicant, having orchestrated his own financial hardship, cannot now seek the Court's discretionary relief on the basis of self-inflicted prejudice and is therefore undeserving of this Court's equitable discretion.

20. On the second issue, it is the respondents position that, the judgment in this matter was delivered on 5th March 2021, yet the Applicant has persistently engaged in tactics aimed at frustrating execution. This delay is unjustified and amounts to an abuse of the Court process. The Applicant has had ample time to take necessary legal steps, but instead, he has chosen to file frivolous applications and ignore Court directives.

21. That a party seeking equitable relief, such as a stay of execution, must act promptly and in good faith. In this case, the Applicant's prolonged inaction and failure to satisfy even part of the decretal sum demonstrate a lack of diligence. Furthermore, the Applicant had previously assured the Respondent that he would make an initial payment of Kshs. 100,000, yet he has failed to honor this promise His conduct clearly shows a deliberate attempt to delay and frustrate the Respondent, who is entitled to enjoy the fruits of his judgment. Courts have consistently held that delays in seeking stay orders must be explained and justified. In the absence of any reasonable explanations, such delays prejudice the judgment creditor and erode the integrity of the judicial process.

22. On the requirement as to security, the Respondent submits that, should the order to stay proceedings be granted, the Appellant be ordered to deposit a sum equivalent to the amount prayed by the Respondent in its pleadings, to be heldin an interest-generating account as security on the Respondent's behalf, as a sign of good faith and an indication that the stay application is not just one of the Appellant's delay tactics, meant to further delay the Respondent from the eventual fruits of a successful judgment, which the Appellant has quite a history for. It is the Respondent's further submission that regardless of the proposed security, it is still at the Court's discretion to determine the security to be offered.

23. On the final issue, the Respondent contends that he has endured financial and emotional distress due to the prolonged litigation and that Courts must balance the rights of the Appellant with the Respondent's right to enjoy the fruits of judgment, as reiterated in RWW v EKW [2019] eKLR. The Applicant has engaged in a consistent pattern of transferring assets, breaking settlement promises, and filing meritless applications. Such conduct undermines the integrity of the judicial system.

24. That granting a stay in this manner would set a dangerous precedent, emboldening litigants to disregard judicial orders. It is thus our submission that the Applicant has failed to satisfy the legal requirement under Order 42 Rule 6(2) of the Civil Procedure Rules for granting a stay of execution.

25. That the Applicants conduct demonstrates bad faith, delay tactics, and a blatant disregard for judicial authority. Accordingly, the Respondent prays that this Court dismisses the application dated 12th November 2024 with costs to the Respondent, permits the immediate execution of the decree, and issues any further orders necessary to uphold the integrity of the judicial process.

Analysis & Determination

26. Upon considering the pleadings, response thereto and the respective submissions filed, I find the following to be the one broad issue that arises for determination:

> "Whether an interim injunction should issue to bar the Respondent from exercising its statutory power of sale pending hearing and determination of the suit"

27. Determination on whether to grant interim injunctions is governed by Order 40 Rule 1 of the Civil Procedure Rules which provides as follows;

> "Where in any suit it is proved by affidavit or otherwise —
>
> a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
>
> b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against

> the defendant in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.

28. The principles that guides this Court in dealing with applications for injunctions were well settled in the celebrated case of Giella –vs-Cassman Brown and company Limited Civil appeal No.51 of 1972 where it was held as follows:

    i. The Applicant must establish a prima facie case with a probability of success.

    ii. Applicant has to demonstrate that it will suffer irreparable injury which cannot be compensated by damages.

    iii. Applicant has to demonstrate that balance of convenience tilts in its favour.

29. Further, in Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR, the Court of Appeal reiterated the above principles and gave the following guidelines:

> "These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86).
>
> If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the Court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

30. It is also settled law, that in interim applications, such as in this case, the Court should avoid making final determinations on matters of fact made on the basis of the conflicting Affidavit evidence. In connection thereto, in Mbuthia vs Jimba Credit Finance Corporation & Another [1988] KLR 1, the Court of Appeal guided as follows:

> "...the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions."

31. Before I venture into determination of this matter, I may mention that settlement of a judgment/ decree is obligatory upon a judgment debtor.

32. That the interlocutory Appeal herein attacks exercise of judicial discretion by the Trial Court conducting execution proceedings and is not a substantial appeal against judgment.

33. The Judgment debt is admitted albeit the Applicant has been negotiating to pay the debt in instalments and has on occasion failed to live up to his promises.

34. In order to determine whether the application meets the required threshold the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR where the Court held that: -

> " These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the Court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between.

As to whether the Applicant has established a prima facie case?

35. The case of Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123 defined a prima facie case as follows;

> " A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

36. A close perusal of the affidavit in support of the application, the plaint and the Applicant's submissions reveals the "quicksand" on which this suit is constructed;

37. There is an unequivocal admission of the debt.

38. A cursory look at the memorandum of Appeal filed and reliefs sought is indicative of the Appellants/ Applicant aggrievement as follows;

    i. That the Learned Magistrate erred in law and in fact when he failed to consider the fact that there is a valid decree against the Appellant's insurer (Invesco Assurance Company Limited) to satisfy and pay the total decretal sum, taxed costs and interests therein.

    ii. That the Learned Magistrate erred in law and in fact failed to consider that the Appellant's insurer has been placed on statutory management and that there is an existing moratorium on payments by the said insurer to its policy holders and all other creditors for a period of six months.

    iii. That, the Learned Magistrate erred in law and in fact when he failed to consider the fact the Appellant stands to suffer great prejudice in the event the decree is executed against him yet he has a valid policy hence his insurer is mandated to settle the said decretal sum.

iv. That the Learned Magistrate erred in law and in fact in finding that the Appellant is a man of means yet no evidence was placed before him to confirm the same.

v. That, the Learned Magistrate erred in law and in fact when he allowed the Respondent's application without any consideration to the evidence that was adduced by the Appellant.

39. Applicant must demonstrate a legitimate right to sue, rather than merely offering a superficial or illusory claim of cause of action has was held by Telanga Judge in the case of Bajranglal Agarwal v. Smt. Susheela Agarwal and Ors, CCCA.No.62 of 2024.

40. The Court notes that, the Applicants main issue in dispute is the alleged variations of interest rates charged and Applicant has not demonstrated effort to make repayment of the contractual monthly instalments nor demonstrated efforts at either engaging the Respondent to potentially restructuring their loan or in fact resolve the alleged interest charged dispute.

41. The amounts of interests in dispute remain foggy at this juncture but shall be subject to the main suit.

42. The Court is unpersuaded of an irreparable injury being occasioned if the execution occurs and the injury needs to be actual, substantial and demonstrable and one that cannot be compensated by an award of damages especially one of monetary compensation.

43. The Validity of the Judgment/Decree dated 5th March, 2021 remains unimpeached and any judicial order made to delay the enjoyment of the fruits of judgment by the respondent is prejudicial in this instance in the absence of a substantive challenge on Appeal the debt remains unsettled four years since the award was made

44. This Court can only deploy the balance of convenience test where a prima facie case exists in this instance the parties entered into a contract upon which default the Respondent is contractually obliged to exercise its right to statutory sale, the concept of balance of convenience was defined in the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) EKLR as:

> 'The meaning of balance of convenience will favor of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favor of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer. In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

45. In the case of Labelle International Ltd Vs. Fidelity Commercial Ltd & Another (2003) Z.E.A. it was held that; -

> " It is now established law that when part of the amount claimed is admitted or proved to be due, a charge cannot be restrained by an injunction."

46. An injunction will not be issued hereof when the Applicant's claim is that of a declaratory suit against his insurer, Invesco Assurance Company Limited, and judgment was entered against the said insurer where the Court ordered that the insurer fully satisfies and pays the total decretal sum, taxed costs and interest therein.

47. Under ordinary circumstances the Applicant is expected to settle and his judgment debt and pursue his insurers separately in execution of his fruits in his declaratory judgment.

48. The Upshot is that, the Notice of Motion Application dated 11th November 2024 is without any merit and the same is accordingly dismissed with costs to the Respondent.

49. The Applicant is urged to set down the interlocutory Appeal for admission and hearing within the next sixty (60) from the date hereof

It is so ordered.

SIGNED, DATED AND DELIVERED ON THIS 7TH DAY OF MAY 2025

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MOHOCHI S.M

JUDGE