Kango v Nthuli (Civil Appeal 219 of 2023) [2024] KEHC 117 (KLR) (17 January 2024) (Ruling)

Neutral citation: [2024] KEHC 117 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 219 OF 2023

FR OLEL, J

JANUARY 17, 2024

BETWEEN

ELIZABETH KANGO ..... APPELLANT

AND

EUNICE MUKUI NTHULI ..... RESPONDENT

RULING

A. Introduction

1. The application before this court is the Notice of Motion application dated 8th September 2023 brought pursuant to provisions of Article 159 (2), (a) & (d) of *the constitution* of Kenya 2010, Section 1A, 1B, 3A & 75 of the *Civil Procedure Act*, Order 42 rule 6 and Order 51 rule 1 of the *Civil Procedure Rules*, and all other enabling provision of law. The applicant seeks for orders;

    a) That the Honourable court be pleased to grant stay of execution of the judgment and/or decree issued by Honourable H.M Mbati Principal Magistrate on 10th August 2023, pending the full hearing and determination of this Appeal in Machakos

    b) That this Honourable court allow the applicant to furnish the court with security in the form of a bank guarantee from family Bank.

    c) That costs of this application be provided for.

2. The application is supported by the grounds on the face of the said application and the supporting affidavit of the appellant Elizabeth Kango, who depones that judgement was entered as against her on 10.08. 2023 in Machakos Civil Suit No 451 of 2019, where she was held 100% liable and General damages were assessed at Kshs 520,000/=, Special damages was also assessed at Kshs 11,070/= plus costs and interest. Being aggrieved by the said judgment she had promptly filed this appeal which in her opinion raised triable issues and had high changes of success.

3. That unless stay of execution was granted, she would suffer substantial and irreparable loss if the decision of the trial magistrate was left to stand. The applicant further averred that she was willing and ready to provide security as maybe directed by court and that the respondent would not suffer any prejudice should the application be allowed. The application had been brought foth without undue delay and it was in the wider interest of justice to grant the orders so sought.

4. The respondent counsel made oral submissions in court and urged the court to find that the appeal as filed did not raise any triable issue and the appeal was calculated to prevent her from enjoying the fruits of her judgment. The applicant had not demonstrated what substantial loss she would suffer if stay is not granted and thus his application ought to be dismissed with costs. In the alternative if the court was inclined to allow the said application, then the respondent did pray that the applicant be directed to pay half the decretal sum and deposit the other half in a joint interest earning account held jointly by both advocates.

Analysis & Determination

5. I have carefully considered the Application, Supporting Affidavit, the Respondent's counsel oral submissions and discern that the only issue which arise for determination is whether this court should proceed to grant orders of stay of execution pending appeal

6. The prayer sought by the applicant for an order of Stay of execution pending appeal is governed by Order 42 Rule 6 of the *Civil Procedure Rules*. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant.(see *Butt Vs Rent Restriction Tribuna*l (1982) KLR 417 and *James Wangalwa & Another Vs Agnes Nalika Cheret*o (2012) Eklr).

7. To the foregoing I would add that an order of stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay shall also consider the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, to enable court give effect to the overriding objective, while in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. 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.

i. Undue Delay

8. As to whether the Application has been filed without undue delay, judgment was entered on 10.08.2023. The notice of appeal and application for stay pending appeal was filed on the 11.09.2023, which was within one month (the judgment date excluded). This court thus finds that the appeal and this application for stay of execution has been filed without undue delay.

ii. Substantial Loss

9. On the issue of substantial loss, Ogolla, J in *Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation*) [2004] 2 EA 331 stated that:

> "Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal."

10. In the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR the court expressed itself as hereunder:

> " 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."

11. 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."

12. The respondent did not file a replying affidavit to rebut the averments made by the applicants in the supporting affidavit, nor did she submit that she was in a position to refund the decretal sum should the court hold this appeal.In the case of *National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another* (2006) eKLR the Court of Appeal held thus;

> " Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge."

13. Guided by the above authorities and in the absence of the requisite proof from the Respondent that she is a person of means, I find that the Appellant has satisfied this court that she will suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.

iii. Security

14. As regards deposit of security, the court observed in the case of *Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd* [2019] eKLR it was held that:-

> " The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from

a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls."

Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....

Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree."

15. The Court must similarly consider the overriding objective and balance the interest of the parties to the suit while considering the issue of security to be offered. The law is that where the applicant intends to exercise his undoubted right of appeal, and in the event, that he were eventually to succeed, he should not be faced with a situation in which he would find himself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.

16. The issue of adequacy of security was dealt with by the Court of Appeal in *Nduhiu Gitahi vs. Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 where the Court of Appeal expressed itself as follows:

" The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them.

So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either

party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it".

17. The applicants did state with regard to the issue of security that, they were ready to abide by any conditions that may be impose by court and were willing to deposit a bank guarantee for the decretal amount. The respondent on the other hand did request court to have the appellant pay half the decretal sum and deposit the other half in a joint interest earning account.

A. Disposition

18. Taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful party to the appeal, I do grant prayer (4) of the Notice of motion application dated 8th September 2023 pending hearing and determination of the appeal filed on condition that the appellants will pay the respondent half of the decretal sum awarded and deposit the other half in a joint interest earning account held in the join names of both counsels herein at a reputable commercial bank.

19. The appellant is granted 45 days within which to comply with the above order from the date of delivery of this Ruling and should they fail to do so, the application dated 8th September, 2023 will be deemed to have been dismissed and the respondent will be at liberty to execute.

20. Costs herein will abide the Appeal.

READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS ON THIS 17TH DAY OF JANUARY, 2024.

FRANCIS RAYOLA OLEL

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:-

Ms. Waweru for Appellant

Mr Mutinda for Respondent

Susan /Sam – Court Assistant