**Benjo (K) Ltd v Rono (Civil Miscellaneous Application E010 of 2023)**
**[2024] KEHC 1470 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1470 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CIVIL MISCELLANEOUS APPLICATION E010 OF 2023**

**FR OLEL, J**

**FEBRUARY 14, 2024**

**BETWEEN**

**BENJO (K) LTD ..... APPELLANT**

**AND**

**ROBERT RONO ..... RESPONDENT**

**RULING**

## A. Pleadings

1. The application before this court is the Notice of Motion application dated 18th January 2024 brought pursuant to provisions of Section 1A, 1B, 3A and 79G of the *Civil Procedure Act*, Order 22, rule 22, Order 42 rule 6(2), & , Order 50 rule 6, Order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers (a), and (b) of the said application are basically spent and the main prayer sought are prayers (c) ,(d) & (e) for extension of time to file the appeal out of time, stay of execution of the decree dated 7th December 2023, issued in Kithimani CMCC No 244 of 2019, and that they be allowed to furnish security in the form of a Bank guarantee.

2. This application is supported by the grounds on the face of the said application and the affidavit of the appellant director one Joseph Mwangi Njoroge dated 18th January 2023, while the respondent has opposed this application through his replying affidavit filed in court dated 2nd February 2023.

3. The Appellant averred that they were wholly dissatisfied by the Judgement of Hon Wechuli (PM) dated 7th December 2023 delivered in Kithimani CMCC No 224 of 2019. By the time they gave instruction to their advocate to appeal, time had already lapsed and thus the need to extend time to have the appeal filed. The delay in filing the appeal was not inordinate and was highly regretted.

4. He averred that they has an arguable appeal which had high chances of success as demonstrated in the grounds of the Memorandum of Appeal filed and thus the orders should be granted as there was imminent threat by the respondent to execute the Judgement delivered on 7th December 2023. The

said respondent was not a man of means and if the decretal sum was paid out, it would be difficult to recoup the same. Finally, the Appellant stated that they was ready and willing to furnish security for due performance of the decree and that the Respondent would not be prejudiced if orders sought are granted

5. The Respondent did oppose this application through his Replying Affidavit dated 2nd February 2023. He stated that the appeal as filed was frivolous, incompetent, unmeritorious and misconceived/ constituted an abuse of the process of court. The appellant had not demonstrated what substantial loss they would suffer if they paid the decree under consideration and this appeal was filed as a camouflage to obstruct the course of justice and delay payment of the decretal sum to a successful litigant.

6. The respondent further averred that he was a person of means and was a successful businessman at Sofia Market near Matuu town and was therefore in a position to refund the decretal sum if the court did so order. The application for extention of time to Appeal too was not merited as no plausible explanation had been advanced to explain the delay. Finally, on the issue of security, the guarantee offered was only valid for one year from 6th July 2023 and therefore could not be applied herein.

7. The Respondent thus urged this court to find that the application was not merited and prayed that it be dismissed with costs. If in the alternative the court was inclined to grant the said Application, the Respondent urged the court to direct the applicant to pay half the decretal sum and deposit the other half in a joint interest earning account held in the joint names of the advocates herein

**B. Analysis & Determination**

8. I have carefully considered this Application, its Supporting Affidavit, and the Respondent's Replying Affidavit. The issues that arise for determination is whether this court should grant leave to the Appellant to file their Appeal out of time, and whether the Appellant has met the conditions necessary for the grant of stay pending appeal.

9. The Judgement Appeal against is dated 07.12.2024, while this application was filed on 19.01.24. considering provision of Order 50, rule 4 of the civil procedure Rules time stopes to run from 21st of December 2023 to 13th January 2024, (both days inclusive). That being so, by 19th January 2024 technically the time to file the appeal had not run out and thus leave was not necessary. Be that as it may granting an order for extention of time to appeal is discretionary upon good reasons being advanced. The reasons advanced by the Applicant are plausible and I do therefore allow this limb of the said Application.

10. Stay of Execution is provided under Order 42 Rule 6 of the *Civil Procedure Rules* 2010 as follows;

> "(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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."

11. The three conditions to be fulfilled can therefore be summarized as follows;

a. that substantial loss may result to the applicant unless the order is made

b. application has been made without unreasonable delay

c. security as the court orders for the due performance

12. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1979] 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.

13. The same finding was also upheld in *Vishram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, where 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 42 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment that the application has been made without unreasonable delay, satisfaction of substantial loss and the furnishing of security. The Court, in exercising its discretion, should also further opt for the lower rather than the higher risk of injustice and finally the court will also consider the overriding objective as stipulated in sections 1A and 1B of the *Civil Procedure Act*, which the courts are now enjoined to give effect to. See *Suleiman vs. Amboseli Resort Limited* [2004] 2 KLR 589, *Samvir Trustee Limited vs. Guardian Bank Limited Nairobi* (Milimani) HCCC 795 of 1997 & *Machira T/A Machira & Co Advocates vs. East African Standard (No 2)* [2002] KLR 63:

14. The court has granted leave to appeal out of time herein, and therefore considering the first limb of the application does not apply arise.

**Substantial Loss**

15. 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.'

16. 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."

17. The same position was also 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."

18. The appellants allege that the respondent is not a man of means and it will be difficult to recover the decretal amount from him, if paid and he loses this appeal. On the other hand, the respondent avers that he is a man of means and a successful businessman at Sofia Market near Matuu town and is in a position to refund sum paid under the decree, if need arises.

19. 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."

20. The respondent did not file an affidavit of means to indeed prove that he is liquid enough to repay the decretal sum if advanced. In the absence of the requisite proof from the Respondent that he is a person of means, I find that the Appellant has satisfied this court that they 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.

**Security**

21. 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."

22. 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 was 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.

23. 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".

24. The Appellant 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 submit that the applicants should pay him half the decretal sum and deposit the other half in a join interest earning account pending determination of this suit.

**C. Disposition**

25. 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,

    a. I do grant prayer (c) of the Notice of motion Application dated 18th January 2024 and grant the Appellant (7) days within which to file their Appeal from the date of this ruling.

    b. I do grant prayer (4) of the application dated 18th January 2024 pending hearing and determination of this appeal I do grant orders of stay of execution of the decree dated 7th December 2023 issued in Kithimani CMCC No 224 of 2019 on condition that the appellants provide a bank guarantee, for the entire decretal sum, which guarantee will be specific to this appeal and shall be valid for the whole duration of the Appeal until it is determined.

    c. 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 18th January 2024 will be deemed to have been dismissed and the respondent will be at liberty to execute.

    d. Costs herein will abide the Appeal

26. It is so ordered.

**RULING WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 14TH DAY OF FEBRUARY, 2024**

**FRANCIS RAYOLA OLEL**

**JUDGE**

Delivered on the virtual platform, Team this 14th day of February, 2024

In the presence of: -

Ms Ochoki for Appellant

Ms Wambui for Respondent

Sam - Court Assistant