Mutua v GN (A Minor Suing Through Mother and Friend MKM) (Civil Miscellaneous Application E006 of 2023) [2024] KEHC 1445 (KLR) (14 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1445 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL MISCELLANEOUS APPLICATION E006 OF 2023

FR OLEL, J

FEBRUARY 14, 2024

BETWEEN

PETERSON KITOO MUTUA ..... APPELLANT

AND

GN (A MINOR SUING THROUGH MOTHER AND FRIEND MKM) ..... RESPONDENT

RULING

A. Introduction

1. The application before this court is the Notice of Motion application dated 11th January, 2024 brought pursuant to provisions of Section 3A, 79G and 95 of the *Civil Procedure Act*, order 50 rule 6 and order 51 rule1 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 is prayer (c) and (d) that; this court to be pleased to grant the applicant leave to Appeal out of time against the Judgement dated 15th November 2023 issued in Machakos SCCC No E359 of 2023 and the said decree be stayed pending hearing and determination of the intended appeal to be filed.

2. This application is supported by an affidavit of the appellant/applicant dated 11th January 2024 and is opposed by the respondents who filed a replying affidavit dated 19th January 2024.

3. The Applicant stated that judgement was entered as against him in Machakos SCCC No E359 of 2023 by Honourable Thibaru on 15th November 2023. He was not aware of the said award and once informed he did instruct his counsel to file an appeal as against the award as he was aggrieved by the quantum and liability awarded by the trial court, which he deemed irregular and high. The time to file an appeal had lapsed and he pleaded with the court to excuse his mistake, which was inadvertent and not deliberate. Further the delay to file the appeal was not inordinate and if allowed would not prejudice the respondents and it was in the interest of substantive justice to allow the orders prayed for.

4. On his application for stay pending appeal, the appellant averred that he had an arguable appeal which has high chances of success and further that the said appeal to be filed was meritorious and stands a good chance of success as demonstrated in the draft Memorandum of Appeal annexed.

5. The appellant stated there is strong likelihood that the respondents would apply for warrants of execution consequent of which they would attach his assets and if sold that would cause him substantial loss and render the appeal filed to be rendered nugatory. Finally, the Applicant stated that he is ready and willing to furnish a bank guarantee as security for due performance of the decree and that the Respondents would not be prejudiced if orders sought are granted.

6. This application was opposed by the Respondents. They deposed that their claim was not fraudulent and had proved during trial that indeed the minor was injured as a result of the accident. The applicant had not offered a cogent explanation as to why the appeal was not filed on time, nor had he annexed any letter and/or documentation exchanged between him and his advocate to show that indeed he was unaware of the Judgement passed as against him and therefore justified to seek to Appeal out of time. The appeal to be filed was unmerited and did not have any chance of success. The application was unmerited and should be dismissed.

B. Analysis and Determination

7. I have carefully considered the Application, Supporting Affidavit, the Replying Affidavit and the two issues which arise for determination is whether the applicant is to be granted leave to Appeal out of time and if granted whether stay of execution should be granted.

8. Section 79G of the *Civil procedure Act* 2010 does provide that

> " Every appeal from a subordinate court to the high court shall be filed within a period of 30 days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant a copy of the decree or order;
>
> Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

9. Order 50 rule 6 of the *Civil procedure Rules* further provides that;

> " where a limited time has been fixed for doing any act or taking any proceedings under these rules or by summary notice or by order of the court, the court shall have powers to enlarge time upon such terms (if any) as the justice of the case may require, and such enlargement maybe ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

10. There is no doubt that the discretion to extend time is not a right of the party, but is an equitable remedy that is only available to a deserving party after laying a basis to courts satisfaction that there exists reasonable explanation as to why there has been a delay. The court will also consider if any prejudice will be suffered by the respondent and if the application has been brought without unreasonable delay. See Nicholas Kiptoo arap korir salat Vs IEBC and 7 others Eklr.

11. In *Imperial Bank ltd (in receivership) & Ano Vs Alnasir popat and 18 others* the court observed that;

> " some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the

possible prejudice, if any, that each party stands to suffer depending on how the court exercised it discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a parties opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; public interest issues implicated in the appeal or intended appeal and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration it must be born in mind that it is not really the role of a single judge to detriment definitely the merits of the appeal. That is for the full court if and when it is ultimately presented with the appeal."

12. In the Salat case(supra)the supreme court did observe that;

> " Extension of time being a creature of equity, only enjoy ,one can only enjoy if he acts equitably: he who seek s equity must do equity .Hence, one has to lay a basis that he was not at fault so at to let time lapse. Extension of time is not a right of a litigant against court, but a discretionary power of the courts, which litigants have to lay a basis where they seek courts to gran the same."

13. The orders sought to be appealed against were made on 15.11.2023 and the application for extension of time was filed on 16.01 2024, which is a period of about this is a period of about one (1) months excluding the period when time does not run between 21st December 2023 to 13th January 2024. This period cannot be said to be inordinate. The explanation given by the applicant is week but plausible and the court in the interest of justice will give the applicant a benefit of doubt regarding this limb of his application.

14. The applicants conduct and that of his advocate cannot be said to be negligent, nor has it been shown that the deliberately sought to delay or obstruct the cause of justice. In the case of *Winnie wambui Kibinge & 2 others Vs Match Electrical limited* civil suit No 222 of 2010 the court did hold that "it does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit."

15. 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 for the due performance of any decree or order as may ultimately be binding on the Applicant.(see *Butt Vs Rent Restriction Tribunal* (1982) KLR 417 and *James Wangalwa & Another Vs Agnes Nalika Chereto* (2012) eKLR).

16. 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

17. As to whether the Application has been filed without undue delay, judgment was entered on 15.11.2023. This application was filed on 16.01.2023, which was within one month (excluding the

days exempted in December into January). This court thus finds that the appeal and this application for stay of execution has been filed without undue delay.

ii. Substantial Loss

18. 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.'

19. 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."

20. 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."

21. The respondents did not rebut the averments made by the applicant in the supporting affidavit, nor did they submit that they were in a position to refund the decretal sum should the court uphold 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."

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

iii. Security

23. 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.
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> 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."

24. The issue of adequacy of security was also 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.
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> 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".

25. The applicant did state with regard to the issue of security that, he was ready to abide by any conditions that may be impose by court and was willing to deposit a bank guarantee for the decretal amount. while the respondents did submit that the bank guarantee offered was not valid and that the applicant was not In a position to depose on the same as he was not a director nor an authorized agent of Direct line Insurance company Ltd.

C. Disposition

26. 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 the applicant leave of seven (7) days to file their appeal out of time from the date of this ruling.

    b. The appellant to deposit the entire decretal sum constituting of the decretal amount and interest therein being Ksh.229,262.07/= in court within the next 45 days failure of which, the application dated 11th January 2024 will be deemed to have been dismissed and the respondent will be at liberty to execute.

    c. The costs of this application to be in the cause.

27. It is so ordered.

RULING WRITTEN, DATED 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

Mr. Mburu for Respondent

Sam - Court Assistant