



REPUBLIC OF KENYA



KENYA LAW
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**Muvila v Mutiso & another (Civil Appeal 123 of 2023)
[2024] KEHC 893 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 893 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 123 OF 2023**

FR OLEL, J

FEBRUARY 7, 2024

BETWEEN

RAPHAEL MUTINDA MUVILA APPELLANT

AND

WINFRED MBETHI MUTISO 1ST RESPONDENT

MORRIS NDAMBUKI 2ND RESPONDENT

RULING

A. Introduction

1. The application before this court is the Notice of Motion application dated 8th June 2023 brought pursuant to provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 42 Rule 6 and 7 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers (1) and (2) of the said application are basically spent and the main prayer sought is prayer (3) and (4) that;
 - a. That this court be pleased to grant stay of execution of the judgment of the trial court delivered on 4th August 2022 and the ruling delivered on 5th June 2023 against the appellant/applicant pending the hearing and determination of the Appeal herein Machakos HCCA No 123 of 2023, Raphael Mutinda Muvila v Winfred Mbithi Mutiso & Morris Ndambuki.
 - b. That this Honourable court be pleased to set aside the interlocutory and final judgement entered against the appellant herein delivered on 4th August 2022 and all consequential orders and proceedings thereto and grant the appellant/applicant leave to defend the primary suit No Machakos CMCC NO 700 of 2019 subject of this Appeal and order the unconditional release of motor vehicle registration Number KBH 186V.
 - c. That costs be in the cause



2. The application is supported by the grounds on the face of the said application and the supporting affidavit of the appellant Raphael Mutinda Muviladated 8th June, 2023 while it has been opposed by the Respondents, who filed a replying affidavit through who filed Replying Affidavit's dated 23rd June 2023 sworn by the 1st respondent Winfred Mbethi Mutiso.

B. Pleadings

3. The applicant averred that there was an irregular ex parte judgement in this matter delivered on 4th August 2022 by the trial court as against him, where he was ordered to pay the Respondents a sum of Ksh.1, 589, 785/=, which sum plus costs and interest had accrued to the sum of Kshs 1,936,136.90/= by the time warrants of execution were issued as against him and his motor vehicle KBH 186V proclaimed on 15th November 2022.
4. It was his contention that he had not been served with summons to enter appearance and therefore applied to have the said ex parte judgement set aside vide his application dated November 17, 2022. The said application was argued inter parties and vide its ruling dated 5th June 2023, the trial court did impose draconian and punitive conditions for setting aside the irregular ex parte judgement by ordering that the entire decretal sum of Kshs.1,936,136.90/= be deposited in court, plus further the Appellant was condemned to pay the auctioneers costs within 7 days, failure of which the judgement issued on August 4, 2022 would revert and execution to issue.
5. Being dissatisfied by the said ruling/order, the Appellant filed this appeal and sought further stay of execution pending hearing and determination of the appeal filed. The appellant did contend that his defence raised triable issues, as the accident involved two motor vehicles and the court needed to hear both parties before determining the issue of liability. Further he had a right to be heard, and thus should be allowed to participate in these proceedings and be indemnify by his insurer if need be.
6. For the above reasons, the appellant stated that the appeal as filed was meritorious and would be rendered nugatory should the orders sought not be granted, as there was high likely hood that the respondents would proceed and sell the proclaimed motor vehicle.
7. This application was opposed by the Respondents who stated that their advocate did serve a statutory notice upon the Appellants insurer Direct line Insurance company Limited and the same was acknowledged. The Appellant was also properly served with summons to enter Appearance, accompanied by the plaint, verifying Affidavit and declined to sign the same, but the process server did file a return of service dated August 3, 2020 confirming proper serve being effected upon the Applicant.
8. The Applicant were later served with the first mention notice, and ignored attending the court proceedings, and thereafter interlocutory judgement was entered as against him. The respondents advocate once again endeavored to serve the appellant on February 1, 2021 with a mention notice for pre trial set for February 25, 2021, during which process the applicant communicated with the processor through his phone number 0720-964-380. Further on May 17, 2021 and 27.07.2021, they did serve the appellant, with a judgement notice and notice of entry of judgement. The Applicant thus could not cry foul over lack of service, as he was given an opportunity to attend court, but failed to do so.
9. It was the respondent's contention that the trial court rightly gave the applicant condition to meet before stay of execution could be granted. They also pointed out that both the process server and the appellant were cross examined on their affidavits filed and the trial court did find as a fact that the process server was consistent in his answers and explanation without any inconsistencies. There was



therefore no basis to depart from the findings of the trial court on conditions of stay as the appellant was only keen to delay the completion of this matter and unnecessarily prolong the course of justice.

10. The respondents thus urged this court to find that, there is no basis of setting aside the Judgement and/or orders of the conditional stay as granted on 5th June 2023. They therefore urged the court to dismiss this application with costs.

Analysis & Determination

11. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and written submissions filed by both parties and discern that the issues which arise for determination is whether;
 - a. Whether this court should grant stay of execution of the Judgment/Decree dated 4th August 2023 issued in Machakos CMCC No 700 of 2019.
 - b. Whether this Honourable court should set aside the interlocutory and final judgement entered against the appellant herein delivered on 4th August 2022 and all consequential orders and proceedings thereto and grant the appellant/applicant leave to defend the primary suit being Machakos CMCC No 700 of 2019.
12. As regards the second issue raised of setting aside the interlocutory judgement and final judgement entered against the applicant/appellant on 4th August 2022, it should be noted that that is the main issue for determination in this appeal. The same cannot be determined at this interlocutory stage as that would have the effect of prematurely determining this Appeal.
13. 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 v Rent Restriction Tribunal* (1982) KLR 417 and *James Wangalwa & Another v Agnes Nalika Chereto* (2012) eKLR)
14. In the case of *Masis Mwita vrs Damris Wanjiku Njeri* (2016) eKLR provided the guiding principles which the court should consider while determining an application of this nature. These were;
 - a. The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - b. 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 to be rendered nugatory should that appeal court reverse the judge's discretion.
 - c. A judge should not refuse 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. The court in exercising the discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the cases and unique requirements.
15. The ruling appealed against was delivered on 5th June 2023. The Appeal herein was filed on 8th June, 2023 and this application was also filed on 8th June, 2023. Thus, it can be said that this appeal and application for stay of execution have been file timeously.



16. On the likelihood of suffering substantial loss, it was sufficient if an applicant seeking a stay of execution demonstrated that he/she would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful. See *G. N. Muema P/A (516) Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & Another* (2010) eKLR, *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* (2006) eKLR .
17. It is evident that the decretal sum of Ksh.1,936,136.90/= together with costs is a tidy sum of money. In the case of *G. N. Muema P/A (516) Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & Another* (2010) eKLR the court stated as follows;
- “It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”
18. In the case of *National Industrial Credit Bank Ltd v 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.”
19. Guided by the above authorities and also considering the fact that the applicant’s motor vehicle registration KBH 186V is being held by the Auctioneer, I find that the Appellant has satisfied this court that he would suffer substantial loss if the motor vehicle is sold before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.
20. On the security, the Appellant has not indicated whether he is willing to furnish security for due performance.
21. The court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of his judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of his judgment. See *Attorney General v Halal Meat Produces Limited* Civil Application No. Nairobi 270 of 2008; *Kenya Shell Ltd v Kibiru & another* (Supreme); *Mukuma v Abuoga* (1988) KLR 645.
22. This issue of adequacy of security was dealt with in the Court of Appeal in *Ndubiu Gitabi v Warugongo* (1988) KLR 621; IKAR 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 guarantees 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 judgment has been given. It is subject to 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 issues pending in the appeal. For that purpose, it matters not whether the plaintiff are secured in one way rather than the other, it would be easier for the defendants or if for any reasons they would prefer to provide security by a bank guarantee rather than cash. There are absolutely no principles why they should not do so... The aim of the court in this case was to make sure, in an even-handed manner, that there 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 or will any 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.”

23. The obtaining position herein, creates a unique scenario, where it has been held after cross examination of both the process server and the appellant that the appellant was duly served and was aware of the primary suit. The trial court also did find that the defence filed raised tribal issues and the appellant ought to be given a chance to defend the suit, though it was the second application to set aside judgement, after the 1st defendant too had applied to set aside the interlocutory judgement entered as against him.
24. The prolonged proceedings have definitely prejudiced the respondent, who seeks to enjoy the fruits of his judgement and this has to be balanced with the appellant/applicants right to be heard. In considering the rights of both parties the appellant/applicant was granted seven days to deposit the decretal sum. That period is definitely too short and unfair and he should have been granted more time to do so.

Disposition

25. Taking all relevant factors into consideration and in order not to render the intended appeal illusory, I do grant stay of execution of the decree herein on condition that;
 - a. The Appellant/Applicant do deposit as sum of Kenya shillings one million (Ksh.1,000,000/=) only into court within the next 30 days from the date of this ruling.
 - b. The applicant will further pay the auctioneers costs before motor vehicle registration Number KBH 186V can be released to him
 - c. In default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
26. The costs of this application will be in the cause.
27. It is so ordered.

RULING WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 7TH DAY OF FEBRUARY, 2024

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 7th day of February, 2024

In the presence of: -

Mr Musembi for Appellant



Ms Mutuku for Respondent
Sam - Court Assistant

