



Mugumoini Academy Ltd v Waweru (Miscellaneous Application E049 of 2023 & Civil Appeal E98 of 2023 (Consolidated)) [2024] KEHC 1126 (KLR) (5 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1126 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION E049 OF 2023
& CIVIL APPEAL E98 OF 2023 (CONSOLIDATED)**

MW MUIGAI, J

FEBRUARY 5, 2024

BETWEEN

MUGUMOINI ACADEMY LTD APPLICANT

AND

BENEDETA NJERI WAWERU RESPONDENT

RULING

Notice of motion

1. Vide a notice of motion under Certificate of Urgency dated 3rd April, 2023 and filed in Court on 23rd April, 2023 brought under Order 21 rule 1B, Order 22 rule 22, Order 42 rule 6, Order 51 rule 1 of the Civil Procedure Rules, sections 1A, 1B and 3A of the Civil Procedure Act, Article 159 (2) (a) and (d) of the Constitution of Kenya 2010.
2. The Applicant seeks the following orders that:
 1. Spent.
 2. Spent.
 3. Spent.
 4. This Court grants a stay of execution of the judgment dated and delivered on 23/02/2023 and Decree issued by Honorable B. Luova on 29/03/2023 pending the hearing and determination of this intended appeal.
 5. The Court allows the Applicant to furnish the court with Security in the form of a Bank Guarantee from Family Bank.
 6. The Application be heard inter partes on such date and time as this Court may direct.



7. The costs of this Application abide the outcome of the Appeal.
 8. This Court be pleased to issue any other and/or direction it deems fit to grant in the circumstances.
3. The grounds upon which this Application is based are on the body of the said Application.

Supporting Affidavit.

4. The Application was supported by an affidavit dated and filed in court on 3rd April, 2023, Sworn by Samuel Mirie, the insured of Motor Vehicle Registration Number KCG 430P registered in the name of the Applicant herein, wherein he deposed inter alia that he is advised by his Advocate on record that judgment was delivered on 23rd February 2023 and the Appellant was found to be 100% liable. Respondent was awarded Kshs. 265,640 for repair costs, search Record Kshs. 550 and Kshs. 375,000 for loss of user with costs and interest (Annexed and marked copy of the judgment).
5. Deposing that there is imminent threat of execution by the Respondent to execute the judgment delivered on 23/02/2023 since the 30 days stay of execution period had since lapsed. (Annexed and marked copy of the letter threatening execution).
6. He deposed that the judgment is of a substantial amount and the Applicants are apprehensive that if the Respondent is paid he may deal with the same in a manner prejudicial to the Applicant and if the intended appeal is successful, he might not be able to recover the same from the Respondent.
7. He deposed that the insurer is ready, willing and able to furnish the court with a Bank Guarantee from Family Bank as Security. (Annexed and marked copy of the said bank guarantee).
8. Further, that the inadvertent delay on their part is highly regretted he honestly believe that the Applicant should not be penalized. And further that he is informed by his Advocate on record that unless stay of execution is granted herein they are likely to suffer injustice and irreparable loss.
9. The matter was canvassed by written submissions.

Submissions

Applicant's Submissions

10. The Applicant in its Submissions dated and filed in Court on 31st July 2023, wherein counsel for the Applicant raised the following issues.
 - a. Whether or not the Applicant had issued plausible reason for the delay in filing the Amended Memorandum of Appeal; and what prejudice has the Respondent suffered.
 - b. Whether or not the amended Memorandum of Appeal raises arguable issues.
 - c. Whether or not substantial loss will occur if stay of execution is not granted.
11. On the first issue, counsel contended that the Applicant admits that the Appeal was not filed within the required statutory timelines and the reason for the delay was occasioned by the fact that the instructing client issued the instructions after the prescribed timeline had lapsed, hence the circumstances leading to the delay have been well and sufficiently explained by the Applicant. To buttress the point of delay counsel relied on the case of *Kenya Power & Lighting Company Ltd v Rose Anyango & Another* [2020] eKLR, where there was a delay of 40 days.



12. Submitting that the Respondent has not established that she has been prejudiced in any manner by the said delay. Reliance was made on the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and boundaries Commission & Others* [2013] eKLR.
13. On the second issue, Counsel submitted that the amended Memorandum of Appeal herein is arguable and raises serious issues to warrant this honorable court's intervention on Appeal. On this limb counsel quoted the case of *Kenya Revenue Authority v Sidney Keitany Changole & 3 others* (2015) eKLR.
14. On substantial loss, Counsel opined that the Respondent's means are unknown and it is highly unlikely that the Respondent will be capable of refunding the decretal amount in the event that the intended Appeal succeeds since the Respondent has not disclosed nor furnished the Court with any documentary evidence to prove her financial standing.
15. To buttress this limb Counsel quoted the case of *Edward Kamau & another v Hannah Mukui Gichuki & Another* (2015) eKLR, and submitted that in the absence of an affidavit of means as to the Respondent's financial status is still unknown and has not been proven. Contending that there is likelihood that she has no means to refund the decretal amount.
16. It was averred that the Applicant having satisfied all the conditions set out in *Civil Procedure Rules* pray that he be granted an order of stay of execution pending the hearing and determination of the intended appeal aforesaid.

Respondent's Submissions

17. The Respondent in her submissions dated 27th July, 2023 and filed in Court on 31st July, 2023, raised the following issues for determination:-
 - a. Were the Court orders properly served upon the Respondent?
 - b. Whether the Respondent is in contempt of Court order when said orders were not properly served upon her, and she proceeded to execute the judgement?
 - c. On account of lack of service, whether the Court can review the stay conditions and payment of auctioneer's fees.
 - d. Who bears the cost of the application
18. On the issue of whether the Applicant/Appellant was properly served the Court orders in the case of *Hon Basil Criticos v Hon. Attorney General & 8 Others* [2012] eKLR the Court declared that:

“.....the law has changed and as it stands today knowledge supersedes personal service ... where a party clearly acts and shows that he had knowledge of a Court Order, the strict requirement that personal service must be proved is rendered unnecessary”
19. The Counsel for the Appellant was asked to demonstrate service [of earlier interim orders of stay of execution granted by this Court]; *vide* Orders made by this Court on 24th May, 2023, he confirmed this position on record that service was never effected and as a result the [Respondent was] seeking the orders be reviewed and/or set aside.
20. On the issue of whether the Respondent is in contempt of Court order when said orders were not properly served upon her, and she proceeded to execute the judgement; the Appellant/Applicant has not proved beyond the required threshold that it served the Respondent with the Order before the



proclamation and that the Respondent knew of the existence of the said Order before proceeding to instruct her Auctioneers to proclaim on the Appellant/Applicants.

21. In the case of *Mutitika v Baharini Farm limited* (1985) KLR 229, 234 it was held that;
“The standard of proof in contempt proceedings must be higher than proof on balance of probabilities almost not exactly, beyond reasonable doubt”
22. On the issue of whether it is just, lawful and fair for this Court to issue orders for the security of costs, advocates fees and Auctioneer’s fees in the present circumstances, reliance is made in the case of *Noormohamed Abdulla v Ranchhodbal J. Patel & Anor* [1962] EA 448 the Court held thus;
“The order for security ...is designed to ensure that a litigant who by reason of near insolvency is unable to pay the costs of the litigation when he loses, is disabled from carrying on the litigation indefinitely except upon terms and condition which afford some measure of protection to the other parties...”
It is therefore imperative in consideration of an application for security of costs, for the court to balance the competing rights of the parties, that is the right to access to justice and the right to security for costs.
23. In the instant case the stay conditions as they are present, do not take into account the balance of justice and interests in the matter. On one hand, the successful litigant in the Trial Court has been locked out from realizing the fruits of litigation and has been denied a livelihood noting that the motor vehicle still lays at the garage awaiting the conclusion of this matter.
24. The damaged motor vehicle cannot be utilized and as it appears, the Respondent may even have to wait longer, noting that the Record of Appeal is yet to be furnished and much more time may end up being utilized before the completion of the intended Appeal.
25. See the case of *Nicholas Stephen Okaka & Anor v Alfred Waga Wesonga* [2022] eKLR where the Court held that a Court is not bound by the type of Security offered by an Applicant. The Respondent proposed that 50% of the judgment sum alongside the payment of advocate costs granted by the Trial Court & taxed thereto be paid to allow the Appellant eke a living.
26. Counsel for the Respondent majorly delved on the setting aside of the Court Orders granted on 5th April, 2023 and affirmed on 14th April, 2023. According to the Counsel, the said orders were granted on a misrepresentation by Counsel for the Applicant.
27. It was submitted that the Respondent was un-informed of the contents of the Court order by omission of the Appellant/Applicant and were desirous to realize the fruits of justice accorded to Respondent, advised her auctioneers to proceed to proclaim the Motor Vehicle Registration Number KCG 430P which they did on 27th April, 2023.
28. Counsel contended that failure to serve the Orders of Court dated 4th April, 2023 and those dated 11th April, 2023 was not a mistake on the part Appellant. Averring that the same was calculated move aimed at denying the Respondent an opportunity to be heard, and for the Appellant to obtain favourable orders since their application was unopposed.
29. It was the respondent’s contention that the orders as they currently are, are one sided to the appellant’s advantage. Counsel in his submissions quoted a number of authorities in consonance to his discontent on the orders issued by this court.



30. Further it was argued that while the Respondent is not opposed to the granting of stay of execution pending the outcome of the Appeal, Court was asked to review its Orders in conditions of stay to balance the interest of the parties.

Determination/analysis

31. I have considered the Application, the Supporting affidavit, and the submissions filed as well as the authorities relied upon by the counsels on behalf of their respective clients.

32. The issue that commends itself for determination is whether the applicant has demonstrated that the orders for stay of execution pending appeal are merited.

33. The guiding principles for grant of execution pending appeal are well established. These principles are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which is to the effect thus:

“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.” (emphasis added)

34. Further to the foregoing, court in determining on whether to grant a stay or not is enjoined to have regard to the sufficient cause. The overriding objective espoused under Section 1A and 1B of the *Civil Procedure Rules* no longer limit the court. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under *Civil Procedure Act* or in the interpretation of any of its provisions.

35. According to Section 1A(2) of the *Civil Procedure Act*, “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B, some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.” (Emphasis added)

36. In the case of *Stephen Boro Gitiba v Family Finance Building Society & 3 others* Civil Application No. Nai. 263 of 2009, Nyamu, JA on 20/11/09 held inter alia that:

“The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way.” (Emphasis added)

37. It is worth noting that an Applicant for stay of execution of Decree or any consequential orders thereto pending Appeal must demonstrate and/or satisfy the conditions set out under Order 42 rule 6(2), namely:

- a. that substantial loss may result to the applicant unless the order is made;
- b. that the application has been made without unreasonable delay; and
- c. that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.



Susbstancial Loss

37. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, where it was observed that:

“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.” (Emphasis added)

38. In the case before me, the Applicant at paragraph (h) of its grounds upon which its application is premised averred that unless the stay of execution is granted, and the Respondent and/or executes the said judgment of 15th June, 2021 the Appellants/Applicants appeal will be rendered nugatory and the Appellant/Applicant will suffer irreparable loss and damage. Applicant further submitted that the Respondent has not disclosed nor furnished the court with any documentary evidence to prove his financial standing.

39. Platt, Ag. JA (as he then was) in case of *Kenya Shell Limited v Kibiru* [1986] KLR 410, at page 416 wherein he expressed himself as follows:

It is usually a good rule to see if Order XLI rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”. (Emphasis added)

40. Gachuhi, Ag. JA (as he then was) at 417 held thus:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted? By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.” (Emphasis added)

41. Regarding the contention that there was no evidence that the 1st Respondent would be able to refund the decretal sum if paid over to the Respondent, Hancox, JA (as he then was) in the above cited case expressed himself as follows:

“I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not



repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age.” (Emphasis added)

42. From the foregoing case, the three Judges of Court of Appeal (as they then were) carefully, ably distilled the import of substantial loss noting that it is not sufficient to state the sum is a lot of money and the Applicant will suffer loss if the money is paid. The Applicant must establish what loss it would be. Therefore, an allegation that a decree holder is a person of unknown means does not rob and/or deny the said decree holder from the enjoyment of the fruits of a judgement. The doctrine is and has been that courts are enjoined not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court.
43. In this case, Applicant’s apprehension that the Respondent will not be able to refund the decretal sum if paid over to her and the appeal succeeds, is based on the fact that the judgment is of substantial amount that if paid to Respondent she may deal with the same in a manner prejudicial to the Applicant and if the intended appeal is successful, the Applicant might not be able to recover the same from the Respondent. However, it has not been alleged by the Applicant that payment of the said sum may adversely affect the financial position of the Applicant or his insurer. Accordingly, it is my considered view that the Applicant will not suffer substantial loss in the event that the decretal sum is paid to the Respondent.

Security

44. On the issue of security, it is a requirement under Order 42 rule 6 of the Civil Procedure Rules, that the applicant is to offer security for the due performance of the decree and the Court is entitled to consider the fact that no such security has been offered in deciding an application thereunder.
45. In the case of *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others* [2015] eKLR, it was held that:
- “... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.” (Emphasis added)
46. In *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR, where the court stated 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 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 fails.

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 judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... This 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.” (emphasis added)

47. The Court of Appeal in *Ndubiu Gitahi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100, 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” (Emphasis added)

48. In the instant case and from the pleadings and the annexures thereto the Applicant is ready, willing and able to furnish the court with a Bank Guarantee as security provided by his insurer, Directline Assurance. The bank guarantee is from the Family Bank. In my view I find no reason why the same should not be accepted as security bearing in mind that it is from a reputable bank and as such Respondent will not be prejudiced by it as it an adequate form acceptable form of security before the eyes of the court.
49. As to appeal being brought without unreasonable delay, I note that the Applicant admitted in its submissions that the Appeal was not filed within the required statutory timelines and the reason for delay was occasioned by the fact that the instructing client issued the instructions after the time to file



an appeal had lapsed hence, the Applicant prayed that this court extends time for filing the intended appeal and be granted leave to appeal out of time against the award of liability and quantum.

50. In the circumstances of the instant matter, the Trial court judgment was delivered on 23/2/2023 and memorandum of appeal was filed on 2/5/2023 there was a lapse of after 23/3/2023 upto 2/5/2023. The Applicant attributes delay to lack of instructions and having regard to the reasons advanced by the Applicant on the delay to file a memorandum of appeal within the prescribed.
51. The Law prescribes judicial discretion where the Applicant was/is not to blame for any misconduct of actions aiding delay and hence his right of appeal ought to be upheld. I find no reason why the Applicant should be denied the right to appeal by filing the said Memorandum of Appeal out of time but within strict timelines not to prevent the Decree-holder enjoyment of fruits of its judgment.

Payment of Auctioneers Fees.

52. The Appellant filed the Certificate of urgency on 3/04/2023 seeking stay of execution of judgment and decree of the Trial Court of 23/02/2023.
53. This Court granted interim stay of execution in the Court orders of 4/04/2023. That the application of 3/04/2023 to be served to the Respondents so as to have the matter heard interpartes.
54. On 17/04/2023 this Court was informed that the Application was served to the Respondent via email and there was no response. An Affidavit of Service was filed and the application was unopposed. This Court granted stay of execution on condition the Appellant to deposit Bank guarantee or deposit decretal sum with both Advocates in a joint account within 90 days.
55. On 3/05/2023, the Appellant filed certificate of urgency that the Respondent was in the process of execution even after the court granted orders of maintenance of status quo.
56. On 9/5/2023, The Respondent informed this Court that the Application under Certificate of Urgency they filed on 2/5/2023 was not heard. This Court sought to peruse the Court file.
57. Apparently, as per this Court's perusal of the court record the Respondent filed an application on 2/05/2023 which was not placed in the court file or before any officer of the duty Courts to deal with but was inserted in the court file later after Respondent Counsel Mr. Morgan Omusundi Advocate; wrote to Court vide letter of 10/05/2023 to Deputy Registrar that the application of 2/05/2023 was not placed before court for hearing.
58. On 24/05/2023 this Court confirmed the pleadings on record to the parties/Counsel vide Ruling read out to parties/Counsel.
59. This Court asked the Appellant to provide proof that they notified /served Courts directions/orders of 4/4/2023 to the Respondent(s). The Court confirmed that the Certificate of Urgency filed by the Respondent on 2/5/2023 was not placed in the Court file nor before any Duty Court and therefore granted orders that the Court orders of 14/4/2023 would not be set aside as each party has the legal right to appeal and the stay of execution terms maybe varied taking into account Respondent/Applicant's submission/application.
60. The Court orders included that proof of service of Court orders of the application of 3/04/2023 be presented to confirm that the proceedings that led to orders of 17/04/2023 were proper, legal and valid or not.
61. This Court did not find proof of service of the Court orders that stopped execution by granting stay of execution and that the Respondent is held in contempt of Court orders by pursuing execution is not on



record and not proved. Infact it is the Respondent's application of 2/5/2023 that was not heard by this Court as it was not placed in the Court file. The Respondent was pursuing enjoyment of fruits of its judgment. Therefore, in the present circumstances any loss or liability shall be borne by the Appellant.

Disposition

62. The Court has considered the Written Submissions and taking into account the interest and rights of both parties and the chronology of events as outlines above; this Court orders as follows;
1. The Bank guarantee of the full decretal amount as granted on 17/04/2023 remains in force.
 2. The Auctioneers fees incurred due to the Respondents execution process without notice and service of the Court orders of 4/04/2023 that a temporary stay of execution was granted, shall be paid to the Auctioneers by the Appellant within 90 days.
 3. The Court grants leave to file appeal out of time as it was filed on 3/04/2023. The Amended Memorandum of Appeal filed on 30/06/2023 is deemed to be the appeal and direction on the said appeal shall be on 12/02/2024.

RULING DELIVERED, SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 5TH FEBRUARY, 2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W. MUIGAI

JUDGE

In the presence of:

Ms Ochoki H/B Osoro - For The Appellant

Ms Gichuki H/B Mr. Waweru - For The Respondent

Patrick - Court Assistant

