Muia & others v Mutua (Civil Appeal 9 of 2014)
[2024] KEHC 1088 (KLR) (5 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1088 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 9 OF 2014

MW MUIGAI, J

FEBRUARY 5, 2024

BETWEEN

JOHN MUIA & OTHERS ..... APPLICANT

AND

TITUS KILONZO MUTUA ..... RESPONDENT

RULING

Background

1. By a Notice of Motion under Certificate Urgency dated 14th June,2023 and filed in Court on 15th June,2023 brought under Sections 1A, 1B and 3A, of the *Civil Procedure Act*, Order 12 Rule 7 and Order 51 of the Civil Procedure Rules, 2010.

2. The Applicant seeks the following orders that:

    1. Spent.

    2. Spent

    3. Pending the hearing and determination of this Application there be an order of stay of execution of both the Judgment delivered in Machakos CMCC. No. 109 of2011 and the warrants of attachments issued by Justus Munyaka Muinde t/a Kande Auctioneers.

    4. Pending the hearing and determination of this Appeal there be an order of stay of execution of both the Judgment delivered in Machakos CMCC. No. 109 of2011 and the warrants of attachments issued by Justus Munyaka Muinde t/a Kande Auctioneers.

    5. This Court be pleased to issue an order enlarging the time required to file a record of a Record of Appeal.

6. This Court do make any such further orders and issue any other relief it may deem just to grant in the interest of justice.

7. The costs of this application be in the cause.

3. The grounds upon which this application is based are on the body of the said application.

Supporting Affidavit

4. By Supporting Affidavit dated and filed in court on 14th June,2023 and filed in court on 15th June,2023 Sworn by John Muia the Applicant herein, wherein, he deposed that around 2014 he was served with the pleadings filed in Machakos CMC 109 of 2011 and forwarded the same to the insurance company which instructed the firm of Manthi Masika and Company Advocates to come on record. Further that he has never been updated on the progress of the case and he was only served with warrants of attachment on 12th June,2023 (Annexed and marked copy of warrants of attachment).

5. Deposing that the said appeal was dismissed for want of prosecution and it is only fair that he is granted an opportunity to have the appeal heard on merit. He lamented that from the pleadings he has never been involved in the cases and he always assumed that the Insurance company was handling the case in conjunction with the appointed advocate.

6. He deponed he has never recorded any statement with the previous advocate for filing in court. consequently, he opined that if the orders are not granted, the instructed auctioneers will proceed to attach his assets yet he had a valid insurance policy as at the time of filling the case.

7. He is duly informed by his advocate on record that once a judgment is delivered, a new advocate can only come on record once a consent is executed between the previous and the new advocate. (Annexed and marked copy of the consent).

8. It was deposed further that the mistakes of an advocate should not be borne by the Appellant.

Replying Affidavit

9. The Respondent vide a Replying Affidavit dated 30th June,2023 and filed in court on 5th July,2023, sworn by Titus Kilonzo Mutua, wherein he deposed that the judgment herein was delivered on 16/01/2014 nine (9) years ago. Further that he is informed by his advocate on record that after judgment the applicant/Appellant was given 30 days stay of execution which lapsed on 6/02/2014.

10. Deposing that he is informed by his Advocate on record that the Applicant/Appellant filed an Application for stay dated 20/2/2014 on 24/2/2014. (Annexed and marked copy of the said Application).

11. He lamented that the Appellant/Applicant on securing orders for stay, went into slumber and has never made any step in prosecuting this Appeal and has not even served his Advocates on record with neither a Memorandum of Appeal nor a Record of Appeal. Further he his informed by his Advocate on record that on 20/9/2019, they moved for the matter to be placed before the Honorable Court for dismissal.

12. He lamented further that the matter was slated for Notice to Show Cause on 16/01/2023 with notice to Parties. (Annexed and marked copy of the said Notice and Cause List). That on the day slated for Notice of Show Cause neither the Appellant nor his Advocate on record, attended court despite being aware of the said date.

13. He deposed that this application is an afterthought only meant to delay the finalization of this matter. If the application is allowed, he will be greatly prejudiced as it will delay the finalization of this suit.

He further deposed that the Application is fatally defective and offends order 9 rule 9, of the *Civil Procedure Act* and should be dismissed with costs to him.

14. The matter was canvassed by written submissions

Submissions

Appellant's submissions

15. The Appellant/ Applicant by his written submission dated 9th August,2023 and filed in court on 31st August, 2023, wherein counsel for the Applicant submitted that the Notice of Motion is Premised upon the provisions of Order 42 Rule 6 of the Civil Procedure Rules 2010. Contending that Rule 6 (1) provides that no Appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except as the court appealed from may order for sufficient cause. To buttress this position counsel relied on the case of Butt Vs Rent Restriction Tribunal [1982] KLR 417 and submitted that the most important consideration that this court should bear in mind in determining this application is whether the Applicant has established sufficient cause to convince this honorable court that it would be in the interest of justice to allow the application.

16. On substantial loss, Counsel placed reliance in the cases of Corporate Insurance Company Limited Vs Emmy Cheptoo Letting & Another [2015] eklr and HCC Misc Appl 42/2011 at BGM in James Wangalwa & Another Vs Agnes Naliaka Cheseto [2012] eKLR.

17. It was submitted that it is not in dispute that the Machakos CMCC 109 of 2011 was heard and determined to its finality. It is also not in dispute that the Applicant herein was represented by an Advocate on record who went on to file this appeal against the judgment, which was later dismissed for want of prosecution. What is however in dispute is the fact that the applicant was never updated on the progress of the case and neither did he knew that an appeal had been lodged and later dismissed. Contending that the Applicant only came to know of the same when he was served with warrants of attachment on 12th June,2023.

18. It was submitted that they have sufficient cause why a stay of execution should be issued to allow the applicants Appeal to be heard on merit. To cement this position credence was placed on the case of Hon Attorney General Vs The Law Society of Kenya & Another C.A Civil Appeal No. 133 of 2011 [2013] eKLR.

19. Submitting that if the orders sought herein are not granted, the instructed auctioneers will proceed to attach the applicant's assets yet he had a valid insurance policy as at the time of filling the case.

20. Regarding the unreasonable delay, Counsel submitted that the Application herein was filed on 15th June,2023 just five months after the appeal was dismissed. Contending that the reason delay has been explained in the Applicant's supporting affidavit. Averring that the Applicant filed this application as soon as he was served with the warrants of attachment.

21. As to security, it was submitted that the Applicant had already paid some security upon the counsel on record for the Respondent and the court needs not issue another order for the applicant to pay security. Contending that the Applicant Appeal ought to be allowed to file his record of appeal and have the appeal prosecuted on merit. To buttress the point on Security, reliance was placed on the case of Recoda Freight & Logistic Ltd Vs Elishana Angote Okeyo [2015] eklr and submitted that the appeal as filed has overwhelming chances of success as the lower court misguided itself in the aforementioned judgment.

Respondents Submissions

22. The Respondent in his submissions dated 17th October,2023 and filed in court on 18th October,2023 wherein counsel for the Respondent submitted that the current application is brought to court by the firm of O.N Makau & Mulei Advocates and is fatally defective, as they are new advocates in the matter and have not sought to come on record as enshrined in Order 9 Rule 9 (a) of the Civil Procedure Rules.

23. Submitting that none of the orders sought from the court from 1-7 seeks leave for the said firm to come on record as such, the same is non-starter and should most definitely fail and be struck out with costs to the Respondent.

24. It was submitted that the application herein is frivolous, vexatious, and bad in law, untenable and a gross abuse of the court's process and is dead on arrival as it offends order 9 Rule 9 of the Civil Procedure Rules. To buttress this position reliance was placed on the cases of HCCA No. 21 of 2013 John Langat vs Kipkemoi Terer & 2 Others and ELC No. 252 of 2014 Julieta Marigu Njagi Vs Virginia Njoki Mwangi & John Ngari Ngungi.

25. Submitting that it is clear that the application by the Appellant/Applicant is mere afterthought and a ploy to derail the satisfaction/realization of the fruits of the Judgment and should be dismissed together with the Appeal with costs to the Respondent.

Determination/analysis

26. I have considered the Application, the Supporting Affidavit, the Replying Affidavit, and the Submissions filed as well as the authorities relied upon by counsels for their respective clients.

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

28. 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 that:

> " 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)

29. Further to the forgoing, 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.

30. 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).

29. In Stephen Boro Gitiha vs. 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)

30. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. The Court shall consider overriding objective as stipulated in section 1A as read with section 1B of the *Civil Procedure Act*. The Court considers the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice.

31. 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.

32. 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) of the Civil Procedure Rules 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. (Emphasis added).

Substantial Loss

33. As to what substantial loss is, in 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)

34. In the case before me, the Applicant submitted that it is not in dispute that the applicant herein was represented by an advocate on record who went on to file this appeal against the judgment, which was later dismissed for want of prosecution. According to the Applicant what is in dispute is the fact that the Applicant was never updated on the progress of the case and neither did he know that an appeal had been lodged and later dismissed. He only came to know of the same when he was served with warrants of attachment on 12th June, 2023.

35. The Applicant's concern is that if the orders sought are not granted, the instructed auctioneers will proceed to attach the Applicant's assets yet he had a valid insurance policy as at the time of filing the case. In my considered opinion the allegation that the auctioneers will proceed to attach the Applicant's assets yet he had a valid insurance policy as at the time of filing and the Insurance Company stepped in during Trial Court proceedings and then stopped there is cause for concern as it is in issue whether the Applicant is directly liable to settle the claim of it is the Insurance Company. This Court considered that if the Applicant had valid income policy and paid the premium there is legitimate expectation that the Insurer would settle a valid claim.

Security

36. On the issue of security, it is a requirement under Order 42 rule 6 aforesaid, that the applicant is to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder.

37. In the case of Mwaura Karuga t/a Limit Enterprises vs. 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)

38. In Gianfranco Manenthi & another vs. 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 degree 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)

39. The Court of Appeal in Nduhiu Gitahi vs. 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)

Delay In Filing/prosecuting Appeal

40. The Court record confirms the Appeal was filed in 2014 Civil Appeal No. 9 of 2014 was not prosecuted. Notice of dismissal was filed on 1/12/2020 and dismissed under the RRI Programme on 16/01/2023 and later by Application by the Applicant, the appeal was reinstated by the Court order of 10/07/2023. This Court finds that the right to Appeal is protected and applied within the law. Under Section 65 & 78 of CPA 2010 and in light of the facts pleaded that the Applicant was not aware of the Appeal pending was dismissed for want of prosecution as the matter was dealt with by the Insurance Company was /is found a plausible explanation. Therefore the Court reinstated the matter.

41. The Court notes the objection to reinstatement of the suit contrary to Order 9 Rule 9 CPR relying on Misc. Civil Application No. 401 of 2018,Nginyanga Kavole vs Mailu Gedion Hon Odunga J (as he the was) relied on C.A. Nicholas Kiptoo Korir Salat vs IEBC & 6 Others 2013 eKLR; HCCA.21 of 2013 John Langat vs Kipkemoi Terer & 2 Others and Julietta Marigu Njagi vs Virginia Njoki Mwangi & John Ngari Ngugi ELC 252 of 2014.

42. The Court record confirms that the requirements of Order 9 Rule 9 CPR for consent from previous advocates to take up the matter after judgment was not complied with.

43. In the case of Martin L Barasa v Giza Systems Smart Solutions Ltd [2022] eKLR, the Court observed;

> It is notable that at the time the suit was dismissed, the Applicant had instructed the firm of firm of Samuel Nyambane & Co. Advocates to act for him in the matter vide a Notice of Appointment dated 11th June, 2021.The Respondent has faulted the Application on the basis that the Applicant did not comply with the provisions of Order 9 Rule 9 of the Civil Procedure Rules (CPR) .....

> By and large, the said firm of Advocates have only been on record for the Applicant on paper but not in the real sense. Should the Applicant therefore be penalized for want of procedure for failing to seek leave to act in person from Counsel who has never really represented him? The question thus is, in the face of non- compliance with the procedural requirements under Order 9 Rule 9 of the CPR and Rule 33(3) of this Court's Rules, is this a case that merits exercise of discretion in favour of the Applicant? It is within the general discretion of the Court to set aside any order issued by it ex parte. This should be subject to the Applicant adducing sufficient cause for the exercise of such discretion. Discretion should also be exercised judiciously..as was considered in the case of Shah vs Mbogo [1967] EA 116 and 123B:-See also; CMC Holdings Limited vs Nzioki [2004] 1 KLR 173, Philip Chemowolo & Another vs Augustine Kubende, [1982-88] 1 KAR 103 on exercise of judicial discretion.

44. In the instant case; the Respondent deposed that judgment was delivered 16/1/2014; 30 days stay of execution was granted and terms of stay of execution granted.The appeal was not prosecuted until its dismissal on 16/1/2023 and application for reinstatement made on 10/7/2023 and the Court sought parties/Counsel to file submissions for determination.

45. The Applicant posits that they complied with stay of execution terms and paid Respondents Ksh 300,000/- and are ready to deposit the balance. The Appeal was filed by Manthi Masika & Company Advocates but the Application filed for reinstatement is by Makau & Mulei Advocates. The reasons for delay of prosecuting the appeal can only be attributed to the former Advocates on record and while the matter has delayed, the applicant who was not made aware of the delay of the appeal would suffer substantial loss if execution proceeds whilst he was at the time legally and properly insured and the Insurance took up prosecution of his case. Whereas the Court appreciates the delay of execution / enforcement of the judgment is it fair and just that execution is carried out against the Applicant for judgment yet an appeal was timeously filed on his behalf and without his knowledge the appeal was dismissed without recourse on his part? I think not.

46. The justice of the case is that the Applicant's right to appeal ought to be granted as the antecedents that led to the dismissal cannot be visited on him. On the other hand, the Respondent is not to blame for the delay and is prejudiced from enjoying the fruits of his judgment. Order 9 Rule 9 CPR cannot be applied to disenfranchise a party's right of fair hearing/right to appeal. However, to mitigate the hardship on each party the right of appeal is allowed on condition the decretal sum remaining shall be deposited and held in a joint interest earning Account by both advocates of the parties on record.

Disposition

1. 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 plaintiff I grant a stay of execution of the decree herein in the following terms:

    a. The Applicant pay and deposit the remaining decretal sum in an interest earning account of both Advocates within 90 days.

    b. The said conditions (a) to be met within 90 days from the date of this Ruling and in default the application and appeal shall be deemed to have been dismissed with costs and the Respondent will be at liberty to execute.

    c. The Appeal be and is hereby reinstated and shall be prosecuted within 90 days from the date of this Ruling in default stands dismissed for non– prosecution.

    d. Costs of this Application to be the cause.

It is so ordered.

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

M.W. MUIGAI

JUDGE