Theuri v Kima (Suing as the legal representative of the Estate of Agnes Kavila) (Civil Appeal E226 of 2023) [2024] KEHC 952 (KLR) (7 February 2024) (Ruling)

Neutral citation: [2024] KEHC 952 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E226 OF 2023

FROO OLEL, J

FEBRUARY 7, 2024

BETWEEN

JULIUS WAGURA THEURI ..... APPLICANT

AND

KAVINDU KIMA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF AGNES KAVILA) ..... RESPONDENT

RULING

1. The application before this court is the Notice of Motion application dated 22nd September 2023 brought pursuant to provisions of Section 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, 2 and 3 of the said application are basically spent and the main prayer sought is prayer 4 that there be a stay of execution of the judgment/decree and the applicant's insurer be allowed to deposit insurance bond as security.

2. The application is supported by a supporting affidavit of Peter Ngola dated 22nd September 2023. He depones that judgement had been made in favour of the respondent in the sum of Ksh.9,070,550 and he was found liable to pay 50% of the decretal amount being Ksh.4,535,275.00/=. Being dissatisfied by the said award, he had appealed and this appeal had overwhelming chance of success based on the various grounds of appeal raised. The applicant further averred that his insurer Britam insurance co ltd was will to provide security as would be directed by court.

3. This application is opposed by the Respondent who filed Replying Affidavit's dated 29TH September 2023 sworn by the respondent KAVINDU KIMATU, who maintained that the said application was brought in bad faith, meant to obstruct and delay the course of justice and the applicant had not met the conditions for granting stay under Order 42 Rule 6(2)(b) of the Civil Procedure Rules, 2010 . The affidavit made in support of the application was defective and violated provisions of Order 19 rule 3(1) of the Civil Procedure Rules, as it was sworn by a person who is not a party to the suit and swore to facts not within his knowledge.

4. This being a money decree, the applicants had not shown, the loss they would suffer if the order of stay of execution was not granted and, in the unlikely event that the appeal was successful, the respondent would be able to refund the sums paid out. Finally, the respondent deponed that if the court was inclined to grant stay of execution the applicant should be compelled to pay the respondent half the decretal sum of Kshs.2,389,720/= and have the other half of the decretal sum being Kshs.2,389,720/= deposited in a joint interest earning account.

5. The applicant did file a further affidavit where he deponed that he had a right to swear the supporting affidavit, being a legal officer of the appellant insurance company and were responsible for processing the decretal sum to the third party. Therefore under the doctrine of subrogation he could rightfully swear the supporting affidavit.

6. Further the applicant reiterated that, the insurer was ready and willing to provide security, and that they were opposed to paying half the decretal sum and depositing the other half in a joint interest earning account as the appeal had overwhelming chance of success and ultimately the decretal sum was unlikely to surpass Kshs.1,000,000/= after apportionment of liability. The respondent too was not a person of means and would not be in a position to refund the sums claimed if paid out. He therefore prayed that the orders sought be allowed.

Analysis & Determination

7. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and submissions filed by both parties. The only issue which arise for determination is whether this court should grant stay of execution of the Judgment/Decree dated 2nd November 2023 issued in Kithimani PMCC No 443 OF 2016.

8. 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."

9. 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

10. 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.

11. In Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365, 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 of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.

12. 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

13. As to whether the Application has been filed without undue delay, judgment was entered on 24th August 2023. The memorandum of appeal was filed on 12th September 2023 and this application for stay pending appeal was filed on the 25th September 2023, all of which were done within one month. This court thus finds that the appeal and this application for stay of execution has been filed without undue delay.

ii. Substantial Loss

14. 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.'

15. 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."

16. 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."

17. The respondent did file a replying affidavit to rebut the averments made by the applicants in the supporting affidavit, but never filed any affidavit of means to show or prove that indeed if he is paid the decretal sum and the appeal is successful, he will be in a position to refund the decretal sum paid to him.

18. 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."

19. Guided by the above authorities and in the absence of the requisite proof from the Respondent that he is a person of means, I find that the Appellants have 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.

iii. Security

20. 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."

21. 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 were 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.

22. 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".

23. The applicants 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 submitted that the appellant should pay him half the decretal sum and deposit the other half in a joint interest earning account pending determination of this suit.

24. The appellant has challenged both liability and quantum. Proof of earning is challenged; lost years and multiplier too was challenged. Under these circumstances it would not be prudent to have part of the decretal sum paid out.

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 a sum of Kshs two million (Ksh.2,000,000/=) a joint interest earning account in the joint names of advocate for the appellant and advocates for the respondent at a reputable financial bank for the whole duration of this appeal.

    b. This condition is to be met within 45 days from the date of this ruling or 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. Gaya for Appellant

No appearance for Respondent

Sam - Court Assistant