



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mbai v Mueke (Miscellaneous Application 122 of 2023)
[2024] KEHC 3108 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3108 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION 122 OF 2023**

MW MUIGAI, J

MARCH 8, 2024

BETWEEN

BENARD NDIVO MBAI APPLICANT

AND

HELLEN SALA MUEKE RESPONDENT

RULING

1. Vide a Notice of Motion dated 27th June, 2023 brought under Sections 1A (2) 3A, 38A and 51 of the Civil Procedure Act and Order 42 Rule 6 (2) of the Civil Procedure Rules wherein, the Applicants sought the following orders that:
 1. Spent
 2. Spent
 3. That this Court to grant the applicant leave to file out of time against the judgement delivered on 24th January 2023, by Hon M.A Otindo.
 4. This Court to grant stay of execution of the judgement delivered on 24th January, 2023 in Machakos CMCC 284 of 2020 by Hon M.A Otindo pending the hearing and determination of the appeal.
 5. That this Court allow the Applicant to furnish the Court with security in form of a bank guarantee from a reputable bank.
 6. That the cost of this application abide the outcome of the appeal.



Supporting Affidavit

2. The application was Supported by Supporting Affidavit dated 27th June 2023 sworn by Benard Ndivo Mbai, she deposed that judgement was delivered on 24th January 2023 and the Respondent was awarded general damages of Kshs 200,000 and special damages kshs 6,530 plus costs and interests and that the quantum was excessive in the circumstances.
3. He deponed that there was a delay in filing an appeal occasioned by the time he got to his advocates on record in regard to their opinion, the time with which to lodge the appeal had already lapsed and that he was not aware there was stipulated time to lodge an appeal and asked the court to excuse his mistake.
4. It was further deposed that there was an imminent threat of execution by the respondent a step which will render the judgement nugatory and the intended appeal useless and that the intended appeal was not an afterthought.
5. The applicant lamented that the inadvertent delay on his part was highly regretted and that he should not be penalized.
6. He further deponed that the intended appeal was merited, arguable and raised pertinent points of law with overwhelming chances of success and that he stands to suffer irreparable loss and damages if the orders are not granted.
7. It was deposed that his insurer MS Directline Assurance Company Limited was ready and willing to offer security in form of a bank guarantee for the decretal sum awarded.
8. He deponed that the respondent was a man of no means and if the decretal sum was paid to him, it would be hard to recover.

Replying Affidavit

9. By a Replying Affidavit dated 13th July,2023, sworn by Hellen Sala Mueke wherein she deposed that the application was fatally defective, frivolous based on speculations and misrepresentation of facts and should be struck out
10. He stated that the application had been brought with extreme undue delay of over 6 months and the same was unmerited and had not indicated the reasons for the undue delay and that further any steps had been taken to have the appeal instituted in good time.
11. She deposed that the applicant was served with a tabulation letter calling for settlement of the judgement but he declined to do so and that the application was an afterthought.
12. It was deposed that due to the refusal of the applicant to pay the judgement, the respondent instructed her advocates to proceed with execution in the matter hence the declaratory suit was filed and that the applicant's decision to appeal out of it has been prompted by the execution proceedings taken against Directline Assurance Co. limited.
13. The matter was canvassed by way of written submissions.

Submissions

The Appellant/Applicant's Submissions

14. The Appellant/Applicant filed his written submissions dated 13th October,2023 and submitted that the respondent in her replying affidavit are not opposed to the application save for the issues of stay



conditions and that they were willing to supply the court with a bank guarantee as security for the entire judgement and asked the court to issue fair determination on stay conditions

15. It was finally submitted that the application has met the three conditions required for grant of stay of execution pending appeal and the court was urged to exercise its discretion and grant the orders sought.

Respondent's Submissions

16. It was submitted that it was only just, fair and equitable that the instant application be struck out as unmerited and disregarded by the Court because the applicant sat on their right to appeal for over 6 months and only brought the application herein after execution proceedings began.
17. It was the respondent's submission that the application was devoid of merit and an abuse of the court's process and should be dismissed with cost

Determination

18. I have considered the application, affidavits in support and in opposition to, submissions and the authorities relied upon.
19. The application is premised on Order 42 rule 6(2) of the *Civil Procedure Rules*, 2010 provides that:-

“No appeal or second appeal shall operate as a stay of execution or proceedings 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 sub rule (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.

20. It therefore follows that no appeal or second appeal will operate as a stay. A party must show sufficient reasons why stay orders should be granted. See *Vishram Ravji Halai v Thornton & Turpin* Civil Application No. Nairobi 15 of 1990 [1990] KLR 365.

21. The Court, in *RWW v EKW* [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who



should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

22. The only issue necessary for determination would be whether the application seeking stay of execution is merited.

Substantial Loss

23. On the first condition, the court in *Tropical Commodities Suppliers Ltd and Others v International Credit Bank Limited (in liquidation)* (2004) EA LR 331, defined substantial loss in the sense of Order 42 rule 6 as follows:-

“...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...”

24. In *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR, the Court relied on the case of *Equity Bank Ltd v Taiga Adams Company Ltd*, [2006] eKLR to explain the onus of the Applicant where the court stated a follows: -

“...The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out—in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the appellant.”

25. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR Court of Appeal held thus:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”

In Paragraph 11 of the replying affidavit, the 1st respondent set out the contracts in which the 2nd respondent was engaged in but the values of those contracts were not disclosed. We repeat that the decretal sum was awarded to the 1st respondent, not the 2nd respondent and all that the 2nd respondent is entitled to from the judgment are the costs of the applicant’s dismissed suit. The sum awarded to the 1st respondent was on a counter-claim. On the material before us, the means or resources of the 1st respondent remain wholly unknown and, in those circumstances, we agree with Mr. Laibuta that if the decretal sum was paid over to the 1st or even to the 2nd respondents, the two might not be able to repay it back and in that case, if the applicant’s intended appeal were to succeed, that success would be rendered nugatory.

26. The Applicant’s contention is that there was an imminent threat of execution by the respondent, a step which render the application nugatory and the intended appeal useless.

27. In *George Kimotho Ilewe Anastacia Wanza Muthuka & Joseph Mutuku Ngewa (suing as legal representatives of the estate of Judy Kioo Wanza – deceased)* the Court stated that:-

“It is not enough to simply speculate that the Respondent, a successful litigant would not be able to refund the decretal sum. As far as the Court is concerned, she is a successful litigant and is entitled to the sum decreed in her favour. Similarly, there is no allegation that the



payment of the said sum would ruin the applicant's business." See in Bungoma High Court Misc Application No 42 of 2011 - *James Wangalwa & Another v Agnes Naliaka Cheseto and James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR.

28. in *Kenya Shell Limited v Kibiru* [1986] KLR 410, at 417 the Court held:

"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 judgment. 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."

29. It therefore follows that the Applicant must demonstrate the loss he/she would suffer if the decretal sum is paid to the Respondent.

30. The Court notes that despite the Respondent not stating in his replying affidavit whether he is capable of refunding the decretal amount or furnishing the court with documentary evidence if paid to him, the Applicant has not demonstrated what substantial loss she will suffer. The Applicant has simply stated that the respondent is a person of unknown means and was apprehensive that if the decretal sum is paid out, the appeal will be rendered an academic exercise. 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 a crucial issue. The court cannot shut its eyes where it appears the possibility of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal is doubtful. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal to ensure that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement. In other words, the court should not only consider the interest of the applicant but has also to consider, in all fairness, the interest of the respondent who has been denied the fruits of his judgement.

31. The Court is of the view the Applicant/Appellant has not demonstrated the substantial and/or irreparable damage and loss they will suffer. The ground is therefore not satisfactorily met

Unreasonable Delay

32. On the second condition, the Applicant sought to be granted leave to appeal out of time as the judgement was delivered on 24th January 2023 and the application was filed on 30th June 2023 which is almost 6 months later and demonstrates undue delay.

33. The decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion just like any other exercise of discretion by the court. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in *Thuira Mwangi v Kenya Airways Ltd* [2003] eKLR. They include the following:

- i) The period of delay;
- ii) The reason for the delay;
- iii) The arguability of the appeal;
- iv) The degree of prejudice which could be suffered by the Respondent if the extension is granted;



- v) The importance of compliance with time limits to the particular litigation or issue; and
 - vi) The effect if any on the administration of justice or public interest if any is involved.
34. The Applicant averred that the delay was occasioned by the fact that after the judgement was delivered and by the time he got back to his advocates on record for their opinion, time with which to lodge an appeal had already lapsed. All factors considered the reason given for the delay only paints the applicant as indolent and inclines the court not to grant the leave as 6 months period is inordinate
35. The Court finds that there is undue delay in filing the application herein.

Furnish Security

36. The Applicant stated that her underwriter was ready, willing and able to give a bank guarantee as security pending the hearing and determination of the application and intended appeal.
37. The Court in *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, stated that:-

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

38. It follows therefore that it is the discretion of the court to determine the security and whether the bank guarantee is sufficient security taking note of the Respondent’s Concerns on the bank security as a guarantee.

Disposition

39. In the premises: -
- a. There will be a stay of execution on condition that the Applicant remits to the Respondent through Advocate on record half of the decretal sum within 90 days from the date hereof and ½ in a Bank guarantee within 90 days. In default, the application for stay shall stand dismissed. The Applicant to file an Application within 30 days from today.

It so ordered.

RULING DELIVERED DATED SIGNED IN OPEN COURT IN MACHAKOS ON 8TH MARCH, 2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE

In The Presence Of:

No Appearance - For The Appellant

Ms Masila H/b Munyoki For The Respondent

Geoffrey/patrick - Court Assistant(s)

(judge Bereaved)



Judgment Released To Registry On 26/3/2024.

