Mugo v Macharia (Civil Appeal E265 of 2023) [2024] KEHC 2130 (KLR) (5 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2130 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E265 OF 2023

SM MOHOCHI, J

MARCH 5, 2024

BETWEEN

JOSEPHAT MUGO ..... APPLICANT

AND

PAUL MWANIKI MACHARIA ..... RESPONDENT

RULING

1. The Appellant/Applicant moved court vide Application dated 25th September, 2023 under Order 42 Rule 6 of the civil procedure rules and Section 3A of the *Civil Procedure Act* seeking the following prayers.

   i. Spent

   ii. Spent

   iii. That there be a stay of execution of the Trial Court's default Judgment pending the hearing and determination of the Appeal Nakuru HCCA No. E265 of 2023 preferred thereon in High Court

   iv. That the costs of this application be provided for

2. The Applications is supported by the sworn Affidavit of Josephat Mugo who deponed that the Respondent obtained default judgment in Nakuru Small Claims Civil Suit No. E123 of 2023 on 20th April, 2023. That the Trial Court set aside the default judgment on condition that the Applicant does pay the Respondent throw away costs. That he complied with the conditional orders and remitted the throw away costs to his then advocates, M/s Murunga Mwangi & Associates Advocates. He stated that the said advocates failed to abide by the condition on time resulting in the default judgment being reinstated on 15th August, 2023.

3. He stated that he then instructed the firm of M/s Murimi Mbago who filed an application dated 11th September, 2023 seeking to set aside of the judgment of 20th April, 2023 and review of the Ruling of

15th August, 2023. The said Application was dismissed on 14th September, 2023. That there is risk of execution and he stands suffer irreparable loss.

4. The Applicant contends that he was not given time to ventilate his defence and thus has preferred an Appeal vide the Memorandum of Appeal dated 21st September, 2023. He is also apprehensive that the Respondent is not a man of means and would not be able to refund the decretal amount should the Appeal succeed

5. The Application was opposed by the Responded in his Replying Affidavit sworn on 13th October, 2023 and filed on 16th October, 2023. He stated that that Application is an abuse of the due process and that the Applicant moved court with unclean hands. He added that the court should not aid the Applicant for being indolent and that he was a total stranger to the Application date 11th September, 2023 or the Ruling thereto. That the instant application is curably defective and should be struck out.

6. The Application was canvassed by way of written submissions pursuant to the Courts directions of 31st October, 2023. The applicant filed his submissions dated 15th November, 2023 on 17th November, 2023 and the Respondent filed his submissions 24th November, 2023 and dated on even date.

Applicant/Appellant's Submissions.

7. The Applicant through counsel submitted that he had filed the Appeal without delay before the lapse of 30 days and relied on Vagpro Kenya Limited v Susan Wanja (2017) eKLR. He submitted that he stood to suffer substantial loss of Kshs 520, 000 and that the Respondent has not demonstrated that he would be in a position to refund the decretal amount should the Appeal succeeds.

8. The Applicant also contented he was willing to provide a personal guarantee and/or alternative security in satisfaction of the condition for security. He relied on the judicial decisions in Vista Holdings International Limited v Span Image K Limited (2014) eKLR and Nduhiu Gitahi vs Warugongo (1988) KLR 621; KAR100; (1988-92) 2 KAR 100

Respondent's Submissions

9. The Respondent submitted that the Application is an abuse of the court process and to emphasize he relied on Satya Bhama Gadhi v Director of Public Prosecutions & 3 Others (2018) eKLR further that the Applicant was indolent and the court should consider the maximums of equity. He relied on the case of Ibrahim Mungara Mwangi vs Francis Ndegwa Mwangi (2014) eKLR.

10. It was also submitted that the Appeal lacks merit as it fails to meet the provisions of Order 42 Rule 6(1) and emphasis was placed in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto (2012) eKLR and RWW v EKW (2019) eKLR. The Respondent argued that since the Ruling being Appealed from has been filed and served, irreparable loss that was likely to be suffered has not been demonstrated and the Applicant has been negligent.

Analysis and Determination

11. The Court has considered the Application, the response thereto and the submissions on record and the only issue for determination is whether the Application is merited to grant an order of stay of execution pending appeal.

12. The law applicable for Stay of Execution pending Appeal is provided for under Order 42 rule 6(2) of the Civil Procedure Rules, 2010 thus:

> "(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.
>
> (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application."

13. In Butt Vs. Rent Restriction Tribunal [1979], the Court of Appeal pointed out on what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court stated thus:

i. The power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an Appeal.

ii. 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.

iii. 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.

iv. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

14. The purpose of granting orders of stay of execution is to preserve the subject matter in a dispute while balancing the rights and interests of the parties involved in light of the circumstances of the case. It is pertinent to note that the Court at this stage is not concerned with the merits of the Appeal. Further that the power of the Court to grant stay of execution of the judgement pending appeal is a

discretionary one which should be used judiciously. This position was emphasized by the Court of Appeal in RWW vs. EKW (2019) as hereunder:-

> " 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.
>
> 9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent."

15. Therefore, for this Court to grant the orders sought the Applicant has to bespeak that;

    a. He stands to suffer substantial loss;

    b. The Application has been made without unreasonable delay; and

    c. Security for the due performance od decree has been given.

Undue Delay

16. From the Affidavit of the Applicant, the Judgement in Nakuru SCCC No. E123 of 2023 was delivered on 20th April, 2023. The default judgment was set aside on 12th July, 2023 on condition that the Applicant pays throw away costs to the Respondent. The default judgment was reinstated on 15th August, 2023 for failure of the Applicant to comply with the orders of the court. The Applicant stated that he filed an application dated 11th September, 2023 seeking to set aside the default judgment on grounds that the advocates on record for the Applicant failed to remit the throw away costs despite being given the same. The Applicant stated and submitted that the trial court dismissed his application on 14th September, 2023 ex-parte without giving directions. The Memorandum of Appeal dated 21st September, 2023 and filed on 25th September, 2023 is appealing the decision of Honourable M. Oboge delivered on 14th September, 2023.

17. The decision dated 14th December, 2023 has not been availed, nor the judgment dated 20th April, 2023. The Respondent has denied existence of the Application dated 11th September, 2023 or the Ruling emanating from that decision.

18. On this aspect the Applicant has not satisfied that he moved court without undue delay for the reason that the Applicant is appealing a decision that he has not afforded court the opportunity to interrogate, if at all any.

Substantial Loss.

19. The Applicant has submitted that he stands to suffer substantial loss to the tune of Kshs. 520,000 should the stay of execution not be granted and that Respondent will not be able to refund the decretal amount should the Appeal be successful owing to the Respondent's unknown financial position. The Respondent on his part has not addressed the issue of not being able to raise the decretal amount should the Appeal succeed. The Applicant has also contended that if the Stay of Execution is not granted the appeal would be rendered nugatory and suffer substantially since auctioneers had already commenced the auction process.

20. In the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR, the court explained substantial loss thus;

> " 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."

21. Therefore, despite the fact that the Respondent has not demonstrated that he will be in a position to refund the decretal sum if the Appeal is successful, the Court is alive to the fact that execution of a decree is a legal process and the mere mention that one shall suffer substantial loss once execution is carried out in itself is not a valid justification. The Applicant ought to demonstrate to court through evidence by way of affidavit and not just alluding it in his submissions.

22. Similarly, the Court of Appeal in Kenya Shell Limited vs. Kibiru [1986] KLR 410 Gachuhi, Ag. JA (as he then was) stated:

> " 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 judgment."

23. Platt JA (as he then was) further in the same case stated:

> " 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."

24. As a general rule, the Court ought not to deny a successful litigant the fruits of his judgement unless there is a demonstration of unprecedented circumstances where declining to do so may be tantamount to suffocating the right of the other party to challenge the judgment at appeal.

25. The Court has perused the Application and the Applicant is concerned that the Respondent instructed auctioneers to proclaim his property putting him at a great risk or irreparable loss. Further that failure of the Respondent to demonstrate ability to refund the decretal amount in the event of success would occasion him substantial loss as he may have difficulties in recovering the amount. Seeing as this is a money decree, the Court has to find a balance between the parties. The Applicant has had numerous occasions to redeem himself but has failed to and thereby making it difficult to justify keeping the Respondent away from enjoying fruits of his judgment.

Security

26. On the issue of security, on 31st October, 2023, the Applicant stated that he was not in a position to satisfy the conditions imposed by Court on 28th September, 2023. The conditions for the temporary stay order were for the Applicant to deposit the entire decretal amount in the default judgement of Nakuru SCCC No. E123 of 2023 in a joint interest earning bank account in the names of the counsels on record. Those conditions have not been met.

27. Looking at the case of Arun C. Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others [2014] eKLR, the court stated: -

> " The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."

28. The Applicant is required to offer security for the due performance of the decree. The Applicant submitted that he was willing to give a personal guarantee or an alternative security. Willing to give a personal guarantee and giving a personal guarantee are two different things. Further, the "alternative security" has not been properly elaborated. The Court appreciates the fact that the Applicant is willing to give security however the Court is also alive to the fact that the Applicant has not fulfilled any of the conditions previously condition set by the Court thus far.

29. The law envisages that security has to be adequate. The Applicant has placed reliance in the case of Nduhiu Gitahi vs. Warugongo (supra) to suggest that security can take many forms and not necessarily monetary form. The Applicant has unfortunately read the decision in isolation since he failed to note that the Court emphasized on adequacy of security.

30. On adequacy of security the Court in Mwaura Karuga t/a Limit Enterprises Vs. Kenya Bus Services Ltd & 4 Others [2015] eKLR, observed 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."

31. The form in which the Applicant suggests ought to adequately be sufficient.

32. The Applicant also seeks to preserve the status quo pending the hearing of the Appeal so that his Appeal is not rendered nugatory. The status quo in the Court's opinion is for the Applicant to deposit the whole decretal amount. The Applicant has not tendered any evidence that that the decretal sum has been deposited or is available for deposit if the court so directs. To this end, the Applicant does not

seem to want to commit to any form of security and also is unwilling to deposit the decretal amount as directed by Court.

33. Taking all relevant factors into consideration the Application appears to be a delay tactic by the Applicant to the detriment of the Respondent. He wants to have his cake and eat it.

34. Having regard to the foregoing, what would be the interest of justice? The general principle is that no party should be turned from the seat of justice. The Court, should at all times strive to opt for the lower rather than the higher risk of injustice. The judgment from the trial court was entered without hearing the Applicant's side on merit. The Applicant has demonstrated willingness to have his day in Court. Despite the lack luster nature of the Applicant, as much as the Court is obligated to promote substantive justice under the provisions of Article 159(2)(d) of *the Constitution* of Kenya, 2010 the law must ensure that nobody is condemned unheard. In any event, there is no wrong that cannot be put right by payment of costs.

35. In balancing the rights of the parties and in exercise of the court's discretion and recalling that small claims were intended to be determined within 60 days in the trial court, I direct as follows;

    a. Stay of execution pending Appeal is granted on condition that the Appellant/Applicant deposits the Entire decretal sum in a joint interest-earning account in the names of the advocates on record within 30 days of this Ruling.

    b. The Record of Appeal shall be prepared, filed and served within 30 days of this Ruling.

    c. Failure to comply with Order a) above shall automatically vacate the stay of execution.

    d. Costs will abide the Appeal.

    e. Mention for directions shall be on 2nd May, 2024

    It is so ordered

SIGNED, DATED AND DELIVERED AT NAKURUON THIS 5TH DAY OF MARCH 2024.

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MOHOCHI S. M.

JUDGE