Isaak v Ethics and Anti Corruption Commission & 2 others (Civil Appeal E054 of 2023) [2024] KEHC 10007 (KLR) (4 June 2024) (Ruling)

Neutral citation: [2024] KEHC 10007 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CIVIL APPEAL E054 OF 2023

SN MUTUKU, J

JUNE 4, 2024

BETWEEN

IBRAHIM HAJI ISAAK ..... APPELLANT

AND

ETHICS AND ANTI CORRUPTION COMMISSION ..... 1ST RESPONDENT

IRINE KAPCHEBAI MBITO ..... 2ND RESPONDENT

EVANS NYAIYO BIKUNDO ..... 3RD RESPONDENT

RULING

Notice of Motion

1. Under determination is the Applicant's Notice of Motion dated 25th August, 2023 brought under Order 42 Rules 6, of the Civil Procedure Rules and Sections 1A, 1B and 3A of the *Civil Procedure Act* and all other enabling provisions of the law. The Application seeks the following orders:

    i. Spent.

    ii. There be stay of execution of the judgement herein pending the hearing and determination of this application.

    iii. There be stay of execution of the judgement herein pending the hearing and determination of the appeal herein.

    iv. The costs of this Application are provided for.

2. The Application is supported by grounds that judgement in Kajiado CMCC No. 160 of 2016 was delivered o 17th August 2023 against him jointly and severally with the 2nd and 3rd Respondents; that being dissatisfied with the judgement he lodged an appeal through a Memorandum of Appeal dated 4th September 2023; that he is still pursuing certified copies of proceedings and judgements to be able

to prepare his record of appeal; that the 1st Respondent has extracted a decree of Kshs. 3,186,895/- and that there is danger of execution if the orders sought are not granted. He stated that this application has been made timely and in the interest of justice so as not to render the appeal nugatory.

3. The Application is opposed by the 1st Respondent through a Replying Affidavit of the sworn by Rosecallen Githinji, an Investigator with the 1st Respondent sworn on 12th October, 2023. She has deposed that the application is misconceived, ill-advised and bad in law; that the Applicant has not demonstrated sufficient cause for grant of stay orders; that the Applicant would not suffer any substantial loss since the judgement is a money decree which the government can refund; that the Applicant has not deposited any security and that the Applicant has fraudulently misrepresented facts before this court that they have extracted a decree with an aim of executing which is not true.

4. She further deposed that the process of executing the judgement in itself would not amount to substantial loss as the execution is a lawful process and that the orders sought should not be granted as the 1st Respondent should be allowed to enjoy the fruits of their judgement.

5. The Applicant filed a further affidavit dated 25th October 2023 in which he stated that the 1st Respondent has not demonstrated that they would refund the decretal sum timely if the appeal succeeds; that it is unknown whether they will be capable of refunding the decretal sum if the appeal succeeds; that the decretal sum of Kshs. 3,000,000/- was jointly and severally against him and the 2nd and 3rd Respondents; that therefore the amount accruing to him is Kshs. 1,000,000/-.

6. He further deposed that his counsel inadvertently annexed Summons to Enter Appearance instead of the extracted decree and that this was done by mistake and in the course of urgency in filing this application. He stated that mistakes of counsel should not be visited on the client and cited Article 159 of *the Constitution* of Kenya which excuses procedural technicalities.

Applicant's Submissions

7. The Applicant's submissions are dated 8th November 2023. He has raised 3 issues for determination:

   i. Whether the Applicant has demonstrated that the orders of stay of execution pending appeal are merited?

   ii. Whether the requirement for security for costs is an impediment to access to justice and a violation of Articles 50, and 159 of *the Constitution* of Kenya?

   iii. Whether the mistake/error on the part of counsel for the Applicant ought to be visited upon the client?

8. The Applicant relied on RWW -vs- EKW (2019) eKLR, where the court held that:

   > " The purpose of an application for stay is to preserve the subject matter in dispute so that the rights of the appellant, exercising his right of appeal, are safeguarded if the appeal were to be successful, is not rendered nugatory."

9. He submitted that there is need for stay of execution as the subject of this appeal relates to a liquidated sum of Kshs 3,000,000; that stay orders are necessary so as not to render the appeal nugatory and that the 1st Respondent has not shown it would without unreasonable delay refund the said amount in the event the appeal succeeds. On this point the Applicant relied on the decision in National Industrial Credit Bank v Aquinas Francis Wasike and Another [2006] eKLR.

10. He submitted further, that he would suffer substantial loss of Kshs. 3,000,000 thereby endangering his economic and social livelihood and that the loss he would incur will outweigh the public interest of the 1st Respondent. In supporting his case on the necessity of stay orders in this case, he cited Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 others [2014]eKLR.

11. The Applicant submitted that he has an arguable appeal with good chances of success; that the judgement of the lower court was based on wrong principles, speculation and uncorroborated evidence; that had the court been guided by evidence on record it would not have found that the Applicant was in breach of public trust and liable for the payment of the decretal sum.

12. On the second issue, the Applicant submitted that the issue of security is discretionary and that there are circumstances in which the court can refuse the call for security. He relied on Saudi Arabian Airlines Corporation -vs- Sean Express Services Ltd [2014] eKLR to emphasize the point that an order for security for costs is a discretionary one.

13. He argued that there is no sufficient reason to impose any monetary condition for stay upon him and relied on the Court of Appeal decision in Abdalla -vs- Patel and another [1962] EA 447 where it was held that: "It is right that a litigant however poor should be permitted to bring his proceedings without hindrance and have his case decided."

14. On the third issue, the Applicant submitted that the attachment of Summons to enter appearance instead of decrees was a mistake that was not intentional as to cause delay in the matter and that the mistake was on the part of his counsel and should not be visited upon him. He relied on Belinda Muras & 6 others -vs- Amos Wainanina [1978] KLR where the court stated thus:

> " A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate."

Respondent's Submissions

15. The 1st Respondent's submissions are dated 11th December, 2023. Two (2) issues have been raised for determination:

    i. Whether the Applicant will suffer substantial loss if the order sought is not granted.

    ii. Whether the Applicant has proved sufficient security.

16. It is submitted in respect of the first issue that Order 42 Rule 6 of the Civil Procedure Rules provides for the requirements to be satisfied for grant of stay as follows:

    a. Substantial loss may result to the applicant unless the order is made.

    b. The application has been made without unreasonable delay.

    c. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

17. It was submitted that all the above conditions ought to be met before grant of stay order. The 1st Respondent relied on the case of James Wangalwa & another-vs- Agnes Naliaka Cheseto Bungoma Misc Aoo. No 42 of 2011 [2012] eKLR where it was held that:

> " .....The conditions share an inextricable bond such that the absence of one will affect the exercise of the discretion of the court in granting stay of execution. The Court of Appeal in Mukuma -vs Abuoga (1988) KLR 645 reinforced this position....."

18. It is submitted that the Applicant together with the 2nd and 3rd Respondents had enriched themselves by fraudulently acquiring Kshs. 3,000,000/- which they have never accounted for to date; that the Applicant should not be allowed to continue benefiting from the same to the detriment of the public; that there is no evidence that the substratum of the appeal would not be destroyed and that the appeal would not be rendered nugatory as they are capable of refunding the money in the event that the appeal succeeds.

19. It was further submitted that contrary to the assertions of the Applicant. The 1st Respondent is capable of refunding the decretal sum as it is a constitutional Commission established under Article 79 of *the Constitution* and is not under any risk of insolvency. The 1st Respondent relied on the Court of Appeal decision in Michael Chesikaw v Kenya Anti-Corruption Commission Civil Appeal (Application) No. E537 of 2023 where it was stated that:

> " On the contrary, the Respondent is a Constitutional Commission, and we have no reason to doubt its financial ability to settle the claim should the appeal succeed."

20. It was submitted that in an application for stay the court ought to balance between the applicant's right of appeal and that of the 1st Respondent whose judgement was in its favour; that this matter touches on public interest and public funds; that the decretal sum being public funds was lost over a decade ago and that it is only fair that the Applicant refunds the money and that the possibility of execution proceedings cannot be said to be the basis for alleging substantial loss. The 1st Respondent relied on James Wangalwa case, cited above, where it was held 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."

21. On the issue of security, it was submitted that the Applicant has not provided any sufficient security; that the purpose of security is to guarantee due performance of a decree; that this Court should direct the Applicant to provide security to satisfy the decretal sum of Kshs. 3,000,000 and that the Applicant has quoted the security for cost under Order 26 which is different from the security required under Order 42 and therefore not relevant to this application. The 1st Respondent relied on Mwaura Karuga

t/a Limit enterprises -vs- Kenya bus services ltd & 4 others civil case No 106 of 2005 [2015] eKLR, where it was held that:

> " First of all, 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."

Analysis and Determination

22. I have considered the application, the affidavit in support, the Replying Affidavit in opposition and the written submissions of the parties. Stay of execution pending an appeal is provided for under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules as follows:

    (1) 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 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.

23. To my mind, an applicant seeking stay pending an appeal must demonstrate that:

    a. He will suffer substantial loss unless the order for stay is granted.

    b. That he filed the application seeking stay without unreasonable delay.

    c. He has provided security for the due performance of the decree or order as may ultimately be binding on him.

24. These are the conditions that the Applicant must satisfy before this court can grant the prayers he is seeking. The Applicant has argued that he will suffer substantial loss of Kshs. 3,000,000 thereby endangering his economic and social livelihood and that the loss he would incur will outweigh the public interest of the 1st Respondent. While I agree with him that the purpose of granting stay is to preserve the subject matter, I disagree with him when he says that the appeal will be rendered nugatory if the subject matter, which is Kshs 3,000,000 is paid as security.

25. The Applicant has pleaded substantial loss because the Respondent has not demonstrated that they would without unreasonable delay refund the money paid to them should the appeal succeed. The applicant has also pleaded that he should not be subjected to provide monetary security.

26. I have considered the opposing arguments and I agree with the 1st Respondent that the 1st Respondent is in a position to refund Kshs 3,000,000 should the appeal succeed. It is not enough, in my view, for the

Applicant to argued that he will suffer substantial loss and that the 1st Respondent is not in a position to refund the amount. It is not a substantial amount and I take the view that the 1st Respondent is in a position to refund the amount.

27. On whether the application has been made without unreasonable delay, I have read the court record and I have noted that the judgment was delivered on 18th August 2023 and the Application was filed on 15th September 2023. This was after the judgement was delivered on 18/8/2023. This was within a period of one month after delivery of judgment. Therefore, there was no delay in filing the application.

28. On the issue of security, I am guided by the James Wangalwa case, cited above that the process of execution does not amount to substantial loss for the reason that this is a lawful process. For an applicant to succeed in an application seeking stay, he 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.

29. I have stated above that I take the view that the 1st Respondent is able to refund this money even if execution were to take place and the appeal were to succeed. This court must balance the rights of the Applicants to appeal and the rights of the 1st Respondent as the judgment holder.

30. I wish also to distinguish security for costs under Order 26 and security for due performance of the decree or order in an application for stay of execution pending appeal provided under Order 42 Rule 6 of the Civil Procedure Rules. In Arun C Sharma v Ashana Raikundalia t/a Raikundalia & Co Advocates & 2 others [2014 eKLR the court held that:

> " 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."

31. The Applicant in this matter has not shown willingness to deposit any security for the performance of the decree. While I note that the application was filed without unreasonable delay and on that point the applicant has satisfied one of the requirements for grant of stay, it is my finding that he has not satisfied the remaining two requirements.

32. I find that the Applicant has failed to demonstrate that he will suffer irreparable loss and that he is not willing to provide security for the due performance of the decree. Consequently, I find the application dated 25th August 2023 without merit and hereby dismiss the same with costs to the 1st Respondent. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 4TH JUNE 2024.

S. N. MUTUKU

JUDGE

In the presence of:

1. Ms Wakarima for Mr. Bake for the Applicant

2. Mr. Kisaka for the 1st Respondent