Ngetich v Kimosop (Civil Appeal E125 of 2023) [2024] KEHC 6672 (KLR) (7 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6672 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E125 OF 2023

JRA WANANDA, J

JUNE 7, 2024

BETWEEN

JOSEPH KIPSEREM NGETICH ..... APPELLANT

AND

CHEBON KIMOSOP ..... RESPONDENT

RULING

1. Before the Court for determination is the Appellant's Notice of Motion dated 11/10/2023 filed through Messrs J.K. Kaptich & Co. Associates Advocates and which seeks the following orders:

    a. [.....] Spent

    b. [.....] Spent

    c. This Honourable Court be pleased to set aside the orders of Honourable C. Menya (PM) in Eldoret CMCC No. 201 of 2020, Chebon Kimosop vs Joseph Kipserem Ngetich, made on 27/09/2023 granting stay of execution pending the hearing and determination of this Appeal on condition that the entire decretal sum of Kshs 4,932,985/- be deposited in Court within 14 days of the date of the Ruling.

    d. This Honourable Court be pleased to grant stay of execution of the Judgment and decree in Eldoret CMCC No. 201 of 2020, Chebon Kimosop vs Joseph Kipserem Ngetich pending the hearing and determination of this Appeal.

    e. Costs of this Application be provided for.

2. The Application is expressed to be brought under Section 3A of the *Civil Procedure Act*, Order 51 Rule 1 & (2) of the *Civil Procedure Rules* and "all other enabling provisions of the law". The grounds of the Application are as set out on the face thereof and it is supported by the Affidavit sworn by the Appellant, Joseph Kipserem Ngetich.

3. In the Affidavit, the Appellant deponed that the suit before the trial Court proceeded ex parte and Judgment was delivered on 24/02/2023 against him, that he learnt of the Judgment when a Notice of Entry of Judgment was dropped at his brother's barber shop, that he then sought the services of his Counsel now on record who upon perusal of the Court file noted that the suit was instituted on 18/02/2020 and his Insurer (Resolution Insurance Company) instructed Messrs Gumbo & Associates Advocates to act on behalf of the Appellant, that the matter proceeded to hearing with the Plaintiff testifying , that the said law firm later made an Application to cease acting and which was allowed despite the Appellant not having been served with the same, that he was not served with any process until when he was served with the said Notice of Entry of Judgment. He deponed further that it is only fair and just that he be granted an opportunity to be heard in the matter by dint of Article 50 of *the Constitution*, that he made an Application for the Judgment to be set aside and he be allowed to participate in the hearing of the suit but the same was dismissed on 24/03/2023. That aggrieved with the Ruling, he filed this instant Appeal which has high chances of success.

4. The Appellant further deponed that on 18/07/2023, he filed an Application before the trial Court for stay pending Appeal and the Ruling was delivered on 27/09/2023 in terms that he deposits in Court the entire decretal sum of Kshs 4,932,985/- within 14 days and in default, the Application for stay would stand dismissed and execution would issue forthwith, that the Auctioneers' fees on the Proclamation done on 1/08/2023 be paid by the Appellant and which is to be agreed upon or taxed in Court and that costs of the Application be borne by the Appellant.

5. According to the Appellant, the conditions flowing from the said Ruling are harsh and unconscionable on the sense that the decretal sum is so enormous, that despite informing the trial Court of the moratorium in force against payments pursuant to debts arising against the said Insurer, the Court went ahead to order payment of the decretal amount and the Auctioneers' fees when the execution was null and void, that should the Respondent execute, the Appeal shall be rendered nugatory and the Appellant shall suffer substantial loss, that the Judgment and the execution proceedings were given at the time when there were moratorium orders issued in Milimani Commercial Civil Suit No. E168 of 2022 – In the Matter of Resolution Insurance Company Limited, that the Judgment and the entire execution process are therefore a nullity and should be set aside, that the Appeal is meritorious and has overwhelming chances of success being an interlocutory Appeal begged on the right to be heard, that he is willing and ready to provide a bank guarantee for the total decretal amount as a condition for stay of execution and that the Respondent shall not be prejudiced in any way should the Application be allowed.

Response to the Application

6. The Respondent opposed the Application vide his Replying Affidavit filed on 19/07/2023 through Messrs Z.K. Yego Law Offices Advocates. In the Affidavit, he deponed that the Application is an afterthought, that the Applicant has not elaborated any grounds that would warrant this Court to exercise its discretion in favour of the Appellant, that the Appellant highlighted his willingness to abide by any conditions imposed by the Court, including depositing a bank guarantee as security in Court, the Appellant is therefore approbating and reprobating issues in a bid to subvert injustice as he is seeking to set aside the very orders he sought, that Article 159 of *the Constitution* empowers the Court to make orders in furtherance of the ends of justice and Order 50 of the *Civil Procedure Rules* provides that the Court may impose conditions for stay of execution as deemed necessary, that the trial Court made a finding on the basis of the evidence and facts presented as well as in the interest of justice and as such the same ought to be upheld, that mong the grounds for setting aside a Court's decision is error on the face of the record and the Appellant has not identified or pointed to any error in the finding of

the trial Court, that the Appellant has not demonstrated any prejudice likely to be suffered should the Application be dismissed and that litigation must come to an end.

Appellant's Further Affidavit

7. The Appellant swore the Further Affidavit filed on 15/01/2024. He basically reiterated the matters already stated above and added that the suit was initiated, proceeded and the Judgment, together with the execution, proceeded at a time when there was a Court Order in effect, issued on the basis of Section 67C (11) of the *Insurance Act* as read together with Section 5(c) of the Insurance (Amendment) Act of 2019, that the order barred all proceedings against the Insurer and all its policy holders. He deponed further that the trial Magistrate was wrong to hold in her Ruling that the Moratorium orders had no bearing to the orders and Judgment issued by her Court. The Appellant annexed a copy of the Ruling delivered in the said Milimani Commercial Civil Suit No. E168 of 2022 – In the Matter of Resolution Insurance Company Limited on 10/03/2023.

Hearing of the Application

8. It was agreed, and I directed, that the Application be canvassed by way of written Submissions. Pursuant thereto, the Appellant filed his Submissions on 8/02/2024. Regarding the Appellant however, up to the time of concluding this Ruling, I had not come across any Submissions filed by or on his behalf. Upon inquiry made by office from the Respondent's Advocates, they forwarded a soft copy. I am therefore unable to ascertain whether the same was formally filed and if so, the date of filinge.

Appellant's Submissions

9. In regard to the moratorium, Counsel for the Appellant submitted that the trial Magistrate's act of entertaining the suit despite the existence of an order from a higher Court in Milimani Commercial Civil Suit No. E168 of 2022 – In the Matter of Resolution Insurance Company Limited on 10/03/2023 was contemptuous and spiteful of the standard practice of stare decisis. On the legal effect of a Moratorium, he cited the case of Machakos Constitutional Petition No. 18 of 2022 of 2022 which invoked Section 67(c) of the *Insurance Act* and reiterated the need to cushion policy holders from scrupulous insurance firms that expose their customers/policy holders to potential claims. He also cited the case of *Maingi v Insurance Regulatory Authority & 3 Others; Nguli & Another (Interested parties)* (Constitutional Petition 18 of 2022) [2023] KEHC 20819 (KLR).

10. On whether the proceedings ought to be set aside, Counsel reiterated that the Appellant was never served and cited the case of *Yooshin Engineering Corporation v Aia Architects Limited* (Civil Appeal No. 074 of 2022 [2023] KECA 872 (KLR) and also Section Order 9 Rule 13(1) of the *Civil Procedure Rules*. On whether the conditions of stay ought to be set aside, he submitted that the Appellant shall suffer substantial loss if the orders are not granted, that the Application has been made without unreasonable delay, that the Appellant has been ready and willing to abide by any reasonable conditions of stay of execution but the orders of the trial Court were harsh and unconscionable, that on the ability of the Respondent to reimburse the decretal sum, Counsel submitted that the burden of disproving the said concerns rests upon the Respondent and he ought to have provided evidence or proof of his ability to repay the same in case the Appeal succeeds. He cited the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR. He contended further that an Affidavit of means ought to have been produced and cited the case of *Edward Kamau & Another; Hannah Mukui & Another* [2015] eKLR.

Respondent's Submissions

11. On his part, Counsel for the Respondent basically reiterated the matters already stated in the Replying Affidavit. He reiterated that the Appellant is approbating and reprobating at the same time by challenging the very orders that he sought and was granted by the trial Court, that in setting conditions for the stay, the trial Court acted within its discretion, that this Court is enjoined to give effect to the overriding objective principle, that the Respondent, being the successful litigant should be allowed to enjoy the fruits of his judgment, that in any event, the Appellant has not tendered any persuasive submissions demonstrating that his intended appeal is meritorious or likely to succeed, and that the Appellant has not demonstrated any substantial loss that he is likely to suffer in the event that the Application is dismissed. He added that on the issue of whether or not the trial Magistrate had the power to issue orders in the existence of the moratorium, those are issues for the appeal and cannot be dealt with at this stage, and that a party cannot seek to set aside or vary the orders of a subordinate Court in a superior Court vide an application such as the instant one. He cited several authorities as well in support of his Submissions

Determination

12. Before I delve further into this Ruling, I need to point out that I agree with the Respondent's Counsel's submissions that the matter before this Court at this stage is simply an Application that this Court reconsiders this matter and grants conditions of stay different from the conditions set by the trial Court. The Appeal has not been heard as yet and this Court is not at this stage determining the Appeal. This should therefore put to rest the arguments made over the issue whether the moratorium ought to have been adhered by the trial Court and therefore whether the trial Court ought to have suspended any further proceedings in the suit. The same applies to the question whether the proceedings of the trial Court should be set aside by this Court. Those are matters that shall be canvassed during the hearing of the Appeal. The parties should not therefore preoccupy their minds with those issues at this juncture or be raised at this stage. Arguments on the same are clearly premature.

13. Similarly, the Appellant needs to understand that this Court cannot set aside the trial Court's orders granting stay or imposing the conditions of stay pending Appeal. There is no such power unless a separate Appeal was preferred on that issue. What this Court is allowed to do, is simply to reconsider the issue of stay of execution pending hearing of the Appeal before it, make its own determinations and if merited, give its own independent orders which by dint of the hierarchy of the Courts will then override or supersede the orders of the trial Court. This should be differentiated from the jurisdiction to set aside.

14. This Court's power, sitting as an appellate Court, to grant stay of execution or set fresh conditions notwithstanding that a similar application has made and been granted or refused by the trail Court appealed from is donated by the provisions of Order 42 Rule 1 of the *Civil Procedure Rules* which stipulates as follows:

> " 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, 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. [Emphasis mine].

15. It is this provision that the Appellant ought to have therefore perhaps also invoked in addition to Section 3A and 63 of the *Civil Procedure Act* that he cited. Despite this observation, I will nevertheless proceed as if the Application also invokes Order 42 Rule (1) aforesaid. It is therefore clear that this Court's mandate at this stage is limited and does not extend to the substantive issues referred to hereinabove.

16. In view of the foregoing, the issue that therefore arises in this Application is "whether the Appellant ought to be granted stay of execution pending the hearing and determination of this Appeal".

17. As aforesaid, the Court's power to grant stay of execution pending Appeal is provided under Order 42 Rule 6(2) of the *Civil Procedure Rules* as follows:

> " 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.

18. Therefore, an Applicant for stay of execution of a decree or order pending Appeal is required to satisfy the conditions set out above. The first one is whether the Application has been made without unreasonable delay, the second is to demonstrate that "substantial loss" may result to the Applicant unless the order is granted, and the third is the Applicant's willingness or readiness to deposit security for due performance in case the Appeal fails.

19. The first condition that I need to consider is therefore whether the Application has been made without unreasonable delay. In this case, the trial Court's Judgment was delivered on 24/02/2023 but the Applicant states that he only learnt of it as well as existence of the entire suit on 27/02/2023 when the Notice of Entry of Judgment was served. He then on or about 6/03/2023 filed an Application seeking setting aside of the Judgment. The same was heard and a Ruling delivered on 14/07/2023 dismissing it. The Applicant then on 17/07/2023 filed this Appeal and on 18/07/2023 filed an Application before the trial Court seeking stay of execution. However, after taking directions on the Application, the trial Magistrate was transferred to Nakuru. The Magistrate then delivered her Ruling virtually from Nakuru on 27/09/2023. By the Ruling, the stay was granted but with conditions. The Applicant states that for the reason that the Magistrate was now based in Nakuru, it took him about 13 days to get hold of a copy of the Ruling. Not being satisfied with the conditions set for stay of execution, and upon obtaining a copy of the Ruling, the Applicant on 11/10/2023 filed this instant Application before this Appellate Court. In view of this chronology of events, I am satisfied that the Application was been filed timeously and without delay.

20. The second condition is whether the Applicant will suffer "substantial loss" should the order not be granted. As to what constitutes "substantial loss", F. Gikonyo J in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, stated as follows:

> "
>
> " 11. 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. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the *Court of Appeal Rules*, respectively, emphasized the centrality of substantial loss thus:

> "... 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."

With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion under order 42 Rule 6 of the *CPR* only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above."

21. Further, Platt, Ag. JA (as he then was) in *Kenya Shell Limited v Kibiru* [1986] KLR, expressed himself as follows:

> " 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".

22. On his part, Gachuhi, Ag. JA (as he then was) in the same case, stated as follows:

> " 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 judgement. 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."

23. The case before the trial Court against the Appellant was a suit for compensation for personal injuries suffered by the Respondent in a road accident and which involved a motor vehicle stated to be owned by the Appellant.

24. On the merits of the Appeal, the Appellant claims that he was never served with Summons to enter Appearance to enable him defend the suit and that he was never made aware of the suit. He states further that he only learnt of the suit after Judgment when he was served with a Notice of Entry of Judgment and only upon his Lawyers perusing the Court file did they learn that being insured, the Appellant's insurer did appoint Advocates who then acted for him bin the suit but who later successfully applied to cease acting despite no service of the Application being effected upon the

Appellant. For this reason, the matter proceeded ex parte and Judgment was entered against him. Considering these allegations, and the Appellant having raised issues of his right to a hearing being denied, I cannot term the Appeal frivoluous or without chances of success. It definitely raises weighty matters which may need to be further interrogated by this higher Court.

25. Regarding "substantial loss", the Judgment of the trial Court was for an amount of Kshs 4,126,380/- plus costs and interest. Since a copy of the Decree has not been exhibited, I am unable to ascertain how much the entire decretal sum amounted to. I however note that in the trial Court's Ruling delivered on 27/09/2023 whereof the Appellant was ordered to deposit security as a condition for stay of execution, the amount to be deposited was stated to be Kshs 4,932,985/-. It is not in doubt that this amount is enormous for an individual person and in view of the prevailing dire state of Kenyan economy. In the circumstances, I am satisfied that it will cause a great deal of inconvenience, pain and hardship to the Appellant were execution to proceed before the Appeal is determined. Proceeding with execution under those circumstances will no doubt amount to "substantial loss". Although the Judgment is a money decree, I do not believe that in the circumstances, it will be just to simply argue that the loss can be compensated by way of damages. In any event, the Respondent has also not demonstrated his ability to refund the amount should he be paid and subsequently the Appeal succeeds.

26. On the third condition - deposit of security – the Appellant has offered to deposit a Bank Guarantee to secure the decretal sum in the event that the Appeal fails. I find this offer reasonable considering the enormity of the Judgment amount. Considering the amount involved, it may be punitive and unjust to insist on the Appellant depositing the money in cash. Insisting on cash deposit may therefore be tantamount to giving the Appellant stay on one hand and again taking it away with the other. Indeed, this was the nature of the grievance advanced by the Appellant in regard to the stay conditions imposed by the trial Court.

27. Having carefully considered the matter therefore, I am satisfied that the Appellant has met the criteria for grant of stay of execution pending Appeal and I do grant the same. Since however the interests of the parties have to be balanced, and since I find it also unfair to the Respondent to grant the Appellant an unconditional stay of execution, I will order the Appellant to deposit a Bank guarantee as security.

Final Orders

28. The upshot of my findings above is that the Appellant's Notice of Motion dated 11/10/2023 is hereby allowed in the following terms:

    i. Pending the hearing and determination of this Appeal, an order of stay of execution is hereby issued suspending execution of the Judgment delivered on 24/02/2023 in Eldoret Chief Magistrate Court Civil Case No. 201 of 2020 or the Decree arising therefrom.

    ii. As a condition for the above grant of stay, the Appellant shall, within a period of forty-five (45) days, provide security for the stay of execution granted in (i) above by depositing a Bank Guarantee for an amount of Kshs 4,932,985/-.

    iii. Costs of the Application shall be in the Cause.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 7TH DAY OF JUNE 2024

.....

WANANDA J.R. ANURO

JUDGE

Delivered in the Presence of:

N/A for Appellant

Ms Chelimo for Mr. Chanzu for Respondent