



REPUBLIC OF KENYA



Ndungu v Mutua (Civil Appeal E047 of 2024) [2024] KEHC 6276 (KLR) (6 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6276 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E047 OF 2024
FN MUCHEMI, J
JUNE 6, 2024**

BETWEEN

LUKAS NG'ANG'A NDUNGU APPELLANT

AND

EMMANUEL KILUU MUTUA RESPONDENT

RULING

Brief facts

1. The application dated 14th March 2024 seeks for orders of stay of execution of the judgment in Ruiru SPMCC No. E125 of 2022 delivered on 27th June 2022 and subsequent orders including the Ruling dated 7th March 2024 pending the hearing and determination of the appeal.
2. The respondent opposed the application and filed a Relying Affidavit dated 26th March 2024.

Applicant's Case

3. The applicant states that a suit was instituted against him being MCCC/E125 of 2022 for material damage by the respondent and the honourable magistrate delivered a judgment on 27th June 2022. Upon being proclaimed, the applicant filed an application for stay and to set aside the judgment but the trial court dismissed his application on 7th December 2023.
4. The applicant states that when it appeared that he would be compelled to pay the judgment sum, he filed a declaratory suit being MCCC/E526 of 2023 against Monarch Insurance to settle the liability in MCCC/E125/2022. On the basis of the declaratory suit and the irrefutable fact that he was insured against the liability arising in MCCC/E125 of 2022, the applicant sought for stay of execution of the interlocutory judgment in MCCC/E125 of 2022 to allow the insurer to take the said liability.
5. On 21st December 2023, the trial court dismissed the said application for stay of execution without any justifiable legal recourse exposing the applicant to the liability from the judgment of 27th June 2022.



6. The applicant is apprehensive as the respondent has requested for re-issue of the warrants of attachment and will execute the said judgment. The applicant states that he was insured from liability that arose from the impugned judgment and should the said auction ensue, it would cause irreparable injustice to his right to property under Article 40(3) of *the Constitution*.
7. The applicant argues that the ruling of the honourable magistrate robbed him of his rights under the law especially with the declaratory suit which is ongoing against the insurer. The applicant further argues that unless the court intervenes and grants the orders sought, he will be subjected to grave injustice which is not quantifiable. Furthermore, the appeal will be rendered nugatory as execution would have ensued giving no meaning to the present appeal.

The Respondent's Case

8. The respondent opposes the application on the premise that it is misconceived, vexatious, an afterthought and an abuse of the court process.
9. The respondent states that the application has the sole purpose of keeping him away from the fruits of a valid judgment. Furthermore, the respondent states that the applicant has not laid any sufficient basis to grant the orders sought.
10. The respondent argues that the declaratory suit Ruiru MCCC No. E526 of 2023 is against the applicant's insurer for breach of the contract of insurance whereas the primary suit being Ruiru MCCC No. E125 of 2022 is a claim for negligence arising out of an accident that occurred on 17th march 2019 as a result of which the applicant's motor vehicle was damaged. Therefore, the respondent states that the suits are founded on different causes of action. Furthermore, the respondent avers that he is not a party in the declaratory suit and that the statutory right of action the applicant has against his insurer does not bar the respondent from executing the decree issued against the applicant.
11. The respondent contends that litigation must come to an end and he served the applicant with a Notice of Entry of Judgment on 26th October 2022. Furthermore, the respondent states that the present application is meant to delay the execution process as the alleged declaratory suit was filed on 21st December 2023, 14 months after the Notice of Entry of Judgment was served upon the applicant.
12. The respondent states that allowing the application herein will cause him substantial injustice as he will be kept from enjoying the fruits of his judgment and invariably for an indefinite period of time. In the event the court grants the orders sought, the respondent appeals to the court to order the applicant to pay half the decretal sum and deposit the balance in a joint interest earning account in the names of both advocates as security for the performance of the decree.

The Applicant's Submissions

13. The applicant relies on Order 42 Rule 6 of the *Civil Procedure Rules* and submits that he has met the threshold for grant of stay of execution pending appeal. The applicant is apprehensive that he will suffer substantial loss as the respondent will auction his properties. Relying on the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR, the applicant submits that he was insured by Monarch Insurance Limited and therefore his property ought not be auctioned since he has undertaken all due diligence to ensure that the decretal sum is settled. The applicant further relies on the case of *RWW vs EKW* [2019] eKLR and submits that the sole purpose of stay pending appeal in the instant case is to preserve his right to his property as he attempts to pursue his appeal.
14. The applicant argues that he is not appealing the default judgment of the lower court but the ruling dated 7th March 2024 dismissing his application for stay of execution pending the hearing and



determination of the declaratory suit. As such, the applicant submits that the issue of security fails to apply in the instant case.

15. The applicant contends that while the respondent argues that the matter herein is separate from the matter in which the respondent obtained a judgment against him, it is clear that the appeal emanates from the said matter, MCCC No. 125 of 2022. The applicant further submits that the merit of the appeal can only be canvassed in the appeal and it would be an injustice to determine the same without being heard. The applicant argues that he was never afforded an opportunity to defend MCCC No. 125 of 2022 and it would only be fair to allow him explore his options under the law to ensure that liability arising in the matter is settled without suffering any prejudice.

The Respondent's Submissions.

16. The respondent relies on Order 42 Rule 6 of the Civil Procedure Rules and submits that the applicant has not met the conditions in pursuit of stay of execution pending appeal. On the issue of substantial loss, the respondent relies on the case of *Nicholas Stephen Okaka & Another vs Alfred Waga Wesonga* [2022] eKLR and submits that the applicant has not demonstrated any substantial loss or prejudice that he stands to suffer as the respondent has a valid judgment against the applicant and therefore he is within his rights to realize the fruits of the said judgment.
17. The respondent further submits that the appeal does not raise any triable issues and therefore has no chances of success as the claim in Ruiru CMCC No. E125 of 2021 is one of negligence arising out of an accident which occurred on 17th March 2019 whereas the declaratory suit Ruiru CMCC No. E526 of 2023 is against the applicant's insurer for breach of contract of insurance. The respondent argues that the right of action the applicant has against his insurer does not bar him from executing the decree issued against the applicant. The respondent further argues that the declaratory suit was filed in December 2023, 14 months after the notice was served upon the applicant. Thus, this is a calculated move by the applicant to delay the execution process in his favour and thus an abuse of the court process.
18. The respondent submits that he stands to suffer substantial loss if the application is allowed as he has always complied with the rules of procedure and has a valid judgment on record. Thus by allowing the application, he would be kept from enjoying the fruits of a valid judgment for an indefinite period of time.
19. The respondent relies on the case of *Jaber Mohsen Ali & Another vs Priscillah Boit & Another* [2014] eKLR and submits that the ruling was delivered on 7th March 2024 whereas the application was filed on 14th March 2024 and therefore the application was filed timeously.
20. The respondent further submits that the applicant has not offered any security for the due performance of the decree. The respondent thus urges the court to not issue stay orders unless there is security for the due performance of the decree is paid. In any event, the respondent proposes that the court orders the applicant to deposit half the decretal sum with the respondent's advocates and the other half in an interest earning account in the names of both advocates as security for the stay orders.
21. The main issue for determination is whether the applicant has met the prerequisite for grant of stay of execution pending appeal;



The Law

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

22. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) *Civil Procedure Rules*. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:-

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 orders 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 1st 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. Thus under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:

1. Substantial loss may result to him/her unless the order is made;
2. That the application has been made without unreasonable delay; and
3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

24. Substantial loss was clearly explained in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR:-

“ 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.

25. The applicant states that he stands to suffer substantial loss as the respondent will effect execution and sell his home by way of public auction, which loss cannot be quantified by way of damages.



26. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show how execution shall irreparably affect him or will alter the status quo to his detriment therefore rendering the appeal nugatory, which the applicant in this case has failed to do. Furthermore, the loss the applicant alludes to, the sale of his home can be quantified by way of damages. It is therefore my considered view that the applicant has not demonstrated substantial loss that he stands to suffer.
27. From the court record, the ruling dated 7th March 2024 dismissed the applicant's application dated 21st December 2023. Notably, the court cannot grant stay of the impugned ruling as it dismissed the application dated 21st December 2023 which in essence is a negative order and incapable of execution. This principle was enunciated by the Court of Appeal in *Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya)* [2015] eKLR where the court held as follows:-
- An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with.
28. Similarly in *Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others* [2016] eKLR the Court of Appeal expounded on stay of execution stating:-
- In *Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah* [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows:-
- The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.
- The same reasoning was applied in the case of *Raymond M. Omboga vs Austine Pyan Maranga* (supra) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:-
- The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order....The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....
29. Relying on the foregoing authority, it is noted that the order given by the magistrate was a negative order which did not compel any of the parties to do anything or restrain from doing anything is incapable of execution and thus the court cannot order stay of execution of that negative order.

Has the application has been made without unreasonable delay

30. Judgment was delivered on 27th June 2022 and the applicant filed the instant application on 14th March 2024. It has taken the applicant approximately one year nine (9) months between the date of judgment



delivered in the trial court and the time when he filed the instant application. The applicant has not offered any reasons for the delay in filing the application this late. It is therefore my considered view that the delay of 1 year 9 months is inordinate and inexcusable.

Security of costs.

31. The purpose of security was explained in the case of *Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & 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 the 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.

32. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicant has not offered any security for the performance of the decree as he is of the view that it does not apply in the instant case. The respondent appeals to the court to order the applicant pay half the decretal sum to his advocates and deposit the other half in a joint interest earning account in the names of both advocates.

33. It is trite law that the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited vs Guardian Bank Limited* [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

34. The court in granting stay has to carry out a balancing act between the rights of the two parties. Judgment in MCCC No. 125 of 2022 was delivered on 27th June 2022. The respondent has been deprived from enjoying the fruits of his judgment for almost two (2) years. It is noted that the grounds of appeal as set out in the memorandum of appeal do not raise any arguable points of law.

35. All considered, it is my view that the applicant has not met the threshold of granting stay of execution pending appeal.

36. Accordingly, I find that the application dated 14th March 2024 lacks merit and is hereby dismissed with costs.

37. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 6TH DAY OF JUNE 2024.

F. MUCHEMI



JUDGE

