



Mramba & another v Kairu & another ((Suing as the Legal Administrators of the Estate of Phylis Wanjiru Muthee)) (Civil Appeal 19 of 2024) [2024] KEHC 8399 (KLR) (10 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8399 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 19 OF 2024
HM NYAGA, J
JULY 10, 2024**

BETWEEN

MERCY JOAN MRAMBA 1ST APPELLANT

ANN WAMBUI KIMANI 2ND APPELLANT

AND

**PETER MUTHEE KAIRU & GRACE WANJIRU MBURU RESPONDENT
(SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF PHYLIS
WANJIRU MUTHEE)**

RULING

1. *Vide* a Notice of Motion dated 11th March, 2024 the Applicant sought several orders. The prayers that are pending are;
 - a. That the Honourable court be pleased to grant an order of stay of execution of the judgement delivered on 17th January,2024 and all consequential orders arising therefrom pending the hearing and determination of the Appeal.
 - b. That the Honourable court be pleased to issue an Order for Provision of a Bank Guarantee of 50% of the decretal sum awarded by the trial court of Ksh. 3,513,075/= only as security pending the hearing and determination of HCCA E019 of 2024.
 - c. That the Honourable court be pleased to issue any other order as it may deem just, appropriate and expedient in the interest of justice.
 - d. That costs of the Application be provided for.
2. The application is predicated on grounds on its face and supported by an affidavit sworn by the Applicant on 11th March, 2024.



3. The Applicants averred that judgement was delivered on 17th January, 2024 in favour of the Respondents as against them whereby they were held 100% liable for the accident; General damages for Pain and Suffering of Ksh.55,000/=; General damages for Loss of expectation of life Kshs. 180,000/=; General Damages for Loss of Dependency of Kshs. 3,000,000/=; Special Damages of Kshs. 278,075/=; & Costs of the suit and interest thereon were awarded to the Respondents.
4. They asserted that they have appealed against the said judgement and are apprehensive that the Respondents may commence execution against them and thereby rendering their Appeal nugatory.
5. The Applicants through their insurance are ready, willing and able to furnish a bank guarantee from Family Bank for half of the principle sum as security for due performance of the judgement/decreed or order as shall be directed by this Honourable court pending the hearing and final determination of the Appeal.
6. The Applicant further deponed that they are apprehensive that in the event the amount is paid to the Respondents and their appeal succeeds they may never recover the amount which is very high as the Respondents' abilities to refund the same are unknown.
7. They averred that this Application has been made timely and the Respondents will not be prejudiced in any way if the orders sought herein are granted as prayed.
8. The Respondent despite being duly served with the Application chose not to respond to the same.

Analysis & determination

9. At the time the matter came up for directions on the application under certificate of urgency, I gave directions to the effect that the appellants/applicants were to pay half the decretal sum to the respondent within 45 days, since the appeal is basically on the quantum of damages awarded by the lower court. It is apparent that this was not done, as the applicants filed the application dated 1st July 2024 seeking among others, extension of time to pay the said amount. This was prompted by the execution process commenced by the respondent. The applicants have themselves to blame for not acting on time to forestall the execution, which they admit has commenced.
10. In determining this application the application dated 1st July 2024 will also be spent.
11. Having considered the application and the supporting affidavit, it is my considered view that the sole issue for determination is whether the Applicants have met the threshold for grant of stay pending appeal.
12. Order 42 Rule 6(2) of the *Civil Procedure Rules* provides:
 - “(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.”



13. In the case of *Butt vs Rent Restriction Tribunal* [supra] the Court of Appeal gave guidance on how a court should exercise discretion in an application of stay of execution and held that:

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

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 that appeal court reverse the judge’s discretion.

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.

The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

The court in exercising its powers under Order XLI rule 4(2)(b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

14. In *Visbram Ravji Halai vs Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas its power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 Rule 6 of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.

15. With the above in mind, the Court must then determine what substantial loss the Appellant will suffer if stay of enforcement of the judgment of the subordinate court is not made in his favour.

16. On what would amount to “substantial loss” this was aptly discussed in *Century Oil Trading Company Ltd vs Kenya Shell Limited* Nairobi (Milimani) HCMCA No. 1561 of 2007 where the court stated that:

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...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 an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”



17. In the instant case the Applicants claim that in the event the Appeal is successful the Respondents will not be in a position to compensate them for the losses that may be incurred as their abilities to do so are unknown.
18. The law is that once an Applicant expresses apprehension about the Respondent's ability to refund the decretal amount, the evidential burden of proof shifts to the respondent to rebut that apprehension. This proposition was re-iterated by the Court of Appeal in *ABN Amro Bank NK v Le Monde Foods Limited*, Civil Application No. 15 Of 2002 [NRB] where it stated as follows:

“...in those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal was to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on...”
19. The Applicants' claim that the Respondents may be unable to refund the decretal amount if the appeal is successful has not been rebutted by any evidence.
20. Thus, I am persuaded to find that the Applicants have demonstrated they are likely to suffer substantial loss as defined by Gikonyo J in *James Wangalwa & Another V Agnes Naliaka Chesoto*, [2012] eKLR if the stay orders sought are not granted.
21. Of course the court must not forget that the Respondents are successful litigants and are entitled to enjoy the fruits of their judgment. The court has to strike a balance between the competing interests.
22. In regards to whether this Application has been filed without unreasonable delay, I note the lower court judgement was delivered on 17th January, 2024. The appeal was filed on 19th February, 2024, and this application was subsequently filed in March. There was a delay of about one month which in my view is not ordinate. I therefore hold that the application herein was filed without inordinate delay.
23. With regards to security, the Applicants have shown willingness to offer security by way of a bank guarantee for due performance of the decree.
24. On Whether the Appellants, have an arguable appeal, clearly this is a question to be answered by the appellate court. However, having perused the Memorandum of Appeal it is on both liability and on the quantum of damages awarded by the trial court. On the latter, the Applicant terms the same as excessive and unjustified.
25. An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before court; one which is not frivolous.
26. Having said the above, I find the appeal is arguable.
27. The three (3) prerequisite conditions set out in the aforesaid Order 42 Rule 6 of the *Civil Procedure Rules*, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously. In the case of *Trust Bank Limited vs Ajay Shah & 3 Others*, [2012] eKLR at page 23 the court stated that:

“The conditions set out in Order 42 Rule 6(2) (a) and (b) are cumulative. All the three must be satisfied before a stay can be granted. The Applicant only satisfied one condition and failed to satisfy the others. For the foregoing reasons, I find that the Plaintiff's Notice of Motion dated 24th April, 2012 it without merit.”



28. In the instant case the Applicants have satisfied the three (3) prerequisite conditions set out in the aforesaid Order 42 Rule 6 of the *Civil Procedure Rules*, 2010. Consequently, I am therefore inclined to grant stay of execution pending hearing and determination of the Appeal.
29. The Applicant proposes a provision of a bank guarantee of the decretal sum. In determining the security to be accepted by the court, the court has to strike a balance on the interests of the Appellants and those of the Respondents. In doing so, the court exercises a discretion which must at all times be geared towards the achievement of the justice between the parties.
30. Having considered the application and the fact that it is unopposed, I allow the same and order as follows;
- a. Stay of execution of the judgment/decree of 17th January, 2024 is hereby granted on condition that the Applicants has paid half of the decretal amount as ordered and if not done so, to do so within 15 days from the date hereof.
 - b. The balance of the decretal sum to await the determination of the appeal herein.
 - c. The applicants shall bear the auctioneer's costs to be agreed or taxed between them.
 - d. The Record of Appeal to be filed within 45 days from the date hereof.
 - e. In the event of default of any of the aforementioned conditions, the stay hereby granted shall lapse without further reference to the court.
 - f. The costs of this application shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 10TH DAY OF JULY, 2024.

H. M. NYAGA

JUDGE

In the presence of;

Court Assistant Jeniffer

Ms Cherotich for Appellant/Applicant

No appearance for Respondent

