Musyoki & another v Nyong'a & another (Suing as the legal administrators of the Estate of the Late Morris Matheka Mulei - Deceased) (Civil Appeal E120 of 2024) [2024] KEHC 8414 (KLR) (10 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8414 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E120 OF 2024

FR OLEL, J

JULY 10, 2024

BETWEEN

ALPHONCE MBINDA MUSYOKI ..... 1ST APPELLANT

PHYLIS MUTHEU MBINDA ..... 2ND APPELLANT

AND

ESTHER M'MBONE NYONG'A & MONICA MWIKALI MULEI (SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF THE LATE MORRIS MATHEKA MULEI - DECEASED) ..... RESPONDENT

RULING

A. Introduction

1. The application before this court is the Notice of Motion application dated 23rd April 2024 brought pursuant to provisions of Section 1A, 1B, 3, 3A of the *Civil Procedure Act*, Order 42 Rule 6, Order 51 rule 1 of the *Civil Procedure Rules*, and all other enabling provision of law. The applicant seeks for orders that;

    a. Spent

    b. Spent

    c. That the Honourable court be pleased to grant stay of execution of the decree and judgement of the magistrate court (Hon H.M Mbati) dated 26th March 2024 in Machakos civil suit No E207 of 2023; Esther M'mbone Nyong'a & Monica Mwikali Mulei (Suing as legal administrators of the estate of the late Morris Matheka Mulei- Deceased) v Alphonse Mbinda Musyoki & Phylis Mutheu Mbinda pending hearing and determination of the Appeal

d. That costs of this Application be provided for.

2. The application is supported by the ground on the face of the said application and the supporting affidavit of the 1st Appellant dated 23rd April 2024 and his Supplementary Affidavit dated 10th June 2024 respectively. This application was opposed by the respondents who filed a replying affidavit dated, 14th May 2024 sworn by the 1st respondent.

B Pleadings

3. The Appellants averred that judgment was entered against them on 26th March 2024 in the sum of Kshs 10,000,000/= being damages plus costs and interest of the suit and being aggrieved by the said judgement they had filed this Appeal, both as against liability and quantum. Unless stay was granted, they were apprehensive that the respondents would execute the decree to their detriment and it was therefore proper and just to grant the orders sought in the interest of justice.

4. The Appellants further averred that the Appeal filed had reasonable chance of success and they ought to be given a chance to be heard on Appeal. In the circumstance, the prejudice, if any that shall be occasioned to the Applicants if no stay was granted and execution levied would far outweigh the prejudice the Respondents would suffer. It was only then be fair to grant the orders sought to allow them exhaust their constitutional right of Appeal.

5. This application is opposed by the Respondents through the Replying Affidavit's dated 14th May 2024 sworn by the 1st respondent, Eunice M'mbone Nyong'a. She maintained that the application as filed was fallacious, lacked merit and constituted an abuse of the process of this court. That the applicant was a former member of parliament of Machakos Town and the 2nd Appellant was a prominent businesswoman within Machakos town and both were involved in lucrative business, especially transportation business and had over twenty heavy goods vehicles engaged in transportation of goods. It was therefore not true that they were small scale farmers earning Kshs 70,000/= as alleged.

6. This application had been filed in bad faith with the sole aim of delaying and denying the Respondents from enjoying the fruits of their judgment and it is them who would suffer the brunt of any stay orders given. The appellants had not offered any security for stay to be granted and their application could not succeed without security being offered. To ensure the court balances the interest of both parties, the respondent urged the court to order the Appellants/Applicants to release part of the award to them being Kshs 3,000,000/= and deposit the balance of the decretal sum in a joint interest earning account pending hearing and determination of the Appeal.

7. In response to the replying affidavit, the 1st Appellant did file their supplementary Affidavit and admitted that he was a former member of parliament of Machakos town, but currently both Appellants were small scale farmer's and did not run multiple business and/or owned multiple lorry fleet as suggested by the respondent. For clarity he affirmed that he only owned Motor vehicle registration No KCE 352M ISUZU FSR33, which was the suit motor vehicle and was jointly owned by him and NCBA.

8. In addition, the Appellant did aver that the suit motor vehicle was insured by their insurer, Britam Insurance Company ltd and they had already paid the respondents Kshs 3,000,000/= the statutory limit prescribed and in doing so they had already placed the respondent in possession of a significant amount of the decretal sum and prayed that this sum be taken as security of the Appeal. Based on the foregoing, the Appellant urged court to find that his Application was merited and the same be allowed.

Analysis & Determination

9. I have carefully considered the Application, Supporting/ Supplementary Affidavit, the Respondent's Replying Affidavit and the submissions file by both parties. The only issue which arise for determination is whether this court should grant stay of execution of the Judgement/decree dated 26th March 2024 issued in Machakos CMCC No E207 of 2023.

10. Stay of Execution is provided under Order 42 Rule 6 of the *Civil Procedure Rules* 2010 as follows;

> "(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.
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> (2) No order for stay of execution shall be made under subrule (1) unless –
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> (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."

11. The three conditions to be fulfilled can therefore be summarized as follows;

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

b. application has been made without unreasonable delay

c. security as the court orders for the due performance.

12. In *Vishram Ravji Halai v Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 42 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. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions.

13. Further, the courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. According to section 1A(2) of the *Civil Procedure Act* "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective"

while under section 1B some of the aims of the said objectives are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

14. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the *Civil Procedure Act* are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome.

15. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See *Suleiman v Amboseli Resort Limited* [2004] 2 KLR 589.

16. This was the position of Warsame, J (as he then was) in *Samvir Trustee Limited v Guardian Bank Limited Nairobi* (Milimani) HCCC 795 of 1997 where he expressed himself as hereunder:

> " Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...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 judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive

within the corridors of the court. Justice requires the court to give an order of stay with certain conditions."

i. Undue Delay

17. The ruling/order appeal against was issued on 26th March 2024 and this appeal was filed on 23rd April 2024. This court thus finds that the appeal and this application for stay of execution has been filed without undue delay.

ii. Substantial Loss

18. On the issue of substantial loss, Ogolla, J in *Tropical Commodities Suppliers Ltd & Others v International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 stated that:

> " Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.'

19. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR the court expressed itself as hereunder:

> " 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."

20. The same position was adopted by Kimaru, J in *Century Oil Trading Company Ltd v Kenya Shell Limited Nairobi* (Milimani) HCMCA No. 1561 of 2007 where he 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."

21. The decretal sum in contention is Kshs 10,000,000/=. This sum is quite substantial and the respondents has not filed an affidavit of means to confirm if indeed they can refund this sum if paid

out. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* (2006) eKLR the Court of Appeal held thus;

> "Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge."

22. Guided by the above authorities and in the absence of the requisite proof from the Respondents that they have strong financial means of refunding the sums which will be paid out, I find that the Appellants have satisfied this court that they will suffer substantial loss if the entire decretal sum is paid to the Respondents before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.

iii. Security

23. As regards deposit of security, the court observed in the case of *Gianfranco Manenthi & Another v Africa merchant Assurance Co. Ltd* [2019] eKLR it was held that:-

> "The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.
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> Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....
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> Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree."

24. The Court must similarly consider the overriding objective and balance the interest of the parties to the suit while considering the issue of security to be offered. The law is that where the applicant intends to exercise his undoubted right of appeal, and in the event, that he were eventually to succeed, he should not be faced with a situation in which he would find himself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.

25. The issue of adequacy of security was dealt with by the Court of Appeal in *Nduhiu Gitahi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 where the Court of Appeal expressed itself as follows:

> " The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them.
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> So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it".

26. The respondent asked that the Appellant be directed to pay them Ksh.3,000,000/= as security for this Appeal. The Appellant on the other hand averred that his insurer Britam Insurance company ltd had already paid the respondents Kshs 3,000,000/=, which was the statutory prescribed limit which they could pay and having been placed in significant portion of the decretal sum, that should act as security for this Appeal.

27. As stated above the court has to balance the interest of both parties, and when confronted with such circumstances it has to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render the appeal nugatory. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See *Suleiman v Amboseli Resort Limited* [2004] 2 KLR 589.

Disposition

28. Taking all relevant factors into consideration and in order not to render the intended appeal illusory, and since the appellant is seeking to be heard, which is a fundamental right, I do grant stay of execution of the decree herein on condition that;

    a. The Appellant/Applicant do deposit a sum of Kenya shillings One Million (Kshs 1,000,000/=) into court as security of this Appeal

b. This condition is to be met within 90 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.

29. The costs of this Application will be in the cause.

30. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 10THE DAY OF JULY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 10th day Of July, 2024

In the presence of: -

Mr. Nderitu for Appellants

Ms Thiongo Respondent

Sam Court assistant