



Zakayo v Malanga (Civil Appeal 124 of 2023) [2024] KEHC 8859 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8859 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 124 OF 2023
SC CHIRCHIR, J
JULY 18, 2024**

BETWEEN

MOHAMMED ZAKAYO APPELLANT

AND

SIMON WALE MALANGA RESPONDENT

*(Being an Appeal from the judgment of Hon. R.S Kipng'eno(PM)
delivered on 8th August 2023 in Butali PM CC No. E 19 of 2020)*

RULING

1. The Applicant filed suit in the lower court seeking to bar west Kenya sugar Ltd (then as the 2nd defendant) from releasing the proceeds of sale of some sugarcane to the 1st defendant (the appellant) and to order the 2nd defendant to release the said proceeds to the respondent herein, instead.
2. The court delivered judgment on 8th August 2023 in which it issued an injunction barring the 2nd defendant from releasing the proceeds to the Appellant , and directing it to release the proceeds to the respondent . In the alternative, the 1st defendant was ordered to pay the plaintiff Kshs. 100,000/=.
3. The Applicant was aggrieved by the judgment and filed the present Appeal.
4. At the same time the Appellant filed a Notice of Motion seeking for stay of the execution of the decree of the lower court.

The Applicant's case

5. It is the Applicant's case that he was wrongly sued as he was not the Administrator of his late father one Tira Shirandula's Estate.
6. He further states that the respondent never produced any documentary evidence at the trial court to prove any sale between the respondent and his late father.



7. He therefore faults the trial court for returning a verdict against him.

The respondent's case.

8. In his grounds of opposition dated 5th October 2023 the respondent states that the application is bad in law, incurably defective, an abuse of the court process, an afterthought, brought in bad faith, improper before this court, premature, frivolous, incompetent, vexatious and should have been made in the court of first instance.

Applicant's submissions

9. The Applicant's submission dwelt entirely on the merits of the decision of the lower court and failed to demonstrate that he has met the conditions for stay of execution. Consequently, save on consideration of whether the Appeal has high chances of success, the said submissions have not been considered for purposes of this Ruling.

Respondent's submissions.

10. It is the respondent's submissions that the Applicant has not satisfied the conditions for granting stay as set out under order 42 rule 6 of the civil procedure Rules . It is further submitted that in the event that the Application is allowed , the Applicant should be compelled to deposit the decretal sum of ksh. 100,000 in an interest – earning Account.

Determination

11. Order 42 Rule 6 (1) and 2 of the Civil Procedure Rules sets out the law on stay pending Appeal. It stipulates 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 appeal case of 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 referred may apply to the appellate court to have such order 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 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.

12. The above conditions have been restated in many past decisions of the superior courts. In the case of Antoine Ndiaye vs African Virtual University (2015) eKLR, the court held that an Applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the certain conditions namely:-

i. that substantial loss may result to the Applicant unless the order is made;

ii. that the application has been made without unreasonable delay, and;



- iii. that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the Applicant has been given”.
13. On the question of whether the Application has been brought without undue delay, the judgment was delivered on 8/8/2323 and the this Application was filed on 23/8/2023. Am therefore satisfied that the Application was filed without undue delay.
14. On whether the Appeal stands a chance of succeeding, the Applicant has pleaded that the Appeal has high chance of success. I have perused the memorandum of Appeal . The Applicant has pleaded interalia that the trial court relied on hearsay evidence ; that he was wrongly sued and the Respondent’s claim should have been a subject of his father’s succession proceedings. Am of the view that the above issues are arguable
15. However I have not seen any plea that the Applicant would suffer substantial loss , if stay is not granted.
16. What is substantial loss? In James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, the court had this to say about substantial loss; “ 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 a successful party in the Appeal. This is what substantial loss would entail.”
17. In the same case , the court went on to state what “ substantial loss is not. It stated :
- “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.....”
18. In the case of Kenya Shell Ltd vs Benjamin Kanga & Ano (1986)e KLR the court of Appeal also set out what substantial loss is not . It held: “ It is not sufficient by merely stating that the sum of ksh. 20,380 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”
19. The Applicant in the present case has not even pleaded substantial loss , let alone prove it. The Applicant has therefore failed to satisfy this condition .
20. The three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive and not disjunctive. Thus the fact that the Applicant has demonstrated that he has an arguable appeal will not entitle him to stay when he has failed to demonstrate that he would suffer substantial loss.
21. The Application is not merited , the same is hereby dismissed with costs to the respondent.

DATED , SIGNED AND DELIVERED AT KAKAMEGA, THIS 18TH DAY OF JULY 2024

S. CHIRCHIR

JUDGE

In the presence of :

Godwin- Court Assistant

Mr. Iddi for the Respondent



Mohammed Zakayo- The Appellant
Simon Wale Malanga- The Respondent.

