Kipkorir v Kibet (Civil Appeal 104 of 2022)
[2024] KEHC 12229 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12229 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 104 OF 2022

RN NYAKUNDI, J

OCTOBER 11, 2024

BETWEEN

ERNEST KIPKORIR .... APPELLANT

AND

MUSA KIBET .... RESPONDENT

RULING

1. By a Notice of Motion dated 5/09/2024, the Appellant/Applicant seeks orders that:
    1. Spent.
    2. There be interim of stay of execution of decree and all other consequential orders arising therefrom, in Eldoret CMCC No. 831 of 2013, Musa Kibet Limo v Ernest Kipkorir pending the hearing of this application interpartes.
    3. There be interim of stay of execution of decree and all other consequential orders arising therefrom, in Eldoret CMCC No. 831 of 2013, Musa Kibet Limo v Ernest Kipkorir pending the hearing of this application interpartes then after pending the hearing and determination of the appeal.
    4. This Honourable Court be pleased to set aside the orders of Honourable E. Kigen, Senior Resident Magistrate in in Eldoret CMCC No. 831 of 2013, Musa Kibet Limo v Ernest Kipkorir pending the hearing and determination of this appeal on condition that half of the decretal sum be paid to the Respondent and the other half be deposited into a joint interest earning account in the names of both Counsel on record.
    5. Costs of this application be provided for.
2. The application is premised on the grounds therein and it is further supported by the Affidavit sworn by the Applicant on the same date.

3. In the Affidavit, the Applicant deponed that the Respondent herein obtained judgment on 24/06/2022 against him in Eldoret CMCC No. 831 of 2013; Musa Kibet Limo v Ernest Kipkorir, that he is aggrieved by the said judgment and has filed the instant appeal, that upon filing the appeal, he filed an application in the Subordinate Court which stay of execution was granted on 24/06/2022 on condition that half of the decretal amount be paid to the Plaintiff while the other half be deposited in a joint interest earning account in the names of both Counsels on record. According to the Applicant, the said conditions were harsh and unconscionable in the sense that the Respondent is a man of straw and if half of the decretal amount is to be released to him then it could be difficult to redeem the same was the appeal is successful, that the said orders have since lapsed and the Respondent has placed the wheels of execution and has issued him with a Notice to Show Cause. The Applicant maintained that the appeal has overwhelming chances of success since the trial Magistrate failed to grant his Counterclaim and or dismissed it despite overwhelming evidence among other reasons as evidenced in the Memorandum of Appeal, that if half of the decretal sum is paid to the Respondent who is a man of straw as evidence by the record of the Subordinate Court, he would not be in a position to refund any amounts paid to him when the appeal succeeds, that it is in the interest of justice that the half of the decretal amount be deposited into a joint interest earning account in the names of Counsels on record as a condition for stay pending appeal and the other half abide the outcome of the appeal, that the Respondent shall not be prejudiced in any way should this application be allowed as prayed.

The Response

4. The application is opposed by the Respondent vide his Replying Affidavit sworn on 16/09/2024. In the Affidavit the Respondent deponed that the application presently before Court is bad in law and is res judicata, it is devoid of merit misinformed, incompetent and therefore an abuse of Court process and that the contents of paragraphs *1*, *2*,*3*,*4* & 5 are admitted. It was the Respondent's contention that the Applicant made a similar application in the Subordinate Court dated 28/7/2022 in which he sought for an order of stay of execution of the decree and the consequential orders emanating therefrom pending the hearing and determination of the Appeal herein. The Respondent further deponed that reasons given by the Applicant for seeking the prayers sought were that the Respondent is a person of straw and should the decretal amount be paid to him he may not be able to refund in the event of a successful appeal, that the Court considered his prayers in application and in its fair consideration, deemed it fair to grant a conditional stay, that half of the decretal amount be paid to the Respondent's Counsel and the other half be preserved in a joint account for both Counsels, the Court further ordered that in default of compliance within 30 days, execution be levied, that the judgment debtor being the Applicant herein never bothered to comply with said ordered but chose to be silent and let execution commence, that the judgment debtor has made no effort to demonstrate the faintest of good will or any intention to comply with the direction of the trail Court, that being dissatisfied with said directions, the judgement debtor instead of appealing against the ruling opted to file a similar application but in a different Court, as if gambling between Courts to see to it that he by all means do not reap the fruits of his judgment.

5. The Respondent further deponed that in the instant application the Applicant purports to further fear for Respondent's inability to refund even after the Subordinate Court has clearly placed protection for his interests, the Respondent is unfounded and without basis at all. The Respondent maintains that when a party is successful in any proceeding and there are no orders of stay against the implementation of the judgment, they ought to proceed to execution in the event of non-compliance by the judgment debtor, that the lower Court file was scheduled for Notice to Show Cause why execution should not issue against the judgment debtor but again as it has been his nature, despite having been personally served with said Notice and he graciously absconded Court. The Respondent maintained

that when a party to suit makes an application similar to one that a Court of competent jurisdiction has pronounced itself on the same is regarded as being *res judicata*, that in any event ruling on the Applicant's at the trial Court was delivered way back in December 2022 and the Applicant chose to go silent for over two years only to be provoked by their application for execution, that the delay is inordinately long and not justifiable, that there are a number of avenues the aggrieved party would have but not make a similar application in the different Court, that this matter has been in Court since the year 2013, that litigation must come to an end. In the end, the Respondent prayed that the application be dismissed and directions be taken on appeal, he contended that it would highly prejudicial to him if the application is allowed.

The Submissions

6. The Application was canvassed vide written submissions. The Applicant filed his submissions while the Respondent did not file any.

The Applicant's Submissions

7. In regard to whether the application is bad in law, Counsel for the Applicant submitted that the application herein has been properly brought under the provisions of Section 3A and 63 (e) of the *Civil Procedure Act*, Order 42 Rule 6, Order 51, Rule 1 and 2. Counsel further submitted that being an application for stay of execution pending the determination of the appeal, the same is premised on Order 42 Rule 6 and also Order 51 Rule which was erroneously indicated as Order 50 Rule 1 and 2. Counsel maintained that the application has been made on an appeal and thus the issue of whether an appeal exists is not in question.

8. In regard to whether the application is res judicata and hence bad in law, Counsel submitted that the issue of res judicata does not arise in an application of this nature. Counsel cited the provision of Order 41 Rule 6 (1) and (2) in that regard. Counsel cited the case of *Kenya Fluorspar Company Limited V Moses Sigite* (unreported) and the also the case of *Patrick Kalava Kulamba & Another v Philip Kamusu & Rhoda Ndanu Philip (Suing as the legal representatives of the Estate of Jackline Ndinda Philip - Deceased)* eKLR [2016].

9. In regard to whether the orders of the lower Court ought to be set aside, Counsel urged that the orders of the lower Court be set aside. Counsel submitted that the lower Court order was that stay be granted on condition that half of the decretal sum be paid to the Respondent and the other half be deposited into a joint interest earning account in the names of both Counsels on record. Counsel maintained that the Applicant was dissatisfied with the conditions laid by the lower Court and hence the instant application. Counsel added that the Applicant's contention being that the Objective of stay pending appeal could be defeated if half of the decretal is released to the Respondent noting that the appeal entails a decision on a plaint and counterclaim. Counsel maintained that the chances of success of the appeal are high, particularly in awarding the counterclaim. Counsel urged the Court to set aside the lower Court order of stay and in its place substitute in with an order that half of the decretal amount be deposited into a joint interest earning account and the other half await the outcome of the appeal.

10. With regard to whether the Applicant has met the requirements of Order 42 Rule 6 of the *Civil Procedure Rules* for grant of stay orders, Counsel submitted that the application herein is merited and it ought to be allowed. Counsel urged that the circumstance of this case is that substantial loss may result unless the orders of stay are granted and the appeal may be rendered nugatory since the Respondent as stated is a man of straw and may not be in a position to refund the decretal amount in case the appeal which has high chances of success is allowed. Counsel argued that although the Respondent in his replying Affidavit has deposed that he is a man of mean, he has not attached any proof of his capability.

Counsel further submitted that the Applicant herein filed a Counterclaim together with his statement of defence in which he has a genuine claim against the Respondent and thus the Applicant and the Respondent are on equal footing as regards the decretal amount. Counsel urged the Court to find the option that half of the decretal amount be deposited into a joint interest earning account and the other half to await the outcome of the appeal. Counsel cited the case of *Tropical Commodities Supplies Ltd and Others v International Credit Bank Ltd* [2003]

11. Counsel further submitted that the application has been brought without unreasonable delay, that judgment was read in Court on 24/6/2022 wherein 30 days stay was granted, further orders were granted by the Magistrate's Court on 24/6/2022 and the application herein was filed in Court on 5/9/2024 while the orders were still in force and further the appeal was lodged in Court vide a Memorandum of appeal dated 21/7/2022 and thus the Applicant satisfied the requirements as for this principle. Counsel cited the case of *Junaco (T) Limited and 2 Others v DFCU Bank Limited* in that regard.

12. As for security of Costs, Counsel maintained that the Applicant herein is willing to have half the decretal amount to await the outcome of the appeal, which is a sign of good faith on the part of the Applicant thus satisfying this condition.

Determination

13. I have considered the application, affidavits in support and in opposition and the submissions filed herein as well as the authorities relied upon.

14. The Applicant herein seeks orders of stay against the judgment of that was delivered in Eldoret CMCC No. 831 of 2013, on 24/06/2024. The Respondent on the hand contends that the instant application is an abuse of the Court process since the Applicant filed a similar application dated 28/7/2022 before the trial Court.

15. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules which provides 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.

16. Order 42 rule 6(1) of the *Civil Procedure Rules* provides 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 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.

17. In *Stanley Karanja Wainaina & Another v Ridon Anyangu Mutubwa* [2016] eKLR, it was held that:

> "Counsel for the Respondent submitted on the provision of Order 42 Rule 6 (1) of the *Civil Procedure Rules* and argued that the Appellants had been granted a stay of execution by the trial Court and in bringing the present application it was an abuse of the Court process. In my view, Order 42 Rule 6(1) allows a party to file another application for stay of execution in the High Court whether the application for such stay shall have been granted or refused by the Court appealed from. I appreciate the argument by the learned counsel and this Court shares the same sentiment in that once an application has been dealt with by a Court of competent jurisdiction and between the same parties, a similar application cannot be filed before another Court as that would be an abuse of the Court process or at best, res judicata. Unfortunately, that legal provision is part of our laws and until the same has been amended, we have no choice but to live with it as it is."

18. In case of *Equity Bank Limited v West Link Mbo Limited* [2013] eKLR, where it was held by Githinji, JA that:

> "(13) It is trite law that in dealing with (Rule 5 (2) (b) applications the Court exercise discretion as a Court of first instance and even where a similar application has been made in the High Court or other similar Court under Rule 6 (1) of Order 42 of the *Civil Procedure Rules* and refused, the Court in dealing with a fresh application still exercises original independent discretion as opposed to appellate jurisdiction (*Githunguri –Versus- Jimba Credit Corporation Ltd.* (No. 2) [1988] KLR 838."

19. It is therefore clear that under the said provision, whether the application for stay was granted or refused by the trial Court, this Court is at liberty to consider such application and to make such order thereon as it deems just. In other words, for the appellate Court to entertain the application in its original jurisdiction, the Applicant must show that either he had not made an application before the trial Court or that he did make such an application and the same was granted with or without conditions or refused.

20. In the instant case it is not disputed that the Applicant herein sought for stay orders in the trial Court. The trial having determined the said application on merit granted the Applicant herein stay ordered on condition that the Applicant pays the Respondent half of the decretal amount and the other half be deposited in a joint interest earning account in the names of the parties Counsels on record. The Applicant being aggrieved by the said orders is now before this Court seeking for stay of execution orders and setting aside of the trial Court's orders made on 9/12/2022. Is the instant application res judicata? In my view, that determination depends on the Court's interpretation of the phrase "whether the application for such stay shall have been granted or refused by the Court appealed from" as such it is my finding that the instant application is not res judicata as the Court in dealing with a fresh application still exercises original independent discretion as opposed to appellate jurisdiction.

21. As to whether the Applicant shall suffer substantial loss, in the case of *Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga* (1982-1988) KAR 1018 (Supra) the Court of Appeal pronounced itself to the effect that:

> "It is usually a good rule to see if Order 41 Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the Applicant, it would

be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay."

22. Also, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

> "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."

23. The Applicant has a burden to show the substantial loss it is likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Appellant to his Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Applicant herein contends that he shall suffer irreparable loss if stay is not granted in the event the appeal succeeds as it would be able to recover the decretal sum advanced to the Respondent. According to the Applicant, the Respondent is a man of straw and as such he will not be able to refund the decretal amount in the event that the appeal succeeds. While it is not enough to state that the Respondent is not a man of straw, the Respondent herein has not provided any evidence to prove that it the event the Appeal succeeds he will be able to repay the Applicant herein. In the circumstances am of the view that stay ought to be granted.

24. The Applicant ought to satisfy the condition of security. The Applicant has expressed that it is ready to offer security of costs.

25. On whether this application has been filed timeously. The judgment in question was delivered on 24/6/2022 and the Applicant sought for stay orders therein and the Court on 9/12/2022 granted stay of execution orders pending the hearing and determination of the appeal. The Applicant then filed this application 5/09/2022, it has been close to 1 year and 9 months since the ruling granting stay orders was rendered by the trial Court. The Applicant has not rendered any explanation as to why there has been inordinate delay in filing the instant application. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the Applicant's prospects of success. I therefore find and hold that there has been unreasonable delay in filing this application. The question of unreasonable delay was dwelt with in the case of *Jaber Mohsen Ali & another v Priscillah Boit& another* E&L NO. 200 OF 2012[2014] eKLR where it was stated:

> "The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the Court and any order given thereafter.
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> In the case of *Christopher Kendagor v Christopher Kipkorir*, Eldoret ELC 919 of 2012 the Applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the Court holding that, the application ought to have come before expiry of the period given to vacate the land."

26. A party seeking stay must satisfy all the three conditions envisages under Order 42 Rule 6 of the *Civil Procedure Rules*.

27. In the premises, it my finding the application dated 5/09/2024 lacks merit and is hereby dismissed with costs to the Respondent.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 11TH DAY OF OCTOBER 2024.

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R. NYAKUNDI

JUDGE