Mugwe v Kiama (Suing as the legal representative of the Estate of Philip Kiama Gitonga) (Civil Appeal 73 of 2021) [2024] KEHC 16770 (KLR) (3 October 2024) (Ruling)

Neutral citation: [2024] KEHC 16770 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL 73 OF 2021

NIO ADAGI, J

OCTOBER 3, 2024

BETWEEN

PATRICK GICHOHI MUGWE .... APPELLANT

AND

DANCAN KAMUNYA KIAMA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PHILIP KIAMA GITONGA) .... RESPONDENT

RULING

1. The Appellant/Applicant's application dated 18th October 2022 and filed on 23rd October 2022 under Certificate of Urgency. It is premised on Order 22, Rule 22, Order 42 Rule 6 of the Civil Procedure Rules 2010, Sections 1A, 1B & 3A of the *Civil Procedure Act* and all other enabling provisions of the law. The application is supported by the affidavit of Ann N. Kimani sworn on the even date

2. The Applicant herein prays to Court as follows:

   a) Spent.

   b) That this Honourable Court be pleased to grant a temporary stay of execution of the Judgement issued by Hon. A Mwangi on 12th November 2021 in Karatina PMCC No. 102 of 2017 pending the hearing of this application inter-parties.

   c) That this Honourable Court be pleased to grant a stay of execution of the Judgement and Decree issued in Karatina PMCC No. 102 of 2017 pending the hearing and determination of this application.

   d) That this Honourable Court be pleased to grant a stay of execution of the Judgement issued by Hon. A Mwangi on 12th November 2021 pending the hearing and determination of the Appeal before this Honourable court.

e) That this Honourable Court be pleased to grant any other orders and or relief befitting the circumstances.

f) The costs of this application be in cause.

3. The application is opposed by the Respondent vide his Replying Affidavit sworn by Dancan Kamunya Kiama on 13th October 2023 and requests this Honorable Court to dismiss the application with costs to the Respondent.

Factual Background

4. The Respondent instituted the suit herein against the Appellant and the Respondent prosecuted the matter to finality and Judgment was entered in his favour and against the Appellant in the sum of Kshs.3,308,869.50 together with interests and costs of the suit. The Applicant herein being dissatisfied with the said Judgement, filed a Memorandum of Appeal in Nyeri High Court being this appeal on 16th November 2021 and thereafter applied for stay of execution pending hearing and determination of this application and the Appeal.

Analysis and Determination

5. I have considered the application, the supporting affidavit, the Replying Affidavit and the rival submissions filed by Parties counsel as well as the judicial decisions relied upon. In my view, the issues for determination are as follows:

   a. Whether the Applicant/Appellant has met the criteria for grant of orders of stay pending Appeal.

   b. Who shall bear costs of the application?

Whether the Applicant/Appellant has met the criteria for grant of orders of stay pending Appeal.

6. The law relating to stay pending Appeal is Order 42 Rule 6 (2). It is also important to state that the power to grant an order of stay is discretionary and is dependent on certain conditions being met.

7. Order 42 rule 6(1) and (2) of the Civil Procedure Rules,2010 provides 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.
>
> (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."

8. In Vishram Ravji Halai vs. 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 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely:

   i. establishment of a sufficient cause,

   ii. satisfaction of substantial loss and

   iii. the furnishing of security.

9. Further the application must be made without unreasonable delay.

   To the foregoing, Justice Odunga in Michael Ntouthi Mitheu v Abraham Kivondo Musau [2021] eKLR held that:

   > "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. 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."

10. Under Section 1B some of the aims of the said objective 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.

11. In Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009, Nyamu, JA on 20/11/09 held inter alia that the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way.

   The same Judge in Kenya Commercial Bank Limited vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010 held that:

   > "where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplement them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case."

12. 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. 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.

13. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.

14. In Butt Vs. Rent Restriction Tribunal [1979], the Court of Appeal gave pointers on what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court stated thus:

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

    ii. 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 the Appeal court reverse the judge's discretion.

    iii. Thirdly, 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.

    iv. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

15. On the first criterion as set out in Order 42 Rule 6 (2) i.e. Whether Applicant/Appellant has brought this application without unreasonable delay. The Judgement was delivered on 12th November, 2021. The Memorandum of Appeal was filed on 16th November, 2021. The trial court had granted the Applicant 30days stay of execution which lapsed resulting to filing of the instant application date 18th October 2022 and filed in court on 23rd October, 2022. In the circumstances, I find that application has been brought without unreasonable delay.

16. The second criterion is whether the Applicant/Appellant has demonstrated that he is bound to suffer substantial loss if orders of stay of execution are not granted. The question that follows is what comprises substantial loss. In Silverstein Vs Chesoni (2002)1 KLR 867 it was held that

> " 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"

17. The Appellant/Applicant has deposed that he stands to suffer loss if orders sought are not granted. Judgment was entered in favour of the Respondent, who may execute against the Applicant. If the orders sought are not granted, the Intended Appeal will be rendered nugatory, and the Applicant will stand prejudiced and suffer substantial loss while the Respondent will be unjustly enriched.

18. That the order for stay is desirable so that the Appellant/Applicant may have their appeal heard in Court. If the decretal sum is released to the Respondent and the subsequent appeal allowed, where the financial capability of the Respondent is unknown then the applicant stands to suffer loss.

19. The court is under a duty to hold the rings of justice even handed; it should not offer any illegitimate advantage to either party. The Appellant/Applicant appeals to this Honourable Court to maintain the status quo as has been to enable the Applicant an opportunity to be heard on his Appeal. The Applicant invited this court to be guided by the case of James Wangalwa & Another vs. 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 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 situation 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 must be prevented by preserving the status quo because such loss would render the appeal nugatory."

20. In the Replying Affidavit to the application, the Respondent deponed that upon issuance of the judgment, there has never been any decree capable of being executed and an appeal is not a licence for granting the stay orders sought. That in any event, execution is a lawful process if the Estate choses to pursue the same so as to realize the fruits of the deceased's judgment. The Respondent further deponed that the Applicant's basis for contending that the deceased's financial capability is unknown is based on assumptions. That the Estate is entitled to equal treatment before the law and the fact that the Applicant is insured by a big company should not be used to trample on the Estate's rights.

21. The Respondent submitted that, the applicant assertions that the Respondent is a man of straw means and if paid will not be able to refund the money if the appeal succeeds, should not solely be the reason for granting stay. In granting an order of stay of execution, the court should not be seen to interfere with a party's enjoyment of the fruit of the judgment. They relied on the case of Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No.6726of 1991 where the court stated as follows: -

> " The financial ability of a decree-holder solely is not a reason for allowing stay, it is enough that the decree-holder is not a dishonourable miscreant without any form of income. Suffice to state that the respondent, at this moment, is the successful party and in order to deny him the fruits of his success, it is upon the applicant to prove that he is unlikely to make good whatever sum he may have received in the meantime."

22. The loss the Appellant has alluded to is that the appeal herein will be rendered nugatory should the stay order be declined. It is my considered view that this being a monetary claim, any loss to be suffered by either party can adequately be compensated by an award in damages. The Appellant has not shown by evidence through an affidavit that the Estate through the Respondent is incapable of refunding the decretal sums should the appeal succeed.

23. The third criterion is that the Applicants/Appellants must furnish security for the due performance of the decree. I am fully aware that the court has a delicate task of balancing the interests of both the Appellant and the Respondent. The Appellant who seeks 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. It is true that under Order 42 rule 6 aforesaid, the Applicant is required to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder. I agree with the position in Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others [2015] eKLR, where it was held that:

> " ... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ''ultimately be binding' are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick."

24. I also associate myself with the holding in Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd [2019] eKLR, where the court observed:

> " ... 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 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 degree in order to enjoy the fruits of his judgment in case the appeal fails.
>
> 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 judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... This 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."

25. The law is that where the applicant intends to exercise its undoubted right of appeal, and in the event, it were eventually to succeed it should not be faced with a situation in which it would find itself 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. The issue of adequacy of security was dealt with by the Court of Appeal in Nduhiu Gitahi vs. 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. 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 Applicant has submitted that he is willing to deposit any amount in court being part of the decree by the trial court. Further, the Applicant is willing to comply with the directions that the court may issue and he proposes that the decretal sum be deposited in a joint interest earning account between counsel on record for both parties and relies on re Estate of John Ndungu Mubia (Deceased)(2021) eKLR which placed reliance on the case of Arun C Sharma v Ashana Raikundalia & Co. Advocates where Justice Gikonyo stated that :-

> " 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 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."

27. In the end, the Applicant submitted that he has shown a mark of good faith that the application for stay is not meant to deny the Respondent the fruits of his judgment.

Who should bear the cost of this application?

28. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. In Jasbir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 others SC. Petition No. 4 of 2012: [2014] eKLR. The Supreme Court held that costs follow the event and that the Court has the discretion in awarding such costs.

29. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the *Civil Procedure Act*, I find and hold that the Appellant/Applicant has fulfilled the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules.

30. Accordingly, I hereby allow the Appellant/Appellant's application dated 18/10/2022 and grant stay of execution of the Judgment issued by Hon A. Mwangi Wahito on 12th November 2021 in Karatina

PMCC No. 102 of 2017 pending the hearing and determination of the appeal on the following conditions:

a. The Appellant/ Applicant shall deposit the entire decretal sum into an interest earning account in a reputable commercial Bank, to be held by both advocates for the Parties to this appeal, within 30 days of this ruling;

b. The Appellant to file and serve a record of appeal within Forty-Five (45) days of this ruling;

c. Costs shall be in the cause;

d. The appeal shall be mentioned before the Judge at Nyeri High Court for directions on the mode of disposal of the appeal on a date to be fixed at the registry.

31. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 3RD DAY OF OCTOBER 2024

NOEL I. ADAGI

JUDGE