



Bore v Musyoka & another (Suing as personal representative of the Estate of Ngumbu Musembi) (Civil Appeal E110 of 2021) [2023] KEHC 2096 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2096 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E110 OF 2021**

**FR OLEL, J
MARCH 16, 2023**

BETWEEN

JOSEPH YONGI BORE APPELLANT

AND

REGINA MUNYUVA MUSYOKA 1ST RESPONDENT

CHRISTINAH MUINDI NGUMBU 2ND RESPONDENT

**SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF NGUMBU
MUSEMBI**

RULING

1. The application before this court is the Notice of Motion application dated 7th April 2021 brought pursuant to provisions of Section 1A, 3A & 79 of the *Civil Procedure Act*, Order 42 Rule 6(2) of the *Civil Procedure Rules* and all other enabling provision of law. Prayers 1 and 2 of the said application are basically spent and the main prayer sought is that there be a stay of execution of the judgment/ decree delivered on 9th June 2021 in Movoko PMCC No 823 of 2017 *Regina Muniva Musyoki & Christin Muindi Ngumba (suing as the legal representatives of the Estate of Ngumba Musembi (Deceased) v Joseph Boro Yongi* herein pending the hearing and determination of this appeal and that costs be provided for. The application is supported by a supporting affidavit of Joseph Boro Yongi dated 7th July 2021, and the appellants written submissions filed in court on 26th January 2022.
2. This application is opposed by the Respondents who filed Replying Affidavit's dated 6th December 2021 sworn by one Regina Munyiva Musyoki and the and written submissions filed in court by the on 28th June , 2022.
3. The Appellant averred that they are aggrieved by the judgment and decree dated 9th June 2021 delivered in Mavoko PMCC No 823 of 2017 and have subsequently filed an appeal against the said judgment. They state that they have an arguable appeal which has high chances of success and further that the



said appeal is meritorious and stands a good chance of success as demonstrated in the Memorandum of Appeal filed.

4. Further they state that if stay is not granted, the respondent is likely to attach the property and thus will suffer substantial loss and render this appeal nugatory.
5. Finally, the Applicants state that they are ready and willing to give security for the decretal sum in so ordered. They also confirm that this appeal has been filed without undue delay and similarly this application too has been brought without undue delay.
6. The Respondent did oppose this application through their Replying Affidavit dated 6th December 2021. She states that the Appellants' appeal is a tactic to delay and frustrate the payment of the decretal sum which is proper and due to the estate of the deceased, who suffered fatal injuries and that the quantum awarded was correct.
7. The Respondents further states that they have not started execution process and the application is premature and vexatious. Finally on the issue of security the respondents state that the appellant has not deposited the same to show good faith.

Submissions

8. The Appellants in their submissions reiterated what they stated in the application, while emphasizing the power of the court in exercising its discretion while determining applications for stay. Further they stated that the guiding principles which the court should consider while determining an application of this nature. These were;
 - a. Proof of substantial loss may result to the applicant unless the order is made.
 - b. The application is made without unreasonable delay.
 - c. An applicant must provide such security as the court orders for the due performance.
9. The appellant's also relied on other citations to back up their claim that the respondent will not be in a position to refund the sums paid out to the respondent, if the appeal is successful and that may render the said appeal to be rendered nugatory. The citations relied on included *National Industrial Credit Bank Limited vs. Aquinas Francis Wasike & Another* (UR) C.A. 238/2005 and on the issue of substantial loss they relied on the citation of *Daniel Githaiga v Thomas Kabui Muituma* Nairobi HCCA No 627 of 2016, Where it was 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 or value that is merely nominal.
10. The applicant also stated that the application had been filed without undue delay and they were willing to deposit the decretal sum in court or abide by court orders regarding the same.
11. The Respondents on the submissions filed averred that this application was based on insufficient grounds, was fatally defective and incompetent. The posited that the award of damages as assessed was correct and should not be interfered with
12. The respondent further stated that the applicant has failed to prove substantial loss and there did not exist exceptional circumstance's which could deny the respondent the fruits of their judgment. That the applicants had moved court with unclean hands in Equity and therefore could not touch the pure foundation of justice. They relied on the citation of *Jajbbay V Cassim* 1939 AD 537 – 351.
13. The respondent's admitted that the appeal and application for stay was filed on time but deride the applicant for failure to prosecute the same expeditiously. Finally on the issue of security the respondent



stated that the same had not been deposited in court or a joint interest account and that showed bad faith on their part.

Analysis and Determination

14. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and parties' respective submissions and the only issue for determination is whether the Appellant has met the conditions necessary for the grant of stay pending appeal.
15. Stay of execution pending appeal is governed by Order 42 Rule 6 of the *Civil Procedure Rules*. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant (see *Butt vs Rent Restriction Tribunal* (1982) KLR 417 and *James Wangalwa & Another Vs Agnes Nalika Chereto* (2012) eKLR)
16. The decree appealed against was delivered on 9th June 2021. The Appeal herein was filed on 7th July, 2021 and this application filed on 8th July, 2021. This was within a period of 30 days from the date of judgment and thus it can be said that this appeal application have been file timeously.
17. On the likelihood of suffering substantial loss, it is evident that the decretal sum together with costs is a tidy sum of money. The Appellant raises reasonable grounds that the Respondent's will not be able to refund the said sum without hardship if paid out to them. I note that the Respondent's have not filed an affidavit of means as a basis of assessing if he can repay the decretal sum (if paid out).
18. In the case of *G. N. Muema P/A (516) Mt View Maternity & Nursing Home Vs Miriam Maalim Bishar & Another* (2010) eKLR the court states as follows;

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”
19. In the case of *National Industrial Credit Bank Ltd Vs 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.”
20. Guided by the above authorities and in the absence of the requisite proof from the Respondent's that they are person's of means, I find that the Appellants have satisfied this court that they would suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.
21. On the security, the Appellants have indicated that they are ready and willing to deposit the decretal amount in court. The Respondent on the other hand states that the same has not been deposited in a joint account or in court and that shows bad faith.
22. The court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the



Respondent who seeks to enjoy the fruits of her judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of her judgment. See *Attorney General Vs Halal Meat Produces Limited* Civil Application No. Nairobi 270 of 2008; *Kenya Shell Ltd Vs Kibiru & another* (Supreme); *Mukuma Vs Abuoga* (1988) KLR 645.

23. The law is that where the Applicant succeeds, 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 is eventually unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.
24. This issue of adequacy of security was dealt with in the Court of Appeal in *Ndubiu Gitabi Vs Warugongo* (1988) KLR 621; IKAR 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 guarantees 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 judgment has been given. It is subject to 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 issues pending in the appeal. For that purpose, it matters not whether the plaintiff are secured in one way rather than the other, it would be easier for the defendants or if for any reasons they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no principles why they should not do so... The aim of the court in this case was to make sure, in an even handed manner, that there 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 any 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.”

Disposition

25. Taking all relevant factors into consideration. It would be just and proper to allow the appellant ventilated all issues raised in their appeal and have it determined on merit. I do grant stay of execution of the decree herein on condition that;
 - a. The Appellant’s/Applicant’s do deposit the entire decretal sum plus costs into a joint interest earning account held at a reputable bank in the joint names of the appellants advocate and the respondents advocates.
 - b. This condition is to be met within 30 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.
 - c. The costs of this Application are awarded to the Respondent.
26. It is so ordered.



READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS ON THIS 16TH DAY OF MARCH, 2023.

RAYOLA FRANCIS

JUDGE

In the presence of:-

