



Mubachia & another v AMN (Minor Suing through the Mother and Next Friend JNM) (Miscellaneous Civil Application E072 of 2022) [2023] KEHC 2164 (KLR) (23 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2164 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS CIVIL APPLICATION E072 OF 2022
FN MUCHEMI, J
MARCH 23, 2023**

BETWEEN

SAMUEL MUBACHIA 1ST APPLICANT

ANDREW MOSE ONGERI 2ND APPLICANT

AND

AMN (MINOR SUING THROUGH THE MOTHER AND NEXT FRIEND JNM) RESPONDENT

RULING

Brief Facts

1. This application dated 9th January 2023 brought under Section 3 and 3A of the [Civil Procedure Act](#), Order 22 Rule 22, Order 42 Rules 4 and 6 and Order 51 Rules 1 and 3 of the [Civil Procedure Rules](#) and Article 159 of the [Constitution of Kenya](#) seeks for orders for stay of execution of the judgment entered on 22nd September in Mukurweini PMCC No. E006 of 2021 and for leave to appeal out of time against the ruling delivered on 11th October 2022 in Mukurweini PMCC No. E006 of 2021.
2. The respondent opposed the application and filed a Replying Affidavit sworn on 9th December 2022.

Applicants' Case

3. It is the applicant deposes that judgment herein was delivered on 22nd September 2021 for the sum of Kshs. 269,550/- plus costs and interest. The applicants aver that judgment was entered *ex parte* as they did not defend themselves despite having filed all the requisite documents within time. Consequently, the applicants state that they filed an application dated 27th June 2022 seeking to set aside the *ex parte* judgment but the court dismissed it on 11th October 2022. Being aggrieved with the court's ruling, the applicants depose that they instructed their advocates to lodge an appeal. It was further argued that



the delay in lodging the appeal within the requisite statutory timelines was occasioned by the delay in obtaining a copy of the ruling. The advocates were therefore instructed a little later after obtaining the ruling.

4. The applicants aver that there are no orders of stay of execution in force and the respondent has commenced the execution process. Thus, the applicants depose that they stand to suffer irreparable loss and damage if the orders sought are not granted.
5. The applicants urge the court to adhere to natural justice, doctrines of equity and the constitution as they will be condemned unheard if they are not granted an opportunity to defend the suit. The applicants aver that no prejudice shall be occasioned to the respondent if the orders sought are granted.

The Respondent's Case

6. The respondent states that the application is an abuse of the court process, unmerited, vexatious and ought to be dismissed with costs. The respondent contends that the application and the intended appeal is an afterthought and a means of delaying her from enjoying the fruits of her judgment.
7. The respondent states that the judgment in issue is a monetary decree and no substantial loss shall be suffered by the applicants as she is a woman of means being a large-scale farmer. She avers that in the event the decretal amount is paid to her and the appeal is successful, she has the financial means and ability to refund the same.
8. The respondent avers that in the event the court is inclined to grant the orders sought, the applicants ought to be directed to deposit the decretal amount with costs in court pending the outcome of the appeal.
9. Parties disposed of this application by way of written submissions.

The Applicants' Submissions

10. The applicants rely on Order 42 Rule 6 of the *Civil Procedure Rules* and the case of *Global Tours & Travels Ltd* Nairobi High Court Winding Up Cause No. 43 of 2000 and submit that the court has the discretion to grant orders for stay of execution. The applicants argue that if the orders sought are not granted, the appeal shall be rendered nugatory and they shall suffer irreparable damage as the respondent may proceed to execute there being no stay of execution in place. Furthermore, the applicants contend that the ruling delivered on 11th October 2022 was to be delivered on notice however, they did not receive any notice. It is further stated that the applicant discovered that the ruling had been delivered when they perused the file to ascertain the position of the matter. To support their contentions, the applicants rely on the cases of *Butt vs Rent Restriction Tribunal* [1982] KLR 417; *Stanley Karanja Wainaina & Another vs Ridon Anyangu Mutubwa* [2016] eKLR and *House Finance Company of Kenya vs Sharok Kber Mohammed Ali Hirji & Another* [2015] eKLR.
11. The applicants submit that their Memorandum of Appeal raises triable issues namely the award of compensatory damages was in breach of the common law doctrine of *stare decisis*. As such, the applicants contend that their intended appeal has high chances of success.
12. The applicants contend that the decree is for a substantial sum of money and if paid to the respondent, they are apprehensive that the whole sum shall not be recovered.
13. The applicants rely on the cases of *Water Resources Management Authority vs Krystalline Salt Limited* [2018] eKLR and *Shanzu Beach Resort Limited v Crown Marble & Quartz Limited* [2020] eKLR and



submit that they are willing to furnish security for the performance of the decree by way of a bank guarantee from Family Bank.

14. The applicants submit that the orders sought shall not occasion any prejudice to the respondent and urge the court to grant them the orders sought.

The Respondent's Submissions

15. The respondent submits that she instituted the suit in PMCC No. E006 of 2021 on 19th May 2021 and summons to enter appearance were issued and served on 20th May 2021 on the applicants. She further submits that both applicants were served through registered post and as a courtesy, copies of the plaint and summons were served upon the insurance company through G4S courier. The respondent states that she filed for a request for judgment on 20th September 2021, which was 5 months after the statutory period and interlocutory judgment was entered on 21st December 2021.
16. The respondent relies on Order 42 Rule 6 of the *Civil Procedure Rules* and the case of *Simon Wahome Wachichi vs Iriaini Tea Factory & 2 Others* (2016) eKLR and submits that the applicants have not met the threshold of granting orders of stay of execution. Moreover, the respondent submits that the applicants' insurer requested her to undergo a second medical examination on 4th June 2019 whereas on 24th June 2021, they purported to return the summons and the plaint for proper service upon their clients. The respondent contends that the applicants are estopped from seeking setting aside of the ruling when they made a choice to stay aloof to the proceedings.
17. The respondent states that in the event the court is inclined to grant the orders sought, the applicants to be directed to pay Kshs. 50,000/- as throw away costs and pay her half the decretal sum as security for the performance of the decree.

The Law

Whether the applicants have satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

18. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) *Civil Procedure Rules*. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:-
 - “ 1. 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 orders 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 1st 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.

19. Thus under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:
 1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; and
 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
20. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-
 1. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 2. Secondly, 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.
 3. 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.
 4. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

Substantial loss

21. Substantial loss was clearly explained in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR:-

“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.
22. The applicant has an obligation under order 42 Rule 6 to demonstrate substantial loss. It is argued that the respondent may not be in a position to refund the decretal amount for it is a colossal sum. The



decretal amount is Kshs.269,550/= which in my view cannot be referred to as a substantial amount. The respondent argues that she is a person of means based on her occupation as a large scale farmer.

23. The respondent further argues that this being a money decree, no substantial loss is likely to be suffered. It is trite law that in regard to a money decree, the applicant may not prove substantial loss because the amount may be recovered even in a successful appeal. In this case it is not in dispute that the respondent is a large scale farmer and the decretal sum is not substantial by any standards. The fear expressed by the applicant that the respondent is incapable of refunding is neither real nor convincing.

24. In the case of *National Industrial Credit Bank Limited vs Aquinas Francis Wasike and Another* [2006] eKLR the Court of Appeal stated that:-

This court has said before and it would bear repeating that while the legal duty is on the applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.

25. It is my considered view that the applicant has failed to demonstrate that he will suffer substantial loss if the orders are not granted.

Has the application been made without delay.

26. The instant application was filed on 15th November 2022 and the ruling appealed against was delivered on 11th October 2022. This is a duration of about five (5) days. The applicants have not given any explanation as to the delay in filing this application. However, I find the said period not inordinate. The delay is excusable in my view.

Security of costs.

27. The purpose of security was explained in the case of *Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR the court stated:-

“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 the 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.

28. Evidently, the issue of security is discretionary and it is upon the court to determine the same even where the applicant has not given any offer. Notably, the applicants have stated that they are willing to offer security in the form of a bank guarantee from Family Bank. The respondent has argued that in the event the court should consider allowing the application herein, it ought to direct the applicants to pay Kshs. 50,000/- as throw away costs and to pay her half the decretal sum as security for performance of the decree which this court will consider in the event that this application is successful.



29. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited vs Guardian Bank Limited* [2007] eKLR the court stated:-

“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 judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

30. The court in granting stay has to carry out a balancing act between the rights of the two parties. The issue that arises is whether there is just cause for depriving the respondent her right of enjoying her judgment. The respondent states that the applicant has not satisfied the conditions to warrant it stay of execution. The applicants on the other hand states that their appeal has high chances of success and if the orders sought are not granted, the appeal shall be rendered nugatory.
31. I have perused the grounds of appeal and without going to the merits of the appeal, noted that they do not raise any arguable points of facts or law. The applicant cannot convince this court that his appeal has high chances of success. However, the nature and facts of the case as well as the applicants’ right of appeal ought to be considered.

Whether the court should exercise its discretion to grant the applicants leave to file their appeal out of time;

32. Section 79G of the *Civil Procedure Act* states:-

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

33. It is clear from the wording of section 79G of the *Civil Procedure Act*, that before the court considers extension of time, an applicant must satisfy the court that that he has good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited vs William Muthama Kitonyi* [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.
34. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated *inter alia* that:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;



- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.

35. Similarly in the case of *Paul Musili Wambua vs Attorney General & 2 Others* [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

36. The respondent has been waiting for over one (1) year to enjoy the fruits of her judgement. If orders sought in this application are granted, the respondent is likely to suffer prejudice due to the prolonged waiting period. Balancing the interests of both parties is a delicate act which tends to favour the respondent more than the applicants given the fact that the applicants have a history of indolence from the date of delivery of judgement.

37. Considering the foregoing, I hereby grant the following orders:-

- a. That orders for stay of execution are hereby granted on condition that the applicants do deposit the whole decretal amount in an interest earning account of the advocates on record for the parties within 30 days failure to which the stay orders will automatically lapse.
- b. That leave of fourteen (14) days is hereby granted to the applicant to lodge his appeal against the ruling delivered on 11th October 2022 in Mukurweini SPMCC No. E006 of 2021 in default of which the stay orders herein will stand vacated.
- c. That the costs of this application shall abide in the appeal.

38. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 23RD DAY OF MARCH, 2023.

F. MUCHEMI

JUDGE

Ruling delivered through videolink this 23rd day of March, 2023

