**Mugambi & another v Ali (Civil Appeal 6 of 2022)**
**[2023] KEHC 2144 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2144 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CIVIL APPEAL 6 OF 2022**

**SM GITHINJI, J**

**MARCH 16, 2023**

**BETWEEN**

**VICTOR MECHA MUGAMBI ..... 1ST APPLICANT**

**JOSEPH ONCHWARI ..... 2ND APPLICANT**

**AND**

**OMAR KOMORA ALI ALIAS OMAR MOHAMED ALIAS OMAR MOHHAMED ..... RESPONDENT**

***(An Appeal from the Ruling of Hon. Magistrate S.D.Sitati – Resident Magistrate in Kilifi Cmcc No.12 of 2020 delivered on 24th January, 2022)***

**RULING**

1 Following a Judgment delivered on 27th September 2021 in Kilifi Magistrate's Court CMCC NO.12 of 2020 by Hon. S.D Sitati, the Applicant filed the present appeal on 31st January 2022. Before the same could be heard and determined, the Applicants filed a Notice of Motion application dated 20th July 2022 seeking the following orders:-

1. Spent.
2. Spent.
3. That the Honourable Court be pleased to grant a stay of execution of the judgment and/or decree issued by the Honourable S.D. Sitati RM Resident Magistrate Court Kilifi CMCC No. 12 of 2020 delivered on 8th June 2022 pending the hearing and determination of the intended Appeal.
4. That upon prayer 1 and 2 being granted, the Honourable court be pleased to fix the appeal for direction.

5. That the costs of this application be in the cause.

2 The application is premised on the grounds enumerated on the face of it and the supporting affidavit sworn on 20th July 2022 by Edmond Mirembe who deposed therein that judgment was entered against the Applicants at a sum of Kshs. 4,667,480/- for general damages, loss of earnings, special damages, costs and interests; and 100% liability entered. The Applicants were apprehensive that the Respondent may levy execution which will render the appeal nugatory.

3 In response to the application, the Respondent swore a replying affidavit dated 29th July 2022 stating that the stay of execution was granted by the subordinate court upon delivery of the impugned judgment and that the present application was filed approximately 269 days after the expiry of the said stay, without any plausible explanation for the delay. The respondent urged the court to dismiss the application and assist him to compel the Applicants to comply with the said judgment.

4 Parties agreed to file written submission which they did. I have perused the application, affidavits and submissions filed by both parties. I find that the sole issue for determination is whether this court should grant stay of execution of the impugned judgment.

**Analysis and Determination**

5 I must first point out the mix-up presented by the Applicants. They seek stay of a judgment delivered by the lower court on 8th June 2022 yet the judgment referred to in their grounds and affidavit is one dated 27th September 2021. I also note that the memorandum of appeal on record is in relation to a ruling of the same court delivered on 24th January 2022. I have nonetheless perused the submissions filed; it appears to me that the judgment sought to be stayed is the one delivered on 27th September 2021.

6 Order 42 rule 6 of the *Civil Procedure Rules*, 2010 lays down the conditions which an applicant must satisfy in order to deserve orders of stay of execution pending an appeal. It provides 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 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.

7 The court in the case *HE -v- SM* [2020] eKLR while considering an application for stay of execution pending appeal had this to say:

13. The court, in *RWW v EKW* [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

> " The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

8. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent."

9 It is trite therefore for the Applicants to show that their application has satisfied the below set criteria: -

(a) No reasonable delay to file the application.

(b) The applicant must demonstrate substantial loss.

(c) Sufficient cause to grant the relief.

(d) Security for due performance of the decree.

10 As regards the time taken to file the application, the impugned judgment herein was delivered on 27th September 2021 and the present application filed on 26th July 2022, approximately 10 months later. No explanation has been given for such a delay. It is my considered view that this delay is not reasonable. Indeed, it appears to me that the present application was an afterthought, brought after the Applicants realized that the Respondent had commenced execution.

11 On substantial loss, the court in *James Wangalwa & Another -v- Agnes Naliaka Cheseto* [2012] eKLR, observed as follows:

> 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."

12 Further, in *Antoine Ndiaye v African Virtual University* [2015] eKLR the court explained as follows: -

> So the applicant must show he will be totally ruined in relation to the appeal if he pays over the decretal sum to the respondent. In other words, he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money should the appeal succeed. Therefore, in a money decree, like is the case here, substantial loss lies in the inability of the respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the respondent cannot pay back. The onus of proving substantial loss and in effect that the respondent cannot repay the decretal sum if the appeal is successful lies with the applicant; follows after the long age legal adage that he who alleges must proof (sic). Real and cogent evidence must be placed before the Court to show that the respondent is not able to refund the decretal sum should the appeal succeed... The inquiry for purposes of stay pending appeal under Order 42 Rule

6 of the CPR is not really about the merits of the appeal but rather the loss which will be occasioned by satisfaction of the appeal in the event the appeal succeeds."

13 In the present case, the Applicants averred that they stand to suffer substantial loss in the event that the decretal sum is paid, for the reason that the Respondent's means were unknown. Guided by the above reasoning in the Antoine case [*supra*]. I am not convinced that the Applicants satisfied their evidential burden. It is not enough to claim they will suffer substantial loss because the respondent has no known means. The Respondent indeed denied this position.

14 It must be noted that both parties to a suit have rights; the Applicants to their appeal which includes prospects of success; and the Respondent to the fruits of Judgment, which right should only be restricted or postponed on sufficient cause. So far, I have found no sufficient cause to do so.

15 That notwithstanding, I note that the Applicants are willing to deposit a sum of Kshs. 3,000,000/- being security for costs; and for purposes of ensuring a balance to both parties enjoying their respective rights.

16 I hereby do exercise the discretion in favour of the applicants and order that the applicants do deposit a sum of Kshs. 3,000,000/= in an interest earning account in the name of both Advocates in this matter, within a period of 30 days from the date hereof. Failure to do so vacates the said order.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 16TH DAY OF DECEMBER, 2022.**

**.....**

**S.M. GITHINJI**

**JUDGE**

-In the Absence of the parties.