Mutua & another v Gaturu (Commercial Appeal 38 of 2019)
[2023] KEHC 1738 (KLR) (Commercial and Tax) (3 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1738 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL 38 OF 2019

A MSHILA, J

MARCH 3, 2023

BETWEEN

CHARLES MUTHOKA MUTUA ..... 1ST APPELLANT

SIMON KIMUTAI CHEPKWONY ..... 2ND APPELLANT

AND

EVANS THIGA GATURU ..... RESPONDENT

RULING

Background

1. The Notice of Motion dated December 3, 2021 was brought under Order 2 Rule 15, Orders 17 and 51 of the *Civil Procedure Rules*, Section 1A, 1B, 2, 3 and 3A of the *Civil Procedure Act* for the following orders;

    a. The Appellant's application Dated November 22, 2019 be dismissed with costs for want of Prosecution.

    b. The Appellant/Respondent's Interim Stay of Execution made on December 4, 2019, and extended on January 28, 2021 be set aside and vacated, so as to facilitate execution of the Decree, made on January 26, 2012 before it expires, so as to recover the decretal sum of Kshs. 3,994,168/14 plus interest at court rates from August 26, 2019 until payment in full.

    c. The Costs of this Application be borne by the Appellants jointly and/or severally, in any event.

2. The application was supported by the sworn Affidavit of Evans Thiga Gaturu who stated that the Respondents obtained an interim order for stay of execution irregularly without hearing the Applicant/Respondent on December 4, 2019 after the Applicant/Respondent filed an application to

set aside the irregular order for stay made on December 11, 2019, for being condemned unheard, the trial judge set aside the irregular orders made on December 11, 2019; on January 28, 2021 but extended the ex parte order for stay until the final determination of the Appellants'/Respondents' Application dated November 22, 2019.

3. The Appellant/Respondent filed the Application for Stay of Execution of Decree, Dated November 22, 2019, with the sole intention of just obtaining the Interim Order for Stay ex parte, and thereafter let their Application go to sleep so as to buy as much time as possible with a view of delaying the Decree Holder from enjoying his fruits of his judgment by merely citing a non-existent moratorium, which does not arise.

4. The Appellants/Applicants/Respondents sole intention of abusing the due process of the Court, by filing an application for stay of execution and obtain an ex parte order for Stay of Execution, irregularily which was set aside on January 28, 2021 by the Judge who held that the Applicant had been condemned unheard, but extended the order for Stay on January 28, 2021, until the final determination of their application dated November 22, 2019, which they have refused, failed and/or neglected to prosecute up to now more than Ten (10) months later.

5. After the Appellants/Applicants' ex parte Order was set aside on January 8, 2021 for having been granted irregularily by denying the Applicant his right to be heard; the Appellants realized that they have no Case against him and refused to fix their Application for hearing, and misled the Judge on two (2) occasions, when the Application was before the Judge for hearing at the behest of the Applicant, that they were waiting for the proceedings so as to prosecute their Appeal, so as to side-line and cover-up the Fact that they had failed to fix their Application for hearing, as ordered by the Judge on January 28, 2021, which has resulted in an abuse of the process of the court; and caused a miscarriage of justice to the Applicant.

Applicant's Case

6. It was the Applicant's case that he Applicant/Respondent herein is a Decree-holder, whose efforts to enjoy his fruits have been met with nothing but frustration by the Appellants. The intention of the Appellants right from the beginning has been to lock doors in which the Applicant herein and the Decree-holder can execute. It remains their intention and the premise of the Application, leading to issuance of the impugned Orders. In any event, the Applicant herein posits that the threshold for issuing the Order of Stay of Execution was not met.In determining what constitutes good cause, the Court is guided by Order 42 Rule 6 of the Civil Procedure Rules.

7. The Appellants did not demonstrate to the Court how he was going to suffer substantial loss. Secondly, the Appellants/Applicants are guilty of inordinate delay, their Application having been filed more than Seven (7) Years after the subordinate Court pronounced itself with finality, and a Decree extracted on January 20, 2012 and served upon them. Their indolence has seen them sleep on their Application(s), and only come to realize that they need to prosecute them too late in the day. Thirdly and most fundamental, is the fact that the Appellant has not furnished any security for the due performance of the Applicant's Decree. The Decree issued on January 20, 2012, and the Application was made on November 22, 2019, more than Seven (7) years and 11 months which cannot be said to be without undue delay, as provided in law.

8. The Applicant contended that the Appellant alleged that there exists a moratorium by the commissioner of Insurance against United Insurance, Company Ltd., and it is on the basis of the purported moratorium, that the Insurance Company is unable to pay the Decree holder. The Appellant cannot hide behind the moratorium, in his bid to avert execution. The cumulative result of

the preceding backdrop is that the Court should exercise its discretion in favour of the Respondent/ Applicant.

9. Further, the 1st Appellant Mr Simon Kimutai Chepkwony against whom the Decree-Holder wished to Proceed; refused to appear in Court on November 25, 2019 in total disobedience of the Court Order of November 25, 2019, and instead, rushed to this Court and obtained an Order for Stay of Execution unlawfully; and illegally; and prayed to set aside the Order for Stay of Execution, and thus to facilitate the quick recovery of the Respondent's/Decree-holder's Money (Kshs. 3,994,168/14) so that he can at last enjoy the fruits of his ten (10) year old judgment whose settlement the Appellants/Respondents have prevented him from enjoying.

Respondents' Case

10. In response, it was the Respondents' argument that it is a matter of public knowledge or by litigants that typed proceedings are prepared by the registry and the registry has its own system of operations. What else was the Respondent/Appellant supposed to do when he had made the request asking for the typed proceedings? The Respondent followed on the same physically upon making the request. Also, the Appellant in the Replying Affidavit sworn by Simon Kimutai Chepkwony attached evidence to support the fact that such a request was made.

11. The Applicant submitted that the delay in getting the typed proceedings should not, even by a mere thought of it, be apportioned to the Appellant. On this the Applicant relied on the Court of Appeal decision in *Rodgers Abisai T/A & Company Advocates vs Wachira Waruru & Another (2014) eKLR*.

12. The crux of the Applicant's Application is primarily based on one assumption, and the assumption is that the Appellant does not want to prosecute their Application dated November 22, 2019. The Application and the Supporting Affidavit sworn by Evans Thiga Gaturu proceeds on that lane of assumption as stated at paragraph 5 of the Notice of Motion Application.

13. The Appellant requested the typed proceedings and that cannot be termed as sleep. Further, the Appellant also provided evidence of acknowledgement of that request. The delay in getting the typed proceedings were not orchestrated by the Appellant and thus the second issue of merit of the application does not even arise. Consequently, the Application is not merited.

Issues For Determination

14. Having considered the Application, response and the written submissions, the court drafts the following issues for determination;

    a. Whether an order of stay of execution should remain in force?

Analysis

Whether an order of stay of execution should remain in force

15. The purpose of the stay of execution pending appeal was reiterated in *RWW vs EKW [2019] eKLR*, where the court stated:

> ' 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. 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.'

16. In light of the above, the Court takes note of the fact that the orders granted were unfettered with no provision made for depositing of security or otherwise; the appellants continue to enjoy these orders and have maybe become indolent; in balancing the interests of the applicant with those of the appellant this court will allow the appellants to continue enjoying the orders but with a condition to expedite the lodging of the Record of Appeal to enable the matter to be heard and determined.

Findings And Determination

17. The Application is thus found to be partially successful and the order of stay of execution pending appeal is hereby varied by extending the same for a limited period of Ninety (90) days to enable the Appellants prepare and lodge the Record of Appeal.

    i. In default the stay of execution orders granted to the Appellants shall stand vacated.

    ii. Mention on March 14, 2023 before the Deputy Registrar for compliance.

    iii. Each party to bear their own costs of this application.

Orders Accordingly

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 3rd DAY OF MARCH, 2023.

HON. A. MSHILA

JUDGE

In the presence of;-

Kirunda for the Applicant/Respondent

Ouma holding brief for Obara for the Respondents

Lucy----------Court Assistant