Machira t/a Machira & Co Advocates v Waruru & another (Civil Suit 1607 of 2002) [2023] KEHC 1745 (KLR) (Civ) (2 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1745 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 1607 OF 2002

CW MEOLI, J

MARCH 2, 2023

BETWEEN

JP MACHIRA T/A MACHIRA & CO ADVOCATES ..... PLAINTIFF

AND

WACHIRA WARURU ..... 1ST DEFENDANT

STANDARD GROUP LIMITED ..... 2ND DEFENDANT

RULING

1. The motion dated March 23, 2021 filed by Wachira Waruru and the Standard Group Limited (hereafter the 1st and 2nd defendant/applicant(s)) seeks to stay execution of the judgment delivered in the cause in favour of the plaintiff, J.P Machira t/a Machira & Co Advocates (hereafter the respondent) on December 17, 2020, pending the hearing and determination of the appeal herein. The motion is expressed to be brought under section 1A, 1B, 3A & 94 of the *Civil Procedure Act*, order 21 rule 8(2) & (3), and order 42 rules 6(1) & (2) of the *Civil Procedure Rules* *inter alia*. It is premised on the grounds on the face of the motion as amplified in the supporting affidavit sworn by Milicent Ngetich, who describes herself as the Company Secretary of the 2nd applicant, conversant with the facts of the matter, competent and duly authorized to depose.

2. To the effect that the applicants are aggrieved with the judgment delivered herein and have preferred an appeal to the Court of Appeal and that the decretal sum is colossal and the applicants are apprehensive that the respondent may proceed with execution, which event would result in substantial loss to the applicants, as the respondent's means and capacity to refund the decretal sum if the appeal eventually succeeds is unknown. That the appeal is therefore likely to be rendered nugatory. The deponent expresses the applicants' willingness to provide security for the due performance of the decree by a bank guarantee or insurance bond given financial constraints of the 2nd applicant arising from the Covid-19

pandemic. She asserts that the instant motion has been made without unreasonable delay and that it is in the interest of justice that it be allowed.

3. The motion is opposed by way of a replying affidavit dated February 4, 2022 deposed by the respondent. He contends that there has been inordinate and unexplained delay in filing the instant motion and that the appeal herein lacks merit; that he is a person of reasonable means having practiced law for over forty years and invested through acquisition of various properties and is hence capable of refunding the decretal sum should the appeal succeed. That the applicants' offer to provide security by way of bank guarantee or insurance bond indicates reluctance to settle the decretal sum whereas the suit has been pending in court for over twenty years and he is entitled to enjoy the fruits of successful litigation. He asserted that the motion is without merit and ought to be dismissed.

4. The motion was canvassed by way of written submissions. As regards the applicable principles and conditions from grant of an order of stay of execution pending appeal, the applicants anchored their submissions on the provisions of order 42 rule 6 of the *Civil Procedure Rules* (CPR) and the decision in *Mukuma v Abuoga* [1988] eKLR. Concerning substantial loss counsel placed reliance on the decisions in *Charles Bundi Okaro v National Industrial Credit Bank Limited* [2012] eKLR and *Focin Motorcycle Co Ltd v Ann Wambui Wangui & another* [2018] eKLR to assert that the respondent has failed to discharge the burden of proving his ability to refund the decretal sum by way proving his financial position. That there was no demonstration that the properties whose titles were presented by the respondent are free from encumbrances and therefore the applicants' apprehension of substantial loss has not been displaced.

5. Calling to aid the decision in *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] eKLR counsel submitted that in the circumstances of the case, the motion was filed within reasonable time and in good faith. And that the applicants' expressed willingness to provide security justifies the exercise of the court's discretion in their favour by allowing the motion.

6. On behalf of the respondent, counsel similarly anchored his submissions on the applicable principles under the provisions of order 42 rule 6 (2) of the CPR. Concerning substantial loss, counsel relied on a raft of decisions including *Kenya Shell Ltd v Benjamin Kabiru & another* [1989] eKLR, *Machira t/a Machira & Co Advocates v East African Standard* [2002] eKLR, *Charles Bundi Okaro v National Industrial Credit Limited* [2012] eKLR, and *Wangethi Mwangi & another v J.P Machira t/a Machira & Co Advocates* [2012] eKLR. His position was that the respondent has demonstrated that he is a person of means and the applicants bear the burden of controverting the same. That in absence of proof of substantial loss, the motion ought to fail. On the timeliness of the motion , counsel relied on the cases of *Jaber Mohsen Ali* (supra) and *Caleb Kipkorir Bett v Joseph Wanjau* [2021] eKLR. He pointed out that while the judgment herein was delivered on December 17, 2020 the instant motion was filed on March 24, 2021 and the applicants have not given a satisfactory explanation for the delay. Lastly, counsel dismissed the form of security offered by the applicants as unreliable and urged the court to dismiss the motion with costs.

7. The court has considered the material canvassed in respect of the motion. It is pertinent to state that at this stage, the court is not concerned with the merits of the appeal. The power of the court to grant stay of execution of a decree pending appeal is discretionary, however the discretion should be exercised judicially. See *Butt v Rent Restriction Tribunal* (supra). The applicants prayer for stay of execution pending appeal, is brought under order 42 rule 6 of the *Civil Procedure Rules* which provides that:

> "(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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. The cornerstone consideration in the exercise of the discretion is whether the applicants have demonstrated the likelihood of suffering substantial loss if stay is denied. One of the most enduring legal authorities on the issue of substantial loss is the case of *Kenya Shell Ltd v Kibiru & another* [1986] KLR 410. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the Shell Case are especially pertinent. These are that:

"1. .....

2. In considering an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.

3. In applications for stay, the court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.

4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid."

9. The decision of Platt Ag JA, in the Shell Case, in my humble view sets out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. Platt Ag JA (as he then was) stated inter alia that:

"The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in order xli rule 4 (now order 42 rule 6(2)) of the *Civil Procedure Rules* was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts... (emphasis added)"

10. The learned judge continued to observe that: -

> "It is usually a good rule to see if order xli rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money." (emphasis added)

11. Earlier on, Hancox JA in his ruling observed that:-

> "It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would... render the appeal nugatory. This is shown by the following passage of Cotton L J in *Wilson v Church (No 2)* (1879) 12ChD 454 at page 458 where he said: -
>
> > "I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory."
>
> As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause."

12. By their affidavit material the applicants express the apprehension that they might suffer substantial loss if execution proceeds as the respondent's financial means to refund the decretal sum if the appeal eventually succeeds are unknown. Hence the likelihood of the successful appeal being rendered nugatory as the applicants would then be compelled to commence recovery proceedings against the respondent. In the case of *National Industrial Credit Bank Ltd v 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 an applicants 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 applicants 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 – see for example section 112 of the *Evidence Act*, chapter 80 Laws of Kenya."

13. The respondent countered the applicants' assertion by stating that he is a person of reasonable means having practiced law for over forty years and has acquired various properties and therefore capable of refunding the decretal sum should the applicants appeal succeed. The applicants have made out a reasonable apprehension, and the burden shifted on respondent to controvert the assertion by proving his own means. The respondent in justifying his reasonable means attached to his affidavit material as annexure "JPM1" and "JPM2" being copies of deeds of title to properties he owns as a demonstration of his ability to refund the decretal sum should the applicants appeal succeed. It was the applicants contention that the respondent did neither tendered proof of his ability to refund the decretal sum

by way of evincing his financial position nor demonstrate that the titles he tendered are free from encumbrances.

14. The foregoing argument seems valid ex facie, as the court is at a disadvantage in establishing whether the properties are encumbered. Moreover, the respondent did not attach thereto current official search certificates from the lands registry in allaying the applicants' fear of substantial loss. Not to mention that while ready cash in a bank account is more versatile, turning real property into cash is an exercise fraught with many unknowns. In my view, the material tendered by the respondent is insufficient to demonstrate his ability to promptly refund the decretal sum in the event the applicant's appeal succeeds. The judgment award herein is Kshs. 6,000,000/- which in the court's considered opinion is a substantial sum. As stated in the Shell case, substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what must be prevented.

15. On the question of delay, the judgment was delivered on December 17, 2020 and the instant motion filed on March 24, 2021 which is almost two months later , or less if the Christmas period is discounted. While in my view the delay is not inordinate, I agree with the respondent that no cogent reason has been offered for the delay. Such a short period of delay however should not defeat an otherwise meritorious application.

16. Concerning the requirement for security, the applicants express the willingness to provide security for the due performance of the decree by either issuing a bank guarantee or insurance bond. Here, I agree with the respondent's reservations; neither of these compares with hard cash. No party ought to be allowed to trifle with the important requirement for security and the applicants who seek the benefit of a stay order are obligated to provide a solid security for the due performance of the decree.

17. Ultimately the applicants' entitlement to pursue their undisputed right of appeal must be balanced against the respondent's equal rights as a decree holder entitled to the sums decreed. The words stated in *Nduhiu Gitahi & another v Anna Wambui Warugongo* [1988] 2 KAR, citing the decision of Sir John Donaldson M. R. in *Rosengrens v Safe Deposit Centres Limited* [1984] 3 ALLER 198 and others, are apt:

> " We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to give advantage the defendant while giving no legitimate advantage to the plaintiff... It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal..."

18. Reviewing the material before it, the court is persuaded that the justice of the matter lies in allowing the motion dated March 23, 2021 on condition that the applicants deposit into court the sum of Kes 3000,000/- (three million) by close of business on April 2, 2023. Costs will be in the cause.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 2ND DAY OF MARCH 2023

C.MEOLI

JUDGE

In the presence of:

For the Applicants: Mr. Ogutu

For the Respondent: Mr.Kimondo Mubea