Mbukoni Services Ltd & another v Ngoti (Civil Appeal 027 of 2022) [2023] KEHC 3165 (KLR) (17 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3165 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL 027 OF 2022

TM MATHEKA, J

APRIL 17, 2023

BETWEEN

MBUKONI SERVICES LTD ..... 1ST APPELLANT

MR. CHARO ALIAS MR. KYALO ..... 2ND APPELLANT

AND

DANIEL MUSIMAMI NGOTI ALIAS DANIEL MUSIMAMI IKGOTI ..... RESPONDENT

RULING

1. What is before me is the application dated May 9, 2022 brought under certificate of urgency under Sections 3A, 79G and 95 of the *Civil Procedure Act*, Order 22 Rule 22, Order 42 Rules 4,6 & 7, Order 50 Rule 6 and Order 51 Rules 1 & 3 of the *Civil Procedure Rules 2010*. It seeks the following orders:

    a. Spent.

    b. Spent.

    c. That this honorable Court be pleased to order a stay of execution of the judgment in Makindu PMCC 366 of 2017 delivered by Honorable J D Karani Resident Magistrate on March 31, 2022 pending the hearing and determination of this appeal.

    d. Spent

    e. That the Appellant/Applicant be allowed to furnish the Court with bank guarantee as security from a reputable bank pending the hearing and determination of the intended appeal and the instant application.

f. That the costs of this application abide the outcome of the appeal.

2. The application is supported by the grounds on its face and the Affidavit of Kelvin Ngure sworn on the same day. He depones that he is the Deputy Claims Manager at Directline Assurance Company, the insurers of Motor Vehicle Registration No KBR 116B at whose instance Makindu Civil Suit No 366 of 2017 is defended.

3. He depones that they are dissatisfied with the whole judgment on liability and quantum and the appeal will be rendered nugatory if the imminent execution is carried out; that the applicants are apprehensive about the inability of the respondent to refund the decretal sum if the appeal is successful. He has exhibited copies of the judgment and bank guarantee as KN 1 and 2 respectively.

4. The application is opposed through the replying affidavit of Shadrack Mwanzia Musimami sworn on June 6, 2022 where he depones that he is the administrator of the estate of Daniel Musimami Ngoti and has authority of his co-administrator to swear the affidavit. Copies of letters of administration and authority are exhibited as SMM 1 and 2.

5. It is his position that the application is a nullity and non-starter as it is filed against a deceased person. A copy of death certificate is exhibited as SMM 3. Further, that, the supporting affidavit is defective as the deponent lacks capacity and has not demonstrated the nexus between him and the applicants, and neither has he demonstrated that he has the to swear the affidavit on behalf of the applicants.

6. He depones further that the applicants have not explained the delay of more than a month in bringing this application; or the alleged substantial loss they will suffer if stay is not granted. He contends that an appeal cannot be rendered nugatory by a money decree particularly where substantial loss has not been demonstrated. On security he takes the position that what is offered is untenable in law as it is from a third party who is not privy to these proceedings thus unenforceable.

7. The application was canvassed through written submissions.

The Applicants' Submissions

8. The applicants submit that the appeal is arguable as the award is excessive and not proportionate to the injuries suffered. They rely on *Kenya Revenue Authority v Sidney Keitany Changole & 3 Others (2015) eKLR* where the Court of Appeal held that;

> " This Court has further held that the applicant need only prove or establish one arguable point noting that an arguable appeal is not necessarily one that will succeed but one that is not frivolous."

9. On whether substantial loss will occur if stay is declined, they submit that the affidavits in support have specifically stated that the respondent's means are unknown hence a high likelihood that he will not be able to refund the decretal amount. They contend that the respondent has neither disclosed nor furnished the Court with any documentary evidence to prove his financial standing. They rely on *Edward Kamau & Anor v Hannah Mukui Gichuki & Anor (2015) eKLR* where the Court (Aburili J) stated that;

> " This Court appreciates that the applicants being a party seeking favorable exercise of the court's discretion is under a legal duty to place some material before the court upon which such discretion should be exercised. In other words, they should prove that the respondent is impecunious that if the decretal sum is paid then they will not recoup should the appeal succeed, thereby rendering it nugatory. They have also argued that although the respondent

is offering a bank guarantee, that is not deposed on her affidavit of means." I am in agreement with the applicants that in the absence of an affidavit of means, it may be construed that the respondent is not possessed of sufficient means and therefore not in a position to reimburse decretal money should the appeal succeed"

10. They submit that the application was filed within the time prescribed by the law and that they are ready and willing to provide security in the form of a bank guarantee. They rely on *Gianfranco Manenthi & Anor v Africa Merchant Assurance Co Ltd (2019) eKLR* where the Court observed that;

> " The applicant must show and meet the condition of payment of security for due performance of the decree..... order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the Court that if the appellant fails to succeed on appeal, there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree."

The Respondent's Submissions

11. The respondent submits that the application is a non-starter as it is against a deceased person. That the applicants were aware of this fact as the substitution was done in the lower Court before the suit was heard and determined. They rely inter alia on the case of *Eunice Kavindu Kioko & Anor v Kenya Commercial Bank Ltd (2014) eKLR* where the Court stated;

> " Then the question is, then what after inter parte hearing? The Court signaled the defect from the moment the matter was lodged but the Applicant's Counsel did not bother to rectify the apparent defect on the same. The Court cannot suo motu amend pleadings for the party nor invoke Article 159(2) d of the *Constitution* and Order 3A *Civil Procedure Act* to favor a party in the circumstances.'

12. He submits that the affidavit in support of the application is defective in that the deponent lacks capacity and there is no nexus between the deponent and applicants. He contends that a deponent who swears an affidavit in a representative capacity must establish such capacity and authorization. He relies on *Akamba Public Road Services v Abdikadir Adan Galgalo (2016) eKLR* for the submission that the principle of subrogation is only applicable after the insurer compensates the insured. It is also his submission that no evidence has been adduced to show that Directline Assurance are the insurers of the suit motor vehicle.

13. As to whether the applicants have satisfied the conditions for grant of stay orders, the respondent submits in the negative. He submits that this application was filed more than a month after delivery of judgment and there is no explanation for the delay. He contends that any delay, irrespective of the length, must be explained. He relies on *Nairobi City County v Salima Enterprises Ltd (2020) eKLR* where the Court of Appeal held that even a day's delay ought to be sufficiently explained.

14. He submits that the applicants have not sufficiently shown the substantial loss that will result if the stay is not granted. He relies on *Antoine Ndiaye v African Virtual University (2015) eKLR* where the Court (Gikonyo J) stated:

> " This legal burden does not shift to the respondent to prove he is possessed of means to make a refund.....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 prove."

15. As for security, the respondent submits that the bank guarantee offered is not sufficient. He contends that it is from a third party that is not a party to these proceedings hence cannot be enforced against it. He relies on *Arun C Shama v Ashana Raikundalia T/A Raikundalia & Co Advocates & 2 Others (2014) eKLR* where the Court (Gikonyo J) stated that;

> " The applicants are proposing to deposit land known as Nguirubi/ Nduini/333 'B' which belongs to and is in the name of Anne Waithera Haruni as security in lieu of deposit of the decretal sum.....the alternative security being offered presents several problems. The first one-the security is owned by another person. This is a civil suit where the applicants are judgment debtors but the applicants seem to have borrowed from the criminal procedures where a person stands surety for the attendance of another in Court.....I therefore hold that the security offered is not suitable for purposes of Order 42 rule 6 of the *CPR*."

16. He submits that if the Court is minded to grant the stay, the parallel positions of the parties should be balanced by allowing him to enjoy some fruits of the judgment as the applicants pursue the appeal. He proposes that the applicants should be ordered to pay half of the decretal amount and deposit the other half in an interest earning account held in the names of both advocates on record.

Analysis

17. From the foregoing the court is called upon to determine whether the application is defective and a non-starter; whether the application has merit.

18. It has been submitted that this application is a non-starter because it has been brought against a deceased person. That it is also defective because the supporting affidavit has been sworn by a person without any nexus to the appellants.

19. I have seen the death certificate which shows that Daniel Musimami Ngoti died on January 2, 2019. Accordingly, the proper respondents should have been Shadrack Mwanzia Musimami and Erickson Muthoka Musimami as per the limited grant of letters of administration pendente lite. The deceased died during the pendency of the suit, substitution was done and the matter was eventually concluded in March 2022.It is clear however is that both parties are aware of this status and the applicant ought to have cited the correct parties while filing the application. Clearly the respondents have a point, that the appeal and the application have been filed against a person who is deceased. As it is the party against whom the application is brought is deceased and no orders would issue against him.

20. As for the supporting affidavit, it is indeed true that a deponent who swears an affidavit in a representative capacity must establish such capacity and authorization. In this case the deponent states that indeed he has authority to swear that affidavit. A deposition under oath is weighty and can always be tested on cross examination. As for the contention that there is no evidence showing that Directline Assurance are the insurers of the suit motor vehicle, they would definitely not have involved themselves in this matter if indeed they were not.

21. The insurance company does not stand to gain anything and is in fact expected to settle any claim that will be found to be due and owing at the end of this process. The law requires that before filing a case of this nature, a statutory notice should be sent to the relevant insurance company. It is therefore obvious that officers from the insurance company are seized of facts and all matters pertaining a particular case from the very beginning. With that in mind, it is not strange to have such officers swear affidavits in the Court matters because the companies have interests to protect. It is also in line with Order 19 Rule

3 of the *Civil Procedure Rules* which requires affidavits to be confined to such facts as the deponent is able of his own knowledge to prove. In *Njuguna Ngugi v Godfrey Adhiambo Oyoo [2021] eKLR* the Court held that:

> " Counsel for the respondent dealt with the issue of subrogation but in my view the insurer is not seeking any compensation from the respondent. What the entire insurer is doing is to safeguard its interest so that exorbitant awards are not made against its insured clients which awards will ultimately be forwarded to the insurance company for settlement. Even if the insurance company is not a party to the suit, it has a legally recognized interest in the matter and I see no good reason why its staff who have knowledge about the dispute cannot swear affidavits in relation to the case. Should the applicant fail to settle the decretal sum, the respondent has the leeway of filing a declaratory suit against the insurer. It cannot be held that the insurer should remain silent until when involved in a declaratory suit or in a subrogation claim. Pauline Waruhiu has averred about what she knows about the dispute and what she has been informed by the counsel on record for the insured. She can be summoned for cross-examination and in my view she is competent to swear the affidavit in support of the application. I do find that the application is properly supported by two affidavits...."

22. The question then is would it be in the interests of justice to strike out the application? I think the answer is No This is because the record does show that the respondent died, there was substitution and there are legal representatives to the estate. They have filed the response. The error in failing to cite the correct parties could be fatal but in the circumstances of this application the same is excusable as inadvertent.

23. Is the application merited? According to Order 42 Rule 6 of the *Civil Procedure Rules*, the conditions which should guide the Court in determining whether to grant stay pending appeal are; whether substantial loss will occur if stay is not granted, whether the application has been filed without unreasonable delay and furnishing security for the due performance of the decree.

24. Judgment in the case appealed from was delivered on March 31, 2022 and this application was filed on May 10, 2022 together with the memorandum of appeal. Although the applicant did not explain the delay, on its face it is not inordinate, and no prejudice has been demonstrated on the part of the respondent.

25. As for substantial loss, the appellants are apprehensive that if the decretal amount is released to the respondent, they might not recover the same if the appeal succeeds. The learned trial Magistrate found the appellants 100% liable and awarded the respondent Kshs 500,000/= as general damages and Kshs 19,050/= as special damages. The respondent did not controvert the apprehension by filing an affidavit of means and his argument is that the legal burden does not shift to him. However, the information about his means is exclusively in his possession and without an affidavit of means, this Court would also not know about his ability to refund the decretal sum if the appeal succeeds. The fear of the risk of substantial loss is not farfetched.

26. As for security, the applicants offered a Bank Guarantee from Family Bank and its purpose is indicated as "...for providing security for awards and or costs awarded in various Court cases/claims pending before Court". The guarantee is dated February 18, 2022 and its duration is indicated to be "12 months with an option to renew". Evidently, the guaranteed has lapsed and the Court was not informed as to whether renewal was done. In any event I agree with the submissions by the respondents that the alleged Bank Guarantee would not be appropriate.

27. The Court is duty bound to balance the competing interests between the parties. While it is the appellants' right to pursue an appeal, the respondent should also enjoy the fruits of winning the first round. Accordingly, I am inclined to agree with the respondent that part of the decretal award should be released to him and the remaining part be deposited in a joint interest earning account in the names of both Advocates on record

28. In the end the following orders issue:

    i. That an order of stay of execution of the judgment in Makindu PMCC no 366 of 2017 delivered by Hon J D Karani Resident Magistrate on March 31, 2022 pending the hearing and determination of this appeal be and is hereby issued

    ii. That the Appellant/Applicant to pay one third of the total decretal sum to the respondents within 30 days hereof.

    iii. That the balance be deposited within 45 days hereof, in a joint interest earning account in the names of both counsel.

    iv. That in default of ii or iii above the order of stay to lapse automatically,

    v. That the costs of this application to abide the outcome of the appeal.

DATED SIGNED AND DELIVERED VIA EMAIL THIS 17TH APRIL 2023

MUMBUA T MATHEKA

JUDGE

CA Mwiwa

Kimondo Gachoka Advocates for the Appellant

S N Ngare & Co Advocates for the Respondent