Shisukane & another v Mokeira & another (Miscellaneous Case E323 of 2022) [2023] KEHC 21677 (KLR) (Civ) (20 April 2023) (Ruling)

Neutral citation: [2023] KEHC 21677 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

MISCELLANEOUS CASE E323 OF 2022

AA VISRAM, J

APRIL 20, 2023

BETWEEN

ISAAC LUKA SHISUKANE ..... 1ST APPLICANT

MARTIN NANGOLE ..... 2ND APPLICANT

AND

JANET MOKEIRA ..... 1ST RESPONDENT

LORAN ADIKINYI MAKHANDIA ..... 2ND RESPONDENT

RULING

1. This ruling relates to the applicants' Notice of Motion dated 6th June, 2022 seeking the following orders; -

    i. Spent

    ii. That this Honourable Court be pleased to grant the Applicants leave to file a Memorandum of Appeal out of time.

    iii. Spent.

    iv. That this Honourable Court be pleased to grant stay of execution of judgment and/or Decree issued by Honourable Sogomo, (PM) in Milimani CMCC No.3185 of 2020 given on 22nd April,2022 pending the full hearing and determination of the Intended Appeal.

    v. That this Honourable Court allow the Applicant to furnish the Court with Security in form of a Bank Guarantee from the Family Bank.

2. The application is premised on the grounds on the face of the application and the supporting affidavit of Kevin Lusweti, the applicants' advocate herein, sworn on 6th June, 2022.

3. Counsel deponed that a judgment was rendered against his clients on 22nd April, 2022. He immediately informed his clients of the decision. However, by the time he received instructions from his clients, the deadline for filing an appeal had passed.

4. Counsel deponed that there was an imminent threat of execution as the stay granted to the applicants at the time judgment was delivered had since expired. And further, that if the respondent is paid, she may not be able to repay the decretal sum in the event the appeal is successful.

5. In opposition to the application, Ms. Mokeira, the 1st respondent filed a replying affidavit sworn on 23rd December, 2022. She deponed that the present case was very old as the cause of action arose four years ago; and she would be prejudiced if denied the fruits of her judgment. Further she stated that the amount awarded in the judgment was not excessive given the severity of injuries she had suffered.

6. Ms. Mokeira contended the intended Memorandum of Appeal lacks merit, and has no probability of success whatsoever. Finally, that to date the same has not been in court.

7. The application was disposed of by written submissions.

Applicants' submissions

8. The applicants submitted that the draft Memorandum of Appeal raises triable issues that merit the consideration of this court.

9. The award of damages in the lower court was based on a hearing that had proceeded ex-parte, and the applicants had not been afforded their right to be heard, which is contrary to the rules of natural justice.

10. On the issue of security, the applicants submitted that a stay ought to be granted with a bank guarantee for the decretal sum which amount ought, to be deposited within a period of 45 days from the date of this ruling.

11. The applicants relied on the High Court case of *Water Resources Management Authority v Krystalline Salt Limited* (2018) eKLR, where it was held that:

> " After considering the application, the affidavits and the submissions of both parties, the court orders that there be a stay of execution of the decree herein on condition that the Defendant furnishes security by way of a bank guarantee from a reputable bank for the sum of Kshs. 1 Billion within 45 days of today. Each party will bear its own costs."

1st Respondent's submissions

12. The 1st respondent submitted that the applicants had slept on their rights and ought not to be provided with the equitable relief sought. The respondent cited the maxim that 'equity aids the vigilant and not the indolent'. Further, the respondent submitted that the applicants had not provided this court with satisfactory reasons for the delay.

13. The respondent relied on the Court of Appeal Civil Application No.35 of 2020 *Kenya Red Cross Society v Mbondo Katheke Mwania* the court held that;

> " For an applicant to succeed, he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory."

14. The 1st respondent further submitted that the bank guarantee proposed by the applicants as security was not appropriate because the same is subject to renewal and expires on an annual basis. Such a guarantee is not appropriate because there is no telling how long it may take to resolve the present dispute.

Analysis and determination

15. I have considered the application, grounds thereof, supporting affidavit and submissions. I have also considered the replying affidavit and submissions in opposition.

16. The issue for determination to be whether the applicants have met the required principles for grant of (a) leave to file appeal out of time and (b) stay of execution pending the hearing and determination of an intended appeal.

17. Section 79G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. Section 79G of the *Civil Procedure Act* provides that:

> " 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 to the appellant 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."

18. From the provision above, it is noteworthy that the phrase used is "an appeal may be admitted out of time". This therefore means that an appeal may indeed be admitted out of time. However, the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal. In *Mugo & Others v Wanjiru & Ano*r [1970] EA 482 the court stated as follows:-

> " Clearly, as a general rule, the filing and service of the notice of appeal ought to be regularized before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused."

19. In the present matter, I note that the applicant has attached a draft Memorandum of Appeal to the present application. The same has therefore not been regularized. However, this does not mean the court is bound to refuse the application.

20. The decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion just like any other exercise of discretion by the court. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were

suggested by the Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR. They include the following:

i) The period of delay;

ii) The reason for the delay;

iii) The arguability of the appeal;

iv) The degree of prejudice which could be suffered by the Respondent if the extension is granted;

v) The importance of compliance with time limits to the particular litigation or issue; and

vi) The effect if any on the administration of justice or public interest if any is involved.

21. Having considered the above factors, I note that judgment was delivered on 22nd April, 2022, while the present application was filed on 6th June, 2022, two (2) months after the lapse of time within which it ought to have been appealed.

22. I am satisfied that a delay of two months is not inordinate. As such, I am persuaded that no prejudice will be occasioned to the respondents if time is enlarged to allow the applicants to file the intended appeal.

23. Based on the reasons above, I am satisfied that the applicants ought to be granted leave to file the intended appeal out of time, and I hereby allow the same.

24. As regards the issue of stay, it is imperative for both parties to understand in what instances a court of law will grant a stay of Orders/Decree. The principles are well laid and must be followed otherwise it would be akin to denying the successful litigant the fruits of judgment.

Order 42 Rule 6 is succinct:

"(2)" No order for stay of execution shall be made under sub rule (1) unless –

a. the court is satisfied that substantial loss shall/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 order for the due performance of such decree or order as may ultimately be binding upon him has been given by the applicant."

25. The affidavit sworn by Mr. Lusweti has not shown the loss that the applicants will suffer if the stay is not granted. In the main body of the Notice of Motion, the applicants simply state that unless the stay is granted the respondents will not be able to refund the amount paid to them.

26. In considering whether or not to grant a stay of execution, the cornerstone of jurisdiction in the exercise of this discretion is whether the applicants have demonstrated the likelihood of suffering substantial loss if stay is denied.

27. 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."

28. The decision of Platt Ag JA, in the Shell case, sets out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The 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)"

29. 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)

30. 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 -vs- 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." (Emphasis mine)

31. The applicant was therefore duty bound to demonstrate how substantial loss would arise in this instance, by showing either, that the respondents would be unable to refund any monies paid under the decree, or that payments in satisfaction of the decree would occasion substantial loss to the applicants.

32. Further, the applicants ought to have established substantial loss by way of affidavit evidence and not mere statements alluding to loss. This was not done. As my Learned Brother Ringera, J. (as he then was) said on the same issue said:

> " Substantial loss said to be likely to result from a refusal of a stay must be demonstrated as a matter of fact; and not by a mere flat statement in an affidavit or at the Bar."

33. Once again, there is simply no evidence that the applicants would suffer substantial loss if they made the payment to the respondents, or that the respondents lack the means necessary to pay back the sums in the event the appeal is successful. Nor has the applicant provided sufficient evidence to show how the appeal would be rendered nugatory if the stay is not granted.

34. Based on the reasons above, I do not think there is adequate justification to keep the respondents out of the fruits of their judgment, and I hereby disallow the prayers seeking a stay of execution.

35. The upshot is that the Motion dated 6th June, 2022 succeeds in part only. Accordingly, I find it appropriate for the applicants to bear the costs of the application. This is consistent with the principle set out in Order 50, Rule 6 of the Civil Procedure Rules which provides that the costs of the application to extend time shall be borne by the party making such application.

36. The orders of this court are as follows:

    i. Leave is granted to the applicants to lodge a Memorandum of Appeal out of time against the judgment and decree by Honourable G. Sogomo, (PM) in Milimani CMCC No. 3185 of 2020 delivered on 22nd April, 2022.

    ii. The applicants shall file and serve the Memorandum of Appeal within 14 days hereof.

    iii. The remaining prayers are dismissed.

    iv. The applicants shall bear the costs of this application.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 20TH DAY OF APRIL 2023

ALEEM VISRAM

JUDGE

In the presence of;

..... for the Appellant

..... for the Respondent