



Nyamweya & another v Auctioneers & another (Civil Appeal E74 of 2023) [2023] KEHC 17480 (KLR) (17 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17480 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E74 OF 2023
RN NYAKUNDI, J
MAY 17, 2023**

BETWEEN

PETER NYAMWEYA 1ST APPELLANT

MARY NYAMWEYA 2ND APPELLANT

AND

TRANZO AUCTIONEERS AUCTIONEER

AND

MATHIAS KIPKEMEI BOSWONY RESPONDENT

RULING

Before Hon. Justice R. Nyakundi

Songok & Company Advocates

Nyamweya & Mamboleo Advocates

1. The applicant approached this court vide a Notice of motion Application dated 5th May 2023 seeking the following orders
 1. Spent
 2. Spent
 3. Pending the hearing and determination of this appeal, an interim order of stay if execution of the court’s decree issued on 20th April 2023 be and is hereby granted.
 4. Costs of the application be provided for.



2. The application is premised on the grounds set out therein and the contents of the annexed affidavit of the 1st Appellant.
3. The parties were directed to canvass the application by way of written submissions.

Applicant's Case

4. Learned counsel for the applicant filed submissions dated 9th May 2023.
5. The applicant's case is that the Respondent had instructed auctioneers to proclaim the Appellants' assets and attachment of their assets in execution of a decree arising from an ex-parte judgement entered in the absence of the Appellants as they had not been served with the subject Claim. That facing a of attachment, the Appellants filed an application dated 2nd May 2023 under certificate of urgency seeking to set aside the Exparte judgement and decree. Counsel urged that the trial magistrate issued directions on the application in which she did not consider the imminent danger of attachment thus exposing the Appellants to the risk of attachment.
6. Learned counsel for the applicant cited the case of Kulamba v Kamosu in which Meoli J summarized the principles that guide the High Court in determining the applications for stay. He urged that the principles set out for consideration were; Whether there is an arguable appeal; Whether if the stay is not granted the appeal will be rendered nugatory and Whether the Respondent will suffer prejudice if stay is granted. He urged that the applicant had satisfied all the principles and prayed the court grant stay of execution.

Respondent's Case

7. Learned counsel for the respondent filed submissions dated 11th May 2023 in opposition to the application. He submitted that the court papers were properly served upon the appellants and urged that at the look of the file, it is clear that on 14th March 2023, a process server duly empowered to serve civil process of this Honourable court one Joseph Mwaniki Nyota swore that on 10th day of February 2023 at around 8 a.m., he received copies of a statement of claim and a mention notice from M/s Seneti & Oburu Co. Advocates to serve the same upon the Defendants who were residing in Nairobi. He travelled from Eldoret to their residents and served the same upon them and therefore, the allegation of none service is unfounded. Further, that all these have not been denied especially the fact that they have an office manned by a secretary called Alice.
8. Counsel submitted that the appellants filed an application dated 2nd May 2023 seeking stay of Execution of the court's decree issued on 20th April 2023 which they duly served upon the Respondents. Their main contention was that they had paid the amounts claimed by the claimant in his claim and further that they were not served with the said claim. It was upon the Respondent to respond by filing a Replying affidavit so the same can be adjudicated. Before the claimant filed his Replying affidavit and just within 24 hours, the Applicant moved to this Honourable court appealing the said application on flimsy grounds. Urging that this application was premature, counsel submitted that the Appellants ought to reinstate and prosecute it and in the event the same fails they can appeal it from there.
9. Counsel submitted that in the event that the court grants stay of execution, the small claim court had taxed costs at Kshs. 58,200 and therefore the Appellants Should be compelled to pay half costs of Kshs 29,100. He prayed the court dismiss the application with costs.



Analysis & Determination

10. This being an appellate court it has a duty as was set out in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

11. Upon considering the application and submissions thereto, the following issue arises for determination;

Whether the application is premature

12. I have perused the file from the trial court and I note that there is an application dated 2nd May 2023, filed on 3rd May 2023 where the appellants sought stay of execution of the court’s decree issued on 20th April 2023. The application came up for mention on 4th May 2023 before the court and the learned adjudicator directed that the applicant effect service of the application within 3 day and fixed the same for direction on 15th May 2023. The applicant then proceeded to file the present application before the application was heard and determined. It is evident that the application seeks the same orders that were sought in the trial court.

13. Section 30 of the *Small Claims Court* governs appeals from the court. It stipulates as follows;

A person aggrieved by the judgment or order of the Court may, pursuant to section 38 of the Act, appeal to the High Court in accordance with Order 42 of the Civil Procedure Rules, 2010.

14. Order 42 rule 6 of the *Civil Procedure Rules* provides as follows on Stay of Execution;

Stay in case of appeal [Order 42, rule 6.]

- (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 sub rule (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.
 - (3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
15. The provisions allow the appellate court to grant orders for stay of execution. However, as there was an application that was yet to be determined in the trial court, this begs the question as to whether the present application is premature? There are two schools of thought that the court of first instance has the jurisdiction to consider stay of execution pending an Appeal or proposals to settle the decree. Secondly where an intended Appeal has been filed by way of a Notice or Memorandum and is set to undergo processes of admission and directions nothing precludes the High Court to hear and determine any such application incidental to the Appeal. An application referred to under order 42 rule 6 of the *Civil Procedure Rules*, shall ordinarily be made to the session judge of that particular court likely to entertain the Appeal in question. When faced with a similar application, the court in comparative decision, the case of Marie Makhoul and Marquerita Desir v Sibina James Alcide SLUHCV AP No. 30/2011 it was held as follows:
1. The general rule is for no stay, as a successful litigant is entitled to the fruits of his judgment without fetter. Accordingly, there must be good reasons advanced for depriving or in essence enjoining a successful litigant from reaping the fruits of a judgment in his favor, particularly after a full trial on the merits.
 2. The modern authority on the guiding principles the court employs in exercising its discretion to grant a stay is the case of *Linotype-Hell Finance Ltd v Baker* where Staughton L.J. opined that a stay would normally be granted if the appellant would face ruin without the stay and that the appeal has some prospect of success. It must be emphasized that it is not enough to merely make a bald assertion to the effect that an applicant will be ruined. Rather what is required is evidence which demonstrates that ruination would occur in the absence of a stay.
 3. The authority of *Hammond Suddard Solicitors v Agrichem International Holdings* is grounded in the same principle though formulated differently. In that case the court pointed out that the evidence in support of a stay needs to be full, frank and clear. They went on to state the principle thus: u ... whether the court should exercise its discretion to grant a stay will depend on all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other 6 SLUHCVAP No. 30/2011 6 hand if a stay is refused and the appeal succeeds and the judgment is enforced in the meantime what are the risks of the appellant being able to recover any monies paid from the respondent?"



4. The court's jurisdiction to grant a stay is based upon the principle that justice requires that the court should be able to take steps to ensure that its judgments are not rendered valueless. The essential question for the court is whether there is a risk of injustice to one or both parties if it grants or refused a stay. Further, the evidence in support of the application for stay of execution should be full, frank and clear. The normal rule is for no stay and if a court is to consider a stay, the applicant has to make out a case by evidence which shows special circumstances for granting one. The mere existence of arguable grounds of appeal is not by itself a good enough reason."
16. In pari materia the spirit underlying the Rules in Order 42 on stay of execution is clearly set out in "*Kenya Commercial Bank Ltd v Benjob Amalgamated Ltd and Another* Nairobi Civil Application Number 50 of 2001 (Gicheru, Lakha and Owuor, JJA on 6 April 2001), *Niazons (Kenya) Ltd v China Road & Bridge Corporation (Kenya) Ltd* Nairobi (Milimani) High Court Civil Case Number 126 of 1999 (Otieno-Onyanog, J in 1999), *UAP Provincial Insurance Co. Ltd v Michael John Beckett*, Nairobi Civil application number 204 of 2004 (O' Kubasu, Githinji and Deverell JJA on 22 October, 2004)
17. In that context one of the key legal issues for consideration is what will be the residual substantial loss in the event the stay remedy is denied or granted in favour of the Applicant. The court in exercising its jurisdiction, is to bear in mind the observations made in the cases of *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR & *Antoine Ndiaye v African Virtual University* (2015) eKLR. The principles cutting across all these cases are that whether the process of execution has been put in motion or is likely to be put in motion by the decree holder and if finally levied substantial loss may result to the Applicant or intended Appellant which is not remediable by damages. Substantial loss on stay of execution is a fact to be proved upon cogent evidence by the Applicant. A mere allegation in an affidavit shall not suffice. In furtherance to his case an Applicant must also demonstrate existence of sufficient cause for the grant of stay of execution of the impugned decree.
18. At the hearing of this application the Applicants in their affidavits have urged the court to distil into the events of the proceedings before the Lower Court which would render it just and convenient to make the order for a stay of execution of the judgement pending the hearing and determination of intended Appeal. The respondent on the other hand, has vehemently opposed any notion of the court exercising any discretion to grant stay which automatically deprives the respondent fruits of his judgement. The Affidavit of the Applicants /Intended Appellants, contains evidence which suggest that the debt due and owing to the Respondent as per the decree had been settled full in consonant with the contractual obligations and terms under the *sale of goods Act*. The Respondent Affidavit in relation of this issue maintained that the Applicants are in breach of the contract terms and the appropriate remedy was to file the dispute before the Small Claims Court. Interestingly from the record issues of service is a moot question. Nevertheless, the judgement creditor Respondent canvased his case before the trial court resulting in a decree dated 25th April 2023. Application for execution of the decree has been put on motion by issuance of warrant of attachments and sale of the Applicants movable assets. In law execution means simply the process for enforcing or giving effect to the judgement of the court and it is completed when the respondents gets paid in one form or another to satisfy the decree as drawn and certified by the court.
19. To my mind, it is of significance to note the process of recovery though commenced, is awaiting compliance with due process as stipulated in the *Civil Procedure Act* and *Auctioneers Act*. For this court where the Affidavits averments are at cross purposes the court's jurisdiction should



be exercised judiciously balancing the scale of justice on grounds that the intended Appeal when considered on the merit and if successful will not be rendered nugatory. In absence of tactical rebuttal evidence that the Applicants/intended Appellants Appeal is frivolous, it passes the threshold of an arguable Appeal and if eventually is determined in their favour they stand high chances of suffering substantial loss and their would be no room to restore the financial ruin occasioned by the execution. The Applicants /Intended Appellants likelihood of being able to recover the decretal sum or other incidentals arising out of the execution process from the Respondents Affidavits it is absolutely non-existence.

20. In essence, the main criterion as espoused in order 42 rule 6(1) and the guiding principles discussed above persuades me to exercise discretion to grant stay of execution of the decree SCC NO E 032/2023 pending the hearing and determination of the intended Appeal. It is also meritorious to grant stay of execution within the scope of the doctrine on the interests of justice. Here I have in mind all the circumstances of the case as prompted by the record of the Lower Court and the question whether there is a risk of injustice to both Applicants / Intended Appellants or the Respondents if stay is allowed or denied. When it comes to the Applicants /Intended Appellants, if this court declines stay there are high chances of the Appeal being stifled. On the other hand, for the Respondents the only conceivable inconvenience would be the delay in accessing the fruits of the impugned judgement. However, that can be compensated in any event by an award of costs or interests on the final judgement affirmed on appeal. Similarly, and admittedly our legal system is based on the rule of law the principle of fairness in both civil and criminal proceedings under Article 50 of *the Constitution*. The principle on fair procedures in the stated Article is anchored on natural justice and a right to be heard. Adherence to the principle of fairness is a characteristic of our constitutional imperative. It is well in line with the provisions of *the constitution* in Article 162, 163, 164 & 165 a right of Appeal is established as a key element of fairness in proceedings not only as a part of the protections of individual rights and freedoms but represents the principle of the rule of law within our legal system. In the case at bar the court of first instance heard and determined the issues in contestation between the Applicants/Intended appellants and the Respondents. The objection to the impugned judgement has been raised on potential decisive grounds which only can be considered by and Appeals court as to whether judicial discretion in the Lower Court was properly exercised. That is not an argument for now, the features of it are at heart of the Appeal itself to be canvased among other things at the right time. Looking beyond the legal and factual particularities, and the interplay of the provisions of procedural fairness and the underlying right of Appeal embodied in our legal framework, the doors on access to justice to an Appeal's court are likely to be closed if the application for stay as a precondition for the Appeal to be heard is denied. In sum I would not forget to mention that order 42 rule 6 does not prohibit and Appeal's court from entertaining and application for stay if at the time the primary court was yet to rule on the merits of the stay application. It is plain from the grounds set forth in the draft Memorandum of Appeal that the applicants have asked this court to interfere with the decision of the court below.
21. Finally, in accordance with these perspectives pinpointed elsewhere in this ruling, the Notice of Motion dated 5th day of May 2023 be and is hereby allowed. The applicants intended Appellants be at liberty to provide a bank guarantee of Kshs 392,000 from a reputable financial institution within 21 days on receipt of this ruling.
22. Equally so before I pen off, It is to be understood that the standards and Principles on the very structure of small claims court provides a latitude of the elements in Section 1(A) of the *Civil Procedure Act*, on the overriding objective. That is to facilitate the just expeditious



proportionate and affordable resolution of the civil disputes with dictates of time being of essence. The approach chosen by the legislature to regulate that court is indeed to solve disputes in a timely manner and this can only be feasible if the Appeals court also adopt a full-fledged system of resolving Appeals within 60 days from the approximation of admission /directions taken on that appeal. The bedrock of this, in regard to this Appeal is to issue a direction that the record of the intended Appeal and submissions be filed and served upon the Respondents within 14 days from delivery of this ruling. Thereafter, the Respondents be at liberty to file rejoinder submissions on the Appeal within 14 days of being served by the Applicants/ Intended Appellants. At the outset the notion on admissibility of the Appeal certainly be a matter to be considered in situ the course of perusal of the record. The costs of this application to abide the outcome of the Appeal.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 17TH DAY OF MAY 2023.

In the Presence of:

Mr. Morara Advocate

Mr. Songok Advocate

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R. NYAKUNDI

JUDGE

