



Prestige Shuttles Tours & Travel Ltd v Mathithi & another (Suing as Administrators of the Estate of Dominic Mwanzia Mathithu - Deceased) (Civil Appeal E141 of 2022) [2023] KEHC 18758 (KLR) (15 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18758 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E141 OF 2022
MW MUIGAI, J
JUNE 15, 2023**

BETWEEN

PRESTIGE SHUTTLES TOURS & TRAVEL LTD APPELLANT

AND

ANNA MWENDE JOHN 1ST RESPONDENT

ROSEMARY NDUNGE MATHITHI 2ND RESPONDENT

**SUING AS ADMINISTRATORS OF THE ESTATE OF DOMINIC MWANZIA
MATHITHU - DECEASED**

(Being an appeal from the Judgment delivered by Hon. Stephen Jalango (P.M) on 22nd September 2022 at the chief magistrate's Court at Mavoko in CMCC No. 782 of 2019)

RULING

Notice of Motion Dated October 25, 2022

1. The Appellant herein filed an Application under certificate of urgency dated October 26, 2022, and sought the following orders;
 - a. Spent
 - b. Spent
 - c. This Court be pleased to order stay of execution of judgment and/or decree issued by Hon S Jalang'o Principal Magistrate on September 22, 2022 in Mavoko CMCC NO 782 of 2019 pending the hearing and determination of the intended Appeal.
 - d. This Court allow the Appellants/applicants to furnish the Court with security in the form of a Bank Guarantee from Family Bank for Kshs 3,000,000/-.



- e. Spent
 - f. The costs of this Application abide the outcome of the Appeal.
 - g. That this Court do issue any other order and/or direction it deem fit to grant in the circumstances
2. The Application is supported by the affidavit of Daniel Mulei Muli a director of the Appellant sworn on October 25, 2022 in which he stated that the Trial Court judgment was entered on September 22, on a 100% liability as against the Appellants; Kshs 50,000/- for pain and suffering, Kshs 100,000/- for loss of expectation of life, Kshs 5,600,000/- for loss of dependency and Kshs 82,050/- for special damages;
 3. The Appellant's/Applicant's being aggrieved and dissatisfied with said judgment filed an Appeal which he believes has high chances of success.
 4. The Appellant/Applicants stated that they are apprehensive that the Respondent may levy execution against the appellant as the 30 days stay of execution has lapsed and the same will render the appeal nugatory and cause irreparable loss and damage on the Appellant considering the sum is of substantial amount and if the decretal amount is paid over to the Respondent the said Respondent would be in no position to refund the same if the Appeal is successful.
 5. The appellant stated that the Respondents have not disclosed nor furnished the Court with any documentary evidence to prove their financial standing
 6. The Appellant/applicant is an entity of no means and the Applicants insurance is ready, willing and able to furnish the Court with a Bank Guarantee of Kshs 3,000,000/- as security to the Court.

Replying Affidavit

7. Rosemary Ndunge Mathithi one of the Respondent filed a Replying affidavit sworn on November 14, 2022 in which she indicated that there is no good reason that has been advanced to warrant the grant of the orders sought. It was contended that there was no opposing evidence adduced by the Appellants/Applicants on the matter of liability and therefore finding that the Appellant/Applicant was 100 % liable was appropriate. Further adequate evidence was offered by the Respondents and the Trial Court relied on documentary evidence to make the awards.
8. It was further deposed that the Appellant/Applicant did not exercise its right of defending the case in the Trial Court hence the current application is just a delaying tactic to deny the Respondents from enjoying the fruits of a successful litigation and delay the conclusion of the matter. The Respondent urges the Court to allow the Application on condition that the Appellant/Applicants do pay Kshs 3,000,000/- of the decretal amount to the Respondent Counsel while the balance be deposited in joint names of both advocates on record in an interest earning account.

Written Submissions

Appellants/applicants Submissions Dated February 20, 2023

9. The Appellants/Applicants raised 4 issues for determination;
 - a Whether the appellant have an arguable appeal.
 - b Whether substantial loss would emerge from refusal to grant stay.



- c Whether the appellants are ready and willing to furnish security.
- d Whether the application was done without unreasonable delay.
10. On the issue of whether the Appellants have arguable appeal it is submitted that the appellants are appealing on quantum as an excessive award made by the Trial Court which is not proportionate. The Appellants Memorandum of Appeal herein is arguable and raises serious points of law and fact that warrant the Court's invention on appeal. Reliance is made in the Court of Appeal In *KRA v Sidney Keitany Changole & 3 others* [2015] eKLR where the Court held;
- “This court has further held that the applicant need only prove or establish one arguable point nothing that an arguable appeal is not necessarily one that will succeed but one that is not frivolous.”
11. On whether substantial loss will occur from refusal to grant stay the Respondents herein means are unknown and it is highly unlikely that the Respondent will be capable of refunding the decretal amount in the event the Appeal succeeds since the Respondent has not disclosed nor furnished the Court with any documentary evidence to prove his financial standing.
12. Reliance is made in the case of *National Industrial Credit Bank limited v Aquinas Francis Wasike*, Court of Appeal Civil application No 238 of 2005;
- “This court has said before and it would be repeating that while the legal duty is on an applicant to prove the allegations 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 an applicant to know in detail the resources owned by the respondent or looks for them. Once an applicant expresses 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.”
13. See also the case of *Tabro Transporters limited v Absalom Dova Lumbasi* [2012] eKLR where the court of Appeal reinforced the centrality of substantial loss in the case of *Mukuma v Abuoga*.
14. In the instant case the decretal sum is Kshs 5,832,050/- plus costs and interest as of the date of the judgment. It is submitted that this is a substantial sum and in the event that the Respondent is unable to repay the decretal sum the appeal will have been rendered nugatory and the Appellants exposed to irreparable damage since the subsequent decree would be no more than a paper decree.
15. On whether the application was done without unreasonable delay it is submitted that the appellants filed their memorandum of appeal within time on October 12, 2022 which was well within the thirty days initial stay of execution period. The application for stay pending appeal was filed on October 26, 2022. It is therefore submitted that both the subject application and memorandum of Appeal were filed without delay.
16. On whether the appellants are ready and willing to furnish security the Appellants insurer is ready and willing to provide security in the form of a Bank Guarantee from Family Bank for kshs 3,000,000/- or deposit the sum of Kshs 3,000,000/- in a joint interest earning account bearing the names of the Counsel on record for both parties pending the hearing and determination of the appeal. They cited the case of *Selestical limited v Global Rock Development* [2015]. The Appellants/Applicants have satisfied all the conditions set out in Order 42 rule 6.



Respondents' Submissions Dated January 23, 2023

17. It was submitted that the Appellant chose not to adduce any evidence at all and obviously the Respondent's water-tight evidence stood unchallenged and the judgment delivered is correct, regular and reasonable considering the evidence on record. It is submitted that the Appellants application is meant to frustrate the process of recovery of decretal amount and further defeat justice.
18. Reliance is made in the case of *Visbham Ravji Halai v Thornton & Turpin* - Civil application No. Nai 15 of 1990 [1990] KLR 365 and in the case of *Michael Ntouthi Mitheu v Abraham Kivondo Musau* [2021] eKLR.
19. In the instant case the appellant in its application has failed to establish "sufficient cause" for grant of the orders it is seeking as required. The appellant indicates that the quantum awarded is exorbitantly high but does not state what loss/damages it would suffer if the orders sought are not granted.
20. See the case of *Shabani v City Council of Nairobi* [1985] KLR 516 where the Court stated that;

"An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate based on some wrong principle or on a misapprehension of the evidence"
21. Also the case of *Ken Odondi & 2 others v James Okoth Omburah t/a Okoth Omburah & Co. Advocates* Kisumu C/A No. 84 of 2009 cited with approval the case of *Kaburuka Gitau & Anor v Nancy Ann Wathithi Gitau & Anor* [2016] eKLR where the Court held thus;

"We agree that this court will not ordinary interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled."
22. It is finally submitted that the appellant has not met the threshold for granting of the orders it is seeking and urged this court to dismiss the application for lack of merit.

Determination

23. In *RWW v EKW* [2019] Hon A Ongeri J held that; -

"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 judgement. 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."



24. This Court is enjoined under Article 159 (2) (d) of the Constitution to dispense justice without undue regard to procedural technicalities. In the same vein, under Section 79 CPA enshrines right of appeal, a party has to be accorded a right to fair hearing.
25. In Butt vs Rent Restriction Tribunal [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-
- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
 - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.
26. On the deposit of security, The court observed in the case of Gianfranco Manenthi & Another v Africa merchant Assurance Co Ltd [2019] eKLR it was held that:-

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

Further 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 court would order for the release of the deposited decretal amount to the respondent in the appeal...

Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”



27. This Court is persuaded by the submissions of the Respondent that indeed a bank guarantee is not proof of money but may be considered only in light of ½ the amount so as to comply with security envisaged in Order 42 [CPR 2010](#).

Disposition

30. In balancing the rights of the parties and in exercise of the Court's discretion, I direct as follows;
- a. Stay of execution pending Appeal is granted on condition that the Appellant remit half of the decretal sum to the Respondent through Advocate on record and the other half be secured by the Bank Guarantee within 90 days of this Ruling.
 - b. The Lower Court file shall be availed within the stated period.
 - c. The Record of Appeal shall be prepared, filed and served
 - d. Costs will abide the Appeal.
 - e. Further mention for directions shall be on after 90 days.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 15TH JUNE, 2023
(VIRTUAL/PHYSICAL CON-FERENCE).**

M W MUIGAI

JUDGE

IN THE PRESENCE/ABSENCE OF:

Mr Kimondo - For The Applicants

Mr Nzavi For The Respondent

Geoffrey/patrick - Court Assistant(s)

