



Mwaura v Glen Mont International Limited & another (Civil Appeal E201 of 2022) [2023] KEHC 20330 (KLR) (Civ) (14 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20330 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E201 OF 2022

CW MEOLI, J

JULY 14, 2023

BETWEEN

MICHAEL JOHN MWAURA APPLICANT

AND

GLEN MONT INTERNATIONAL LIMITED 1ST RESPONDENT

RADIO FREQUENCY SYSTEMS (EA) LIMITED 2ND RESPONDENT

RULING

1. The motion dated 30.03.2022 by Michael John Mwaura (hereafter the Applicant) seeks to stay execution of the judgment and decree in Nairobi MCCC No. E5607 of 2020 (hereafter lower court suit) pending hearing and determination of the intended appeal; an order to compel Glen Mont International Limited (hereafter the 1st Respondent) to avail to the Applicant the plaint and or summons to enter appearance and all other pleadings filed by the 1st Respondent; and that the court be pleased to allow the intended appeal to be filed out of time.
2. The motion is expressed to be brought inter alia under section 1A, 1B, 3, 3A & 63(c) of the *Civil Procedure Act* & order 51 rule 1 of the *Civil Procedure Rules*, on grounds on the face of the motion as amplified in the supporting sworn by Mwaniki Njuguna counsel having conduct of the matter on behalf of the Applicant.
3. To the effect that by the 1st Respondent is in the process of registering an inhibition in respect of Title No. IR 75373/1 valued at well over Kshs. 35,000,000/- in execution and if stay of execution is not granted there is likelihood of what is described as unmitigated consequences, that will render the appeal nugatory. That a similar application earlier filed in HCCA No. E226 of 2022 was withdrawn. He goes on to depose that the Applicant is keen on prosecuting the appeal save for delay in procuring typed



proceedings for which he ought not to be penalized and should be granted leave to file his appeal out of time and stay of execution pending the appeal.

4. The 1st Respondent opposes the motion by way of a replying affidavit sworn by Patrick Karige Munge dated May 5, 2022. He attacks the motion as laden with half-truths, glaring misrepresentation of facts and blatant lies, and is therefore frivolous, vexatious and an abuse of the court. He asserts that stay of execution pending appeal cannot be granted where an appeal does not exist; that the Applicant has not demonstrated sufficient cause for the delay in filing the appeal within time; and that the purported request for proceedings attached to the motion does not exist on the e-filing portal.
5. The deponent further states that the Applicant has not furnished the court with sufficient and justifiable cause to warrant this court exercise its discretion in granting an order of stay of execution. He contends that the Applicant is the author of his own misfortune and that the court ought not to be used to deny the 1st Respondent from enjoying the fruits of its judgment without sufficient or valid cause. He urges that the motion be dismissed with costs.
6. The motion was canvassed by way of written submissions. A cursory perusal of the Applicant's submissions reveals that counsel canvassed matters relating to the substantive appeal. Nonetheless, in addressing the motion before the court, he contended that the Applicant has on a balance of convenience proved that he stands to be most prejudiced if his prayers are not be granted. That the court ought to err on the side of caution, and not allow the dispossession of the Applicant of his property without being heard and denying the court the opportunity to make a final judgment on merits. The court was urged to allow the motion as prayed.
7. On behalf of the 1st Respondent, counsel opened his submissions by contending that the motion was frivolous, incompetent and defective and an abuse of the court process. While calling to aid the decision in *Suleiman Sumra & another v Said Mohamed Said* [2018] eKLR he argued that the Applicant had never applied to set aside interlocutory judgment in the lower court suit and that the prayer seeking leave to file an appeal offends procedure, and is premature and the entire motion ought to be struck out for being an abuse of the court process. That the issues canvassed in the Applicant's submissions as pertaining to service of summons were issues of fact of which are a preserve of the trial court.
8. Citing the decision in *Silpack Industries Ltd v Kioko* [2000] 1 EA 214 counsel submitted that the decision of the lower court which is the subject of the motion is not clear, and in any event, the proposed grounds of appeal appear unlikely to succeed.
9. Addressing the question of leave to appeal out of time, counsel anchored his submissions on section 79G of the *Civil Procedure Act* and the decision in *Waweru v Nzinga* [2022] KEHC 415 (KLR) on the applicable principles. He asserted that the Applicant's motion has not attained the threshold to warrant the order for leave. Because, no proper explanation had been proffered for the delay of one year since 6.04.2021 when the purported judgment was entered and filing of the instant motion dated 30.03.2022. The decision in *Ann Wanjiku Nduati v Fredrick Oogo Oyuoya* [2018] eKLR was cited in the foregoing regard.
10. Concerning stay of execution pending appeal, it was reiterated that the conditions relating to proof of substantial loss and unreasonable delay coupled with an offer of security must be satisfied. That, the Applicant has failed to satisfy these conditions and his motion should be dismissed with costs.
11. Radio Frequency Systems (EA) Limited the 2nd Respondent did not participate in the instant proceedings.
12. The Court has considered the rival affidavit material and submissions made in respect of the motion. The respective parties have both prematurely submitted on issues touching on the substantive appeal.



Additionally, the manner in which the Applicant has presented and canvassed his motion is perplexing. On the face of it, the motion primarily seeks leave to appeal out of time and an order to stay execution pending appeal. However, what was essentially canvassed by counsel for the Applicant appears to be the substantive appeal.

13. That said, the court will endeavor to address the motion in accordance with the provisions invoked and settled principles. Concerning the Applicant's prayer seeking that "the intended appeal to be filed out of time", 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."

14. The words that "an appeal may be admitted out of time" in Section 79G, appears to admit both retrospective and prospective application. So that leave under the section may be sought before or after a memorandum of appeal is filed. Further the principles governing leave to appeal out of time are settled. The successful applicant must demonstrate "good and sufficient cause" for not filing the appeal in time. In [Thuita Mwangi v Kenya Airways](#) [2003] eKLR, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with section 79G of the [Civil Procedure Act](#), reiterated its decision in [Mutiso v Mwangi](#) [1997] KLR 630 as follows:

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted."

15. This court notes from the memorandum of appeal that the decision of the lower court that Applicant intends to appeal against was purportedly delivered on 04.03.2022. Interestingly, the instant motion and memorandum of appeal were filed on 31.03.2022, well within the statutory period within which an appeal ought to be lodged. Whether the date of the impugned decision contained in the memorandum of appeal is erroneous is hard to tell. Therefore, it would seem ex facie, that the Applicant seeks leave to file an appeal out of time, in respect of an appeal that was filed within time. This is confounding and the court considers moot the prayer for leave.
16. Regarding the prayer seeking stay of execution pending hearing and determination of the intended appeal, it is trite 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](#) [1982] KLR 417. The Applicant's prayer for stay of execution pending appeal, is brought pursuant to 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”.

17. The cornerstone consideration in the exercise of the discretion is whether the Applicant has 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 the superior courts. Holdings 2, 3 and 4 of the *Kenya Shell Ltd Case* are especially pertinent. These are that:

“PARAGRAPH 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.”

18. The decision of Platt Ag JA, in the Kenya Shell Ltd Case, in my humble view sets out two (2) 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)”



19. 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)

20. 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 LJ 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.”

21. The Applicant has reiterated in his affidavit material that the registration of an inhibition in respect of Title No. IR 75373/1 valued at well over Kshs. 35,000,000/-, is likely to result in “untold and unmitigated consequences” rendering the appeal nugatory. The 1st Respondent has countered this position by arguing that the Applicant has failed to establish substantial loss and stating that by the inhibition it simply seeks to secure its interest over the property in question for the duration of the court proceedings.

22. Execution in satisfaction of a decree is a lawful process, and the Applicant was duty bound to demonstrate specifically how substantial loss would arise, by showing, either that if the appeal were to succeed, the Respondent would be unable to refund any monies paid to him under the decree, or that payments in satisfaction of the decree would occasion difficulty to the Applicant. As stated in the Shell case, without a demonstration of substantial loss, it would be rare that any other event would render the appeal nugatory and justify keeping the decree holder out of his money.

23. It appears that the decree/order appealed is not expressly a money decree, and that pursuant to the impugned decision of the lower court the 1st Respondent is in the process of lodging an inhibition in respect of Title No. IR 75373/1. Other than contending that the property is well over Kshs. 35,000,000/-, the Applicant has failed to specifically demonstrate the how substantial loss will occur if stay is not granted. In the court’s view, the Applicant has manifestly failed to demonstrate substantial loss and as stated in the Shell case, without a demonstration of substantial loss, it would be rare that any other event would render the appeal nugatory and justify keeping the decree holder fruits of their successful litigation.

24. It follows that the Applicant has failed to establish the likelihood of the appeal being rendered nugatory. Without this evidence, it is difficult to see why the execution process should be stayed. In the circumstances, the motion dated March 30, 2022 is found to be without merit and is hereby dismissed with costs to the 1st Respondent.



DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 14TH DAY OF JULY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Mwaniki

For the Respondent: Ms. Wacheke h/b for Mr. Odongo

C/A: Carol

