Kikambala Housing Estate Limited v Bank of Africa Ltd (Civil Case 2 of 2018) [2023] KEHC 23051 (KLR) (18 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23051 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE 2 OF 2018

DKN MAGARE, J

SEPTEMBER 18, 2023

BETWEEN

KIKAMBALA HOUSING ESTATE LIMITED ..... APPLICANT

AND

BANK OF AFRICA LTD ..... RESPONDENT

RULING

1. The application dated 12/5/2023 was filed by the Judgment debtor seeking the following prayers: -
   a. Spent
   b. Spent
   c. That this Honourable Court be pleased to stay the ruling given on 9/12/2023 pending appeal
2. The story of the above application start with the filing of a notice of appointment on the afternoon of 9/5/2023. The advocate wished to address the court before filing documents. I reminded him that he is not on record. At about 12.24 pm he filed a notice of Appointment and logged in again. The matter had been dealt with and file returned to the registry as the court was then functus official. It is important that advocates maintain fidelity to the truth, as once they know the truth, it shall set them free and they shall be free indeed.
3. The application has now been made and one of the grounds is that the applicant was not given temporary stay. One cannot be given stay which has not been sought.
4. Subsequent to the filing of the application, I gave directions that I did not find the Application urgent then. There was a notice of appeal accompanying the application. The same was filed on 12/9/2023. There is also another one filed a few minutes later. One is by the director and another by the Plaintiff. I am satisfied that there is a notice of Appeal. The validity of the two notices is for another forum.

Submissions

5. The decree holder filed a replying affidavit though Dennis Malembeka dated 31/5/2023.he stated that the applicant does not show that the appeal is arguable, will suffer irreparable loss if stay is not granted and the decree holder has n means of repaying. The also argue the decree holder is in contempt. This is scandalous since the order of 30/9/2022 was directed to the Judgment debtor and not the decree holder.

6. The applicant did not file any submissions.

Analysis

7. The road towards stay of execution pending appeal is travelled and has been with for generation. It is usually a battle of wits. Order 42 rule 6 lays down the tenets and principles guiding stay. Unfortunately, the odds are stack against the Applicant. The order being appealed from is from the lifting of the corporate veil. Though made under order 22, it is not under Order 22, rules 25, 57, 61(3) and 73 (orders in execution). That is where order 43 Rule 1(k) and 2 come in.

8. The onus is on the Applicant and no one else. First to confirm they have at least a non frivolous appeal and complied with requirements for stay of execution. In the case of *OGM (Suing as the father of KGW) v FG & another* [2020] eKLR, the court stated as doth: -

> " 23. The onus is on the applicant to establish existence of a sufficient cause. There is no memorandum of Appeal to demonstrate this and the validity of the notice of appeal is in issue as it was filed by counsel who was not properly on record.
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> 24. I will not delve into the issue of validity of the Notice of Appeal as the power to determine the validity is vested in the full bench of the Court of Appeal under rule 53 of the Court of Appeal rules.
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> 25. Mere filing of Notice of Appeal is not enough to establish sufficient cause envisaged under Order 42 rule 6 *Civil Procedure Rules* a Memorandum of Appeal would in my view provide cogent evidence of existence of sufficient cause.
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> Substantial loss was defined in Bungoma High Court Misc Application No 42 of 2011 -*James Wangalwa & Another vs. Agnes Naliaka Cheseto* that:
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> > "The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail."

9. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides:

> " No order for stay of execution shall be made under subrule (1) unless—
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> (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.

10. In the case of *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR, the court, R.E. Aburili, stated as doth; -

> " 23. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely
>
> (a) that substantial loss may result to the applicant unless the order is made,
>
> (b) that the application has been made without unreasonable delay, and
>
> (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye v African Virtual University* [2015] eKLR.

11. In the case of A*ntoine Ndiaye v African Virtual University* [2015] eKLR, referred to above, justice F. Gikonyo, stated as doth: -

> " The inquiry for purposes of stay pending appeal under Order 42 Rule 6 of the *CPR* is not really about the merits of the appeal but rather the loss which will be occasioned by satisfaction of the appeal in the event the appeal succeeds. I have extensively discussed this matter above and I cite the case of *Jason Ngumba* [2014] eKLR that:
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> ''...Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.
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> But what was stated in the case of *Absalom Dova vs. Tarbo Transporters* [2013] eKLR is relevant, that:
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> ''The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination''
>
> How, therefore, will the court balance the rights of parties in the circumstances of this case?"

12. The applicant is a strange one. The applicant is the one who started this case by suing the parties. Subsequently, they withdrew the suit. The costs were assessed at Ksh 30,303, 956.35. Those costs are

payable. There is no dispute regarding them being paid. There is no dispute regarding whether, the original decree is valid. The question is who is to pay.

13. I am satisfied that notices of appeal have been filed. Therefore, there is an appeal. Whether the appeal raises substantial issues, shall not be addressed today, it is for another day another time. What will constitute loss in this matter. This will be paying Ksh 30,303, 956.35 to the Respondent. Can it constitute irreparable loss. This will stand on where one is standing and what constitutes loss.

14. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

> " No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

15. In this case, the decree for Ksh 30,303, 956.35 and interest is due and payable by the plaintiff.no stay has been sought in respect thereof. What has been sought is the order given on 9/5/2023. In that order, the court found, that the director ought to pay since the Plaintiff is mere sham. If the director pays and the court of appeal finds that the company is not a sham and has assets, the director will recoup his money from the company that he is the main shareholder and the brain behind a company.

16. There is no prospect whatsoever, of the amount reducing as there is not Appeal on that.

17. I note that the issue will be an accounting issue, the money mobbing from the director to the decree holder and the decree holder recouping the same from the company. Further, the issue of refund by the second defendant decree holder does not arise. The decree for the amount has crystalized. The dispute on refund will be between the Plaintiff and the director.

18. I agree with the Respondent that the Applicant had an opportunity to produce books of account but eschewed it. There has also been no application to set aside the orders given.

19. It is now rather obvious that the Applicant is engaged in a wild goose chase game, which is both futile and academic. There is no substantial loss. I therefore find no merit in the Application dated 12/5/2023.

20. There is another question that has disturbed the court. The firm of Wamotsa and Wangila and company came on record after the matter had been determined. The case is at execution stage. Under Order 9, Rule 9, leave is necessary before the firm comes on record. The provision provides as follows; -

> " 9. Change to be effected by order of court or consent of parties [Order 9, rule 9.] When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court— (a) upon an application with notice to all the parties; or (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

21. In the case of *Stephen Mwandware Ndighila v Steel Makers Limited* [2022] eKLR, Justice Maureen Onyango stated as follows; -

> " 36. In the case of *Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi* (2012) eKLR the Court held as follows:
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> > "A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate."
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> 37. Having found that the procedure was not followed by M/s Ochieng', Ogutu & Company Advocates, the said firm is not properly on record, and had no legal standing to move the court on behalf of the Claimant/Applicant when it filed the Bill of Costs dated 19th February, 2020."

22. The net result is that the Application lacks merit. The same is dismissed with costs of Ksh 10,000/= payable within 30 days.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 18TH DAY OF SEPTEMBER, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE