



**Sang v Tanui (Miscellaneous Civil Application E077 of 2023)
[2023] KEHC 22369 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22369 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CIVIL APPLICATION E077 OF 2023
RN NYAKUNDI, J
SEPTEMBER 22, 2023**

BETWEEN

MOSES SANG CLAIMANT

AND

PETER TANUI RESPONDENT

RULING

Coram: Before Hon. Justice R. Nyakundi

Sang & Kangat Advocates

M/s Cheboston Bett & Co. Advocates

1. By a Notice of Motion dated April 6, 2023, the Applicants seeks the following orders:-
 1. Spent.
 2. That pending the hearing and determination of this matter, the Court be pleased to stay any proceedings of the lower Court in Claim No E562 of 2022; Moses Sang Vs Peter Tanui.
 3. That the Honourable Court be pleased to order an interim stay of execution of the decree/ judgment entered on March 31, 2023 and any other consequential orders therein pending the hearing and determination of this application.
 4. That the Honourable Court be pleased to call the lower file being; Small Claims No E562 of 2022; Moses Sanga V Peter Tanui for proper consideration of the issues herein.
 5. That the judgment entered on March 31, 2023, decree and all consequential orders issued in Small Claims No E562 of 2022; Moses Sanga V Peter Tanui be vacated and/ or set aside
 6. That the Applicant's Defence dated October 31, 2022 filed in the lower Court in Small Claims No E562 of 2022; Moses Sanga V Peter Tanui be admitted and be heard on merit fully.



7. That the cost of this application be provided for.
2. The application is premised on the grounds therein and is further supported by the affidavit sworn by the Applicant herein on April 6, 2023.

The Applicant's Case

3. The Applicant deposed that on April 4, 2023, his Advocate was served with a copy of the judgment and Notice of Intention to execute the judgment dated March 31, 2023. That after receiving the said judgment and notice, the Applicant herein instructed his Advocates; being Sang & Lagat Advocates to explain to him the contents and legal perspective of the notice. The Applicant further deposed that he is now aware that the said judgment and notice are with regard to the framed-up debt by the Respondent which according to the Applicant is totally non-existent and will be executed against him at any moment.

The Applicant contends that the suit herein is in relation to some work that he had given the Respondent sometimes ago which he maintains that he cleared up the payments which had even been acknowledged by the Respondent. The Applicant further deposed that the payments were made vide bank account and Mpesa and this was after every trip of work the Respondent did.

4. The Applicant contends that the decision by the trial Court was only based on the documents being the delivery note and one weight bridge receipt in essence one trip which led to the conclusion of the debt. The Applicant maintains that this truly does not reflect the true of position as he had paid the Respondent fully. Further the Applicant contends that in the said decision, he is blamed for the framed-up debt of Kshs 846,000/= and that the liability apportioned against him does not even consider the evidence of payments made. The Applicants further contends that the Court on March 31, 2023 entered judgment against him for the sum of Kshs 846,000/= plus costs and interest from the date of filing the suit, totally excluding in the said decision his testimony and evidence of payments adduced.

The Applicant maintains that as at the time of the said contract, he was paying every time the Respondent delivered the consignment which is evidenced by the statement of payments adduced in Court. The Applicant contends that from the aforesaid statement of payments, the Court did not even bother to inquire whether the payments made were in relation to the contract or were a totally different claim altogether by the Respondent. In addition, the Applicant contends that the Court choose to ignore the statement of payments and his testimony in Court and proceeded to make a determination based on the evidence of the Respondent. Further the Applicant contends that the said judgment does not mention his testimony or defence and or affidavit filed in Court.

The Applicant further deposed that the pleading herein were not served including the submissions and other documents that were relied on.

The Applicant further deposed that the issue raised is a triable and arguable issue that can be handled at the hearing of the appeal. The Applicant has since filed a Notice of appeal, Memorandum of appeal and a letter requesting for proceedings.

5. The Applicant further deposed that the Respondent herein has now and again threatened to execute against him despite the fact that he does not owe him any monies.

The Applicant is apprehensive that his rights are on the verge of being violated and urged the Court to exercise its discretion and power and order for a re-trial on merit.

The Applicant further maintains that since the Respondent never at any given time served him with all Court documents/pleadings, the said proceedings, resultant judgment and decree stands as abuse



of the right to a fair hearing and violates the Constitutional tenets of the right to a fair hearing and access to justice under Article 50.

In the end, the Applicant urged the Court to grant the orders sought as prayed.

6. The application is unopposed. The Respondent was served with this instant application but chose not to respond. This evidenced by the Affidavit of Service filed in Court on June 13, 2023.

The Application was canvassed vide written submissions. The Applicant through his Advocates on record Sang & Lagat Advocates filed his submissions dated August 2, 2023.

Analysis & Determination

7. I have carefully considered the Applicant's application the grounds therein, the Supporting Affidavit and the submissions filed and find that the only issue for determination is whether the orders sought should issue.

The Applicant herein seeks stay of proceedings of the lower Court matter in Small Claims No E562 of 2022; Moses Sanga V Peter Tanui. With regard to this prayer, the same has already been overtaken by events and thus cannot issue as the judgment therein was entered on March 31, 2023. To issue such an order to my mind will only be an exercise in futility. Court orders are never issued in vacuum.

The Applicant also seeks stay of execution of the judgment entered on March 31, 2023.

Order 42 rule 6(1) and (2) of the *Civil Procedure Rules* provides as follows:

- (1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 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.'

8. A party seeking stay of execution pending appeal must demonstrate that: -
 - a. Substantial loss may result to the applicant unless the order was made;
 - b. The application was made without unreasonable delay; and
 - c. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the applicant.



9. In the case of *Kenya Women Microfinance Ltd Vs Martha Wangari Kamau [2020] eKLR* the Court cited the case of *Samvir Trustee Limited Vs Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997* where the Court held that;

'Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.'

10. Being guided by the abovementioned principles. The first consideration is whether the application was filed timeously. The Applicant brought this present application on May 11, 2023, judgment was entered on March 31, 2023. The delay is of about 11 days which in my view is not so inordinate. With that said, I find that the application has been filed timeously.

It is the duty of the Applicant in an application for stay of execution to establish that he/she will suffer substantial loss if the orders sought are not granted. In the instant case, the Applicant contends that the trial Court in rendering the judgment dated March 31, 2023, did not consider his defence, evidence and proof of payment and thus arriving at a wrong conclusion regarding the issue at hand. The Applicants further contends that the impending execution by the Respondent will be detrimental to him as he has no pending debt or payment owing to the Respondent.

As to security, I note that the Applicant has not offered to make any provision for security for the due performance of the decree or for security for costs. The law is clear that the provision of security for the due performance of the decree is a mandatory requirement in the granting of an order for a stay of execution. However, this court is not bound by the type of security offered by an Applicant. It can make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal.



It is clear that the Applicant has shown an unmistakable right to be protected which is directly threatened by an act of execution of the lower Court judgment. So, without stay of execution, the Applicant would be financially ruined in the event he succeeds on appeal.

11. As a consequence, the Applicant has shown a prima facie case that has not been controverted by the respondent to warrant the granting of an order staying execution of the judgment of the trial Court pending the hearing and determination of an appeal.

There is however need for the Applicant to deposit security of the quantum in a joint earning interest account of both counsels in a reputable financial institution within (45) days from today's date.

In default of satisfying this condition, the Applicant's right of appeal is liable to being non-suited. The Respondent to be at liberty to execute the judgment of the trial Court. Further, the Applicant be at liberty upon fulfilling the condition on deposit of security for due performance of the decree within the stipulated period to file the record of appeal and have it served upon the Respondent within 30 days from the date of compliance with clause No. (2) herein above.

The Applicant also wants the Court to vacate and/or set aside the judgment that was delivered on March 31, 2023.

Section 80 of the [Civil Procedure Act](#) Cap 21 provides as follows: -

Any person who considers himself aggrieved—

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

12. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -

(1) Any person considering himself aggrieved—

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

13. In [Republic v Public Procurement Administrative Review Board & 2 others \[2018\] eKLR](#) it was held: -

'Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other



sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.'

14. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc Application No 317 of 2018* John M Mativo Judge culled out the following principles from a number of authorities: -
- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
 - ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
 - iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
 - iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
 - v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
 - vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
 - vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
 - viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
 - ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
 - x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.
15. From the record it is evident that the Applicant herein has already chosen to pursue an appeal in this matter and thus there is no need to vacate and/or set aside the said judgment.

With regard to the Applicant's prayer (4) and (6) the same can await the hearing and determination of the intended appeal.

Accordingly, the Applicant's application dated April 6, 2023, is only allowed in terms of prayer (3). The costs of the application shall abide the outcome the intended Appeal.



DATED SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 22ND DAY OF
SEPTEMBER 2023

.....

R. NYAKUNDI

JUDGE

