Mokoosio & another v Vadera & 3 others (Constitutional Petition 13 of 2020) [2023] KEHC 23752 (KLR) (16 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23752 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CONSTITUTIONAL PETITION 13 OF 2020

FR OLEL, J

OCTOBER 16, 2023

BETWEEN

MARTIN LEMAIYAN MOKOOSIO .... 1ST PETITIONER

EMMANUEL TOYANKA MOKOOSIO .... 2ND PETITIONER

AND

RESHMA PRAFUL CHANDRA VADERA .... 1ST RESPONDENT

SIMON JOSEPH OLE KARASHA .... 2ND RESPONDENT

BINDU KUMAR CHOTALAL VADERA .... 3RD RESPONDENT

NGONG MATONYOK WHOLESALER LIMITED .... 4TH RESPONDENT

RULING

A. Pleadings

1. For consideration before this court is the Notice of Motion dated 13th October 2021 and filed on the same date, brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya, and Order 22 Rule 22, Order 42 Rules 6 and 51 (1) of the *Civil Procedure Rules*, 2010 wherein the Applicants sought for various order, the main one being (prayer 3) that:

    a. That the Honourable Court be pleased to Order stay of execution of the judgement dated 21st September 2021, decree issued on 23rd September 2021 and all consequential orders thereto, pending hearing and determination of the apppeal.

    b. Costs of this application be provided for.

2. The application is supported by the grounds on the face of the said application and the Supporting Affidavit dated 13th October,2021 sworn by Simon Joseph Ole Karasha, who stated that he was the

Executive Director and Chairman of the 4th Defendant company. The petitioners/Respondents did oppose this application by filing their grounds of opposition dated 4th November 2021.

3. The 2nd respondent/applicant (with instructions and Authority of the other applicants), did depone that they had read through the judgment delivered on 21st September 2021 and were aggrieved and dissatisfied with the same and thus had instructed their advocate to lodge an appeal, and a notice of appeal was indeed lodged on the very 21st September 2021.

4. The petitioners on the other hand had started the process of enforcing the decree herein and to that end, their advocate had served them with a demand letter dated 29th September 2021 proposing the Audit companies which could undertake the forensic audit and other companies to carry out an audit of the affairs of the company.

5. It was implied that the audit and inspection costs were to be borne by the 4th respondent and they stood to suffer substantial loss in terms of the human and financial resources, which would result to the 4th Respondent being closed down as the said audit would disrupt the company's operations and also occasion them financial difficulties. Further the order and decree as passed was not enforceable as it was silent on who was to pay costs of Ksh.500,000/= for this exercise as stipulated under Section 786(3) of the *Companies act*.

6. The applicants further deponed that the respondents had not demonstrated that they had misappropriated the funds or income of the company, seized, pilfered and/or disposed of the assets of the company. The respondents had also not in any manner contributed financially or otherwise towards the running the operations of the 4th Respondent company since the demise of John Watenga Mokoosio so as to allege that their fundamental rights had been violated in any manner.

7. The applicants' final issue was that they had satisfied the conditions for granting stay of execution as provided under Order 42 rule 6(1) of the *Civil Procedure Rules* and were ready to abide by any conditions that may be imposed by the honorable court. The application had been brought without any delay and the respondents would not suffer any prejudice if orders sought herein were granted.

8. It was stated that it is in the interest of the shareholders and company that the order of stay be granted as the Applicants had demonstrated sufficient cause for orders for stay of execution of the judgement and decree to be granted.

9. The petitioners/respondents opposed this application and they did file grounds of Opposition dated 4th November 2021 and filed in court on 8th November 2021. They stated that the court was functus officio as the suit had been determined vide the judgment dated 21st September 2021, which judgment was clear, unambiguous, unbiased and was good law. Further no reasonable ground had been adduced to justify why the orders sought should be granted. The application was frivolous, vexatious and therefore should be dismissed.

10. The matter was canvassed by way of written submissions.

B. Submissions

i. Applicant's submissions

11. The applicants did file their submissions dated 23rd November 2021 and stated they had demonstrated that the orders sought were deserved and wholly relied on the pleadings as filed. The doctrine of functus officio did not arise as by dint of provisions of Order 42 Rule 6 and Order 22 Rule 22 of the *Civil Procedure Rules* The court was well clothed with jurisdiction to hear and determine the same. Reliance

was placed on *Lesiure Lodge Ltd Vrs Japhet Asige & Another* (2018) eKLR, *Mombasa Bricks & Tiles Ltd & 5 others v Arvind Shah & 7 others* (2018) eKLR and *Silvanus Kizito v Edith Nkirote Mwiti* (2012) eKLR

12. They had filed their notice of appeal on time and served upon the petitioner's/respondents. The appeal as filed raised triable issues of law, which had merit and high chances of success. It was thus imperative that the orders sought of stay of execution be granted so as not to render the entire appeal as filed to be nugatory. On substantial loss it had been shown that the implementation of the decree involved financial costs, which they were apprehensive, they would be made to bear. The audits as ordered would disrupt the smooth day to day running of the company, its human resource and without doubt would jeopardize the company's operations and financial position. Reliance was placed in Nairobi Civil Application No 238 of 2005 *National Industrial Credit Bnak Limited v Aquinus Francis Wasike & Another* (UR) & *Stanley Karanja Wainaina & Another v Ridon Anyango Mutubwa* (2016) eKLR

13. Finally, the petitioners/respondents had not disclosed their source of income, which they could use to refund the respondents/applicants for the loss they would suffer if the decree was not stayed and the disruptive audit exercise carried out. They reiterated that the said exercise would definitely destabilize their business and daily earnings. Reliance was placed on *Amal Hauliers Limited v Abdulnasir Abukar Hassan* (2017) eKLR.

14. The court was thus urged to allow this application and exercise its powers in such a manner as to render the appeal not to be rendered nugatory. The application was merited and thus should be allowed

ii. Respondents Submissions.

15. The petitioners/respondents filed submissions dated 6th December 2021, where they put forth the issues for determination as follows: whether the Respondent's Application for stay of execution pending the appeal is merited; whether there is an arguable appeal to warrant the issuance of the orders sought in the Application; and who should bear the costs of the application.

16. On the issue of whether the Respondents' Application for stay of execution pending appeal was merited, it was submitted that as a general principle of law, a successful litigant in possession of a lawful and valid Court judgement and Decree is entitled to enjoy fruits of the judgement unless there exists exceptional circumstances to deny him or her the right to enjoy the same and that the application as filed was a ploy to deny the petitioners the fruits of a lawfully obtained judgement against the respondents.

17. The principles that guide the Court when deciding on an application for stay of execution were clearly set out under order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules* and that whether to issue the same or not was based on discretionary power of the Court. The first limb of consideration is whether substantial loss will be suffered by the respondents/applicants if the order was not granted. It was submitted that under this limb, the respondents/applicants bore the burden of proving that the refusal to grant stay of execution would lead to them to suffer substantial loss. Reliance was placed in the cases of ANM v VN [2021] eKLR, *Kenya Women Microfinance Ltd v Martha Wangari Kamau*[2020]eKLR, *Century Oil Trading Company Ltd v Kenya Shell Limited* Nairobi (Milimani), *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR .

18. The applicants had not tendered any credible evidence before court to show the nature and extent of substantial loss they were likely to suffer if the order of stay of execution is denied, and/or how the 4th Respondent will be rendered insolvent, should it incur the cost of the audit and inspection. It was also noted that the applicants had not offered or proposed any security for the due performance of the decree of this court. Reliance was placed in the case of *James Wangalwa & Another v Agnes Naliaka*

Cheseto [2012} eKLR, Kenya Women Microfinance Ltd v Martha Wangari Kamau[2020]eKLR,Civil Appeal No. 5 of 2016, - Patrick Mwenda v Evans Omari Mwita [2016] eKLR .

19. On the issue of whether there is an arguable appeal to warrant the issuance of the orders sought in the Application, it was submitted that the draft memorandum of appeal filed by the applicant was frivolous and marred with scantiness of facts and law and it was evident that they did not have an arguable appeal with any chance of success. Finally, the onus of satisfying the Court that unless stay is granted, the intended appeal would be rendered nugatory was upon the applicants and they had failed to discharge that burden.

20. There was nothing exceptionally compelling on the grounds of appeal that could persuade this court that the appeal as filed has high chances of success to warrant grant of stay of execution of decree pending the hearing and determination of the intended appeal.

21. It was finally submitted that the instant Application was fatally defective given that the court lacks jurisdiction and was functus officio to issue the order being sought by the applicants as the suit has been determined and there was no ground the basis upon, which the current application could be predicated upon.

22. The petitioners thus prayed that the Respondents' Application be dismissed with costs to the petitioners.

C. Determination

23. The court has considered the Application, the Response thereto and the submissions on record and it is easily discerned that the only issue for determination is whether the Applicant should be granted an order of stay of execution pending appeal.

24. The first issues raised was that this suit had been determined and the court was functus offcio. That proposition is not valid as provisions of Order 42 Rule 6 of the Civil Procedure Rules expressly confers jurisdiction to hear and determine such applications.

25. Stay of Execution is provided under Order 42 Rule 6 of the Civil Procedure Rules 2010 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."

26. The three conditions to be fulfilled can therefore be summarized as follows;

  a. that substantial loss may result to the applicant unless the order is made

  b. application has been made without unreasonable delay

  c. security as the court orders for the due performance

27. These principles were enunciated in *Butt v 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.

28. In *Vishram Ravji Halai v. Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 42 Rule 6 of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.

29. To the foregoing I would add that an order of stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay shall also consider the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, to enable court give effect to the overriding objective, while in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See *Suleiman v. Amboseli Resort Limited* [2004] 2 KLR 589.

i. Undue Delay

30. As to whether the Application has been filed without undue delay, judgment was entered on 23.09.2021. The notice of appeal was filed on the same day and the applicant further requested for proceedings on 24.09.2021. This application was thereafter filed on 13.10.2021, which was less than a month later. This court thus finds that the appeal and this application has been filed without undue delay.

ii. Substantial Loss

31. On the issue of substantial loss, Ogolla, J in *Tropical Commodities Suppliers Ltd & Others v. International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 stated that:

> " Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.'

32. In the case of *James Wangalwa & Another v. Agnes Naliaka Cheseto* [2012] eKLR the court expressed itself as hereunder:

> " 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."

33. The same position was adopted by Kimaru, J in *Century Oil Trading Company Ltd v. Kenya Shell Limited* Nairobi (Milimani) HCMCA No. 1561 of 2007 where he stated that:

> " The word "substantial" cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words "substantial loss" must mean something in addition to all different from that…Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement."

34. The respondents did not file any replying affidavit to rebut the averments made by the applicants in the supporting affidavit and a such the averments remain unchallenged. Under provisions of Section 786(3) of the *Companies Act*, the applicants would be expected to pay a minimum of Ksh.500,000/= for this exercise. To release such an amount would interfere with its cash follows and other financial obligations/reserve fund.

35. The petitioners had never contributed financially or otherwise towards the running of the business and/or company operations and if this loss was incurred the petitioner's/respondents would not make good of the same or refund business losses incurred during this exercise and would not be in a position to do so. The respondents/applicants had thus demonstrated that the loss which they may suffer will not be marginal and may not be compensated.

iii. Security

36. As regards 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."

37. The Court must similarly consider the overriding objective and balance the interest of the parties to the suit while considering the issue of security to be offered. The law is that where the applicant intends to exercise his undoubted right of appeal, and in the event, that he were eventually to succeed, he should not be faced with a situation in which he would find himself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.

38. The issue of adequacy of security was dealt with by the Court of Appeal in *Nduhiu Gitahi v. Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 where the Court of Appeal expressed itself as follows:

> "The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them.
>
> So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the

appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it".

39. The applicants did state as regards to the issue of security that, they were ready to abide by any conditions that may be imposed by the honorable court as a condition for granting stay of execution. I do also note from the court file and documents filed that the respondents to this application also did file a notice of appeal to also challenge part of the said judgement dated 21st September 2021 and this was specifically acknowledged in the replying affidavit of the petitioners/ respondents dated 29th March 2022 at paragraph four (4).

D. Disposition

40. Taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful party to the appeal, I do grant prayer (3) of the application dated 13th October 2021 pending hearing and determination of the appeal filed.

41. Since both parties have appeal as against the same decree, I do not make any orders with regard to security to be provided.

42. Costs herein will abide the Appeal.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF OCTOBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 16TH DAY OF OCTOBER, 2023.

In the presence of;

.......................for 1st and 2nd Petitioner

........................for 1st to 4th Respondent

....Court Assistant