Masinde v Hebatullah & 2 others (Civil Appeal E956 of 2022)
[2023] KEHC 23425 (KLR) (Civ) (12 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23425 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E956 OF 2022

CW MEOLI, J

OCTOBER 12, 2023

BETWEEN

SIMON MASINDE ..... APPELLANT

AND

HUZEIFA M HEBATULLAH ..... 1ST RESPONDENT

WILL M OMIDO ..... 2ND RESPONDENT

JANET A OMIDO ..... 3RD RESPONDENT

RULING

1. This ruling is in respect of the notice of motion dated November 18, 2022 brought by Simon Masinde (hereafter the Applicant). It is premised on the grounds on its face and the depositions contained in the affidavit of the Applicant. The key prayer seeks an order to stay execution of the ruling delivered by the lower court on November 4, 2022 and any other consequential orders, as well as stay of execution of the proclamation notice in respect to the Applicant's goods in connection with payment of the sum of Kshs.2,515,634/-, all pending the hearing and determination of the appeal herein.

2. In his supporting affidavit, the applicant stated that he was at all material times the garnishee in the lower court suit, namely Nairobi CMCC No. 3150 of 2013, between Huzeifa M. Hebatullah who was the plaintiff/decree holder (hereafter the 1st Respondent) on the one part, and Will M. Omido and Janet A. Omido who were the defendants/judgment debtors on the other part (hereafter the 2nd and 3rd Respondents) pursuant to his sub-tenancy with the 2nd and 3rd Respondents.

3. The Applicant further stated that upon him filing an application dated July 6, 2022 in connection with the garnishee order issued against him in respect to the judgment sum of Kshs. 2,515,634/- owing from the 2nd and 3rd respondents to the 1st Respondent, the lower court dismissed his application vide

the ruling delivered on November 4, 2022 and which ruling the Applicant seeks to challenge through the present appeal.

4. The Applicant expressed his apprehension that unless the stay orders sought are granted, he will suffer prejudice since the 1st Respondent will likely proceed with execution of the decree and garnishee order absolute. The Applicant further expressed his willingness to provide security by depositing a bank guarantee for the sum of Kshs. 600,000/- being payment of two (2) months' rent which would have been due to the 2nd and 3rd Respondents following termination of the tenancy agreement on 31st August, 2022.

5. The 1st Respondent resisted the Motion by swearing a replying affidavit on 23rd January, 2023 where he deposed that the Motion is unmerited since the Applicant fully participated in the garnishee proceedings filed against him following entry of judgment in favour of the 1st Respondent and against the 2nd and 3rd Respondents, respectively. The 1st Respondent further deposed that the lower court had issued a garnishee order in the proceedings, thereby directing that all rent monies payable by the Applicant to the 2nd and 3rd Respondents from 13th September, 2021 to 17th May, 2022 and attached pursuant to an earlier order, be released to the 1st Respondent.

6. That the Applicant failed and/or neglected to comply with the release order, thereby prompting the execution proceedings. That in the premises, the Applicant does not stand to suffer any loss if the rent which would have been payable to the 2nd and 3rd Respondents in any event is released to the 1st Respondent in satisfaction of the decree.

7. At the hearing of the motion, the court directed the parties to file and exchange written submissions on the Motion. Submitting in support of the Motion, the Applicant's counsel anchored his submissions on the decisions in *R WW v EKW* [2019] eKLR and *Vishram Ravji Halai v Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365 on the principles for consideration in applications seeking an order for a stay of execution.

8. Counsel restricted himself to the condition on provision of security, reiterating that the Applicant deposited a sum of Kshs. 400,000/- at the ex parte stage of the Motion and which security was adequate in view of the outstanding rental sums that were due at the time of termination of the tenancy, namely a sum of Kshs. 600,000/-. To buttress his argument here, counsel drew the attention of the court to the decision rendered in *Nduhiu Gitahi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 concerning adequacy of security. For those reasons, the court was urged to allow the Motion.

9. On behalf of the 1st Respondent, it was his counsel's contention that the Applicant has not demonstrated the manner in which he is likely to suffer substantial loss and hence the Motion ought to fail on that ground alone. Buttressing his submission on that score, counsel cited the decision in the renowned case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410.

10. Counsel further contended that the Motion also ought to fail on the ground that there is nothing to be stayed in the impugned ruling as the lower court merely dismissed the Applicant's motion. Citing the case of *Raphael Kakene Muloki & another v Cabinet Secretary of Lands & 2 others* [2021] eKLR where the court held that a dismissal order constitutes a negative order which is incapable of execution and cannot therefore be stayed.

11. Concerning the condition relating to provision of security, it was the position of counsel that should the court be inclined to grant the stay order sought, then the Applicant ought to deposit the outstanding decretal sum of Kshs.2,515,634/- and proposed that the same be deposited in a joint interest earning account. Reliance was placed on the case of *Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others* [2014] eKLR where the court emphasized the requirement

for provision of security in an application seeking a stay of execution. The court was otherwise urged to dismiss the Motion with costs.

12. According to the record, the 2nd and 3rd Respondents did not participate in the hearing of the Motion.

13. The court has considered the grounds and the affidavits material supporting and opposing the Motion, and the respective submissions of the parties. The twin prayers in the motion seek stay of the ruling delivered on 4th November, 2022 and stay of execution of the decree issued in the suit pending appeal. None of the parties availed a copy of the impugned ruling or the application which precipitated the said ruling for reference purposes. However, it is not disputed that by the impugned ruling, the lower court dismissed the Applicant's motion. Consequently, as the 1st Respondent has correctly asserted, such dismissal order consisted of a negative order, incapable of being stayed.

14. This position was taken by the Court of Appeal in addressing a similar situation in *Raphael Kakene Muloki & another v Cabinet Secretary of Lands & 2 others* [2021] eKLR :

> "...in Raymond M. Omboga v Austine Pyan Maranga Kisii HCCA No 15 of 2010, Makhandia J (as he then was) stated thus:
>
> > "The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent, which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise..."
>
> From the circumstances of this case and the applicants' motion having been dismissed by the High court, it is our considered opinion that there is nothing to stay, and the intended appeal will not be rendered nugatory if the stay orders are not granted."

15. But there is more. The two prayers seek stay of execution, pending appeal. It is trite law that courts have discretionary power to grant an order to stay of execution of a decree or order pending appeal and which discretion ought to be exercised judicially. See Butt v Rent Restriction Tribunal (supra). The applicable provision is order 42, rule 6 of the *CPR* which stipulates 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".

16. It is evident on a plain reading of order 42 rule 6(1) of the *CPR* that an order to stay execution pending appeal presupposes the existence of a competent appeal. The filing of an appeal is a condition precedent to the exercise of this court's appellate jurisdiction under order 42 rule 6 (1) of the *Civil Procedure Rules*. In other words, the invocation of the jurisdiction of this court under order 42 rule 6 (1) or 6 (6) of the *Civil Procedure Rules* must be preceded by the filing of a competent appeal.

17. The Court of Appeal in A*bubaker Mohamed Al-Amin v Firdaus Siwa Somo* [2018] eKLR while citing with approval the decision of the High Court in *Rosalindi Wanjiku Macharia vs. James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased))* [2017] eKLR concurred with and adopted the foregoing reasoning.

18. Earlier, the Court of Appeal in the case of *Equity Bank -Vs- Westlink MBO Limited* [2013] eKLR while commenting on rule 5 (2) (b) of the *Court of Appeal Rules*, whose wording is substantially similar to order 42 rule 6 (1) of the *Civil Procedure Rules*, and on order 42 rule 6 (6) of *Civil Procedure Rules*, left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal.

19. Similarly, in *Gladwell Wangechi Kibiru v. Lord Melvin John Blackburn & 4 others* [2015] eKLR the same court held that:

> " The existence of an appeal or intended appeal grants this court jurisdiction to entertain the application. This court in New Ocean Transport Limited & Another v. Anwar Mohamed Bayusuf Limited (2014) eKLR held that:
>
> > "--- under rule 5(2)(b), such an application must be anchored on an appeal or intended appeal and nothing else."

In *Safaricom Limited V. Ocean View Beach Hotel Limited & 20 others* Civil Application No. 327 of 2009, Omolo JA sitting with Waki and Nyamu JJA explained the application of rule 5(2)(b) thus:

> " At the stage of determining an application under Rule 5(2)(b) there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be an intention to appeal which is manifested by lodging a notice of appeal. If no notice of appeal is lodged, one cannot get an order under Rule 5(2)(b) because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal, or no intention to appeal as manifested by lodgment of the notice of appeal, the Court of Appeal would have no business to meddle in the decision of the High Court."

20. In this case, no grant of leave to appeal is invoked in the memorandum of appeal or demonstrated by way of a copy of an order indicating that leave to appeal the ruling of the subordinate court was sought by the Applicant prior to the filing of this appeal. Yet the facts of this case do not fall within the matters envisaged in order 43 rule 1 (l) in respect of which appeals lie as of right from orders made under order

23 rule 7 of the *Civil Procedure Rules* (trial of a claim of third person in attachment of debts). Thus, the Applicant has wrongly invoked the appellate jurisdiction of this court.

21. The erroneous invocation of this court's appellate jurisdiction is not a mere technicality that is curable under the provisions of section 3A of the *Civil Procedure Act* and article 159(2)(d) of *the Constitution*. In Peter Nyaga Muvake -v- Joseph Mutunga [2015] eKLR, the Court of Appeal while considering an invalid notice of appeal for want of leave stated inter alia that:

> "Without leave of the High Court, the Appellant was not entitled to give Notice of Appeal where, as in this case, leave to appeal is necessary by dint of section 75 of the *Civil Procedure Act* and order 43 of the *Civil Procedure Rules*; the procurement of leave to appeal is sine qua non to the lodging of the Notice of Appeal. Without leave, there can be no valid Notice of Appeal. And without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave, which has not been sought and obtained is dead in the water."

22. The court has said enough to demonstrate that the appeal filed by the Applicant is incompetent and incapable of giving anchor to his motion. The motion dated November 18, 2022, being incompetent is hereby struck out with costs to the 1st Respondent. The applicant is directed to regularize his memorandum of appeal within 30 days of today's date failing which it will equally stand automatically struck out.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 12TH DAY OF OCTOBER 2023.

C.MEOLI

JUDGE

In the presence of

For the Applicant: Mr. Chege

For the Respondents: Mr Kangethe

C/A: Carol