Vishva Builders Limited v Moi University (Civil Suit 51 of 1999)
[2024] KEHC 12498 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12498 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL SUIT 51 OF 1999

JRA WANANDA, J

OCTOBER 17, 2024

BETWEEN

VISHVA BUILDERS LIMITED ..... PLAINTIFF

AND

MOI UNIVERSITY ..... DEFENDANT

RULING

1. The Application before Court is the Notice of Motion dated 31/01/2021 filed by the Defendant through Messrs Nyairo & Co. Advocates. It seeks orders as follows:

   i. [.....] spent.

   ii. [.....] spent.

   iii. [.....] spent.

   iv. That there be stay of execution and/or further execution and/or enforcement of the decree made on 0/02/2024 and the subsequent decision of 1/03/2024.

2. The grounds of the Application are as set out on the face thereof and it is supported by the Affidavit sworn by one Petrolina C. Chepkwony who described herself as the Senior Legal Officer of the Defendant.

3. In the Affidavit, she deponed that the Plaintiff obtained Judgment herein against the Defendant for Ksh 185,305,011.30 with interest prevailing at bank rates. She deponed further that the Plaintiff was subsequently awarded costs of the suit vide the Ruling delivered on 1/03/2024 hence pushing the figure from Kshs 185,305,011.30 to Kshs 1,149,348,155.80, that dissatisfied with the Court's decisions made on 2/02/2024 and 1/03/2024, respectively, the Defendant lodged an Appeal to the Court of Appeal, that the Defendant desires to be heard on the Appeal and therefore the need to grant the orders of stay of execution pending the Appeal. She contended that should the Plaintiff proceed with

execution of the decree, the Defendant stands to suffer substantial loss that cannot be monetarily compensated in the likely event that the Appeal succeeds as there is no guarantee that the Plaintiff will have the means and/or assets sufficient to refund the monies which it may have received pursuant to the decree hence the need to grant the order for stay of execution pending the Appeal so as to preserve the subject matter and prevent the Appeal from being rendered nugatory.

4. She urged further that unless the orders sought issue, the Defendant risks execution which is likely to paralyse its operations being a public learning institution, that if execution proceeds, it is likely to disrupt/paralyse the Defendant and negatively/adversely affect its students and the public at large considering that the amount in issue is colossal. She deponed further that the claim by the Plaintiff was denied from the word go hence the need for a second opinion on the matter by the Court of Appeal which right ought to be allowed to be exercised freely, and that it is only fair that this Application be allowed in order to prevent the ends of justice from being defeated. According to her, no prejudice will be suffered if the orders are allowed, and that this Court has the power to grant the same in the best interest of justice and fairness. She added that the Defendant is ready and willing to comply with the provisions of Order 42 Rule 6 *Civil Procedure Rules* but which should not be punitive, that the Defendant has the right to access justice as guaranteed under Articles 22 and 48 of the *Constitution*, that any order and/or decision made in line with Order 42 Rules 6 that is punitive and unreasonable will result in denial to access to justice which is unconstitutional, and that the Application has been brought timely and in good faith.

Replying Affidavit

5. The Plaintiff opposed the Application vide the Replying Affidavit filed on 03/04/2024, through Messrs Havi & Co. Advocates and sworn by one Ramji Vekaria who described himself as a Director of the Plaintiff. He deponed that the Application is opposed for reasons that no Notice of Appeal was filed in Court and served upon the Plaintiff's Advocates in respect to the Judgment delivered on 2/02/2021, that the contents of the Defendant's Supporting Affidavit are not true or correct for the reasons that no Notice of Appeal in respect to the Judgment delivered on 2/02/2024 has ever been served upon the Plaintiff's Advocates, that there is no receipt to authenticate the date of filing of the Notice of Appeal dated 5/02/2024 or the letter dated 5/02/2024, and that the only decision in respect of which there is an intended Appeal is the one delivered on 1/03/2024. He deponed further that the Plaintiff has filed a Bill of Costs for Kshs 31,177,092.70, that no Appeal lies against the award of costs only and no stay of execution is available in respect to an order for costs or the taxation of the same. He contended that the Defendant has not made out a case to warrant the grant of stay of execution for the reasons that the filing of a Notice of Appeal does not automatically entitle the Defendant to an order for stay of execution, that the Plaintiff is entitled to the fruits of its Judgment and the execution of the Decree as a matter of right, and that the arguability of the intended Appeal or the possibility of the same being rendered nugatory is not a factor for consideration of an Application for stay made before the High Court.

6. He deponed further that proceedings for the trial of this matter were typed before the writing of the Judgment and that with little zeal, the Defendant should by now have filed a Record of Appeal and an Application for stay of execution before the Court of Appeal where arguability and nugatory are considerations for the grant of a request for stay of execution. He urged that it is the burden of the Defendant to demonstrate that the Plaintiff is so impecunious that it cannot refund the decretal sum, that the Plaintiff is a contractor of means and it is for that reason that it was awarded the multimillion shilling contract the subject matter of this suit, that the fact that the Defendant is a public institution does not give it immunity from the payment of the decretal sum, and the Plaintiff will suffer substantial prejudice if stay of execution is granted as it will continue being kept out of monies due to it for a

period further than the 24 years this dispute has been pending before the High Court and the Court of Appeal. He urged further that the appropriate guarantee for the performance of the decree would be the deposit of the decretal sum together with interest as at 15/02/2024, being Kshs 1,149,348,155.80 and costs of Kshs 31,117,092.70 in a joint interest earning account in the names of the Defendant's and the Plaintiff's Advocates.

Hearing of the Application

7. Pending the hearing and determination of this Application, I granted interim orders of stay of execution on 7/06/2024, but directed that such interim orders were not to affect the taxation of the Plaintiff's Bill of Costs which could then still proceed.

8. The Application was then canvassed by way of written Submissions. Pursuant thereto, the Defendant filed its Submissions on 4/06/2024 while the Plaintiff's is dated 15/04/2024.

Defendant-Applicant's Submissions

9. Ms. Odwa, Counsel for the Defendant cited Order 42 Rule 6 (2) and regarding "substantial loss", submitted that the subject matter in the Appeal involves a hefty sum of money running into over Kshs 1 billion going by the computation given by the Plaintiff, that if the execution were to proceed and this Court's decision is overturned, it would be difficult for the Defendant to undo the damage or loss that may arise from the execution process as it would have already parted with the hefty sum which is certain to cripple it, if not permanently shut down the Defendant's institution. She submitted that Defendant is a public institution that draws its funding largely from taxpayer's money to run its education affairs and if execution were to be levied against it, then it is likely to disrupt/paralyse the Defendant's operations and negatively/adversely affect its students and the public at large considering that the amount is colossal. She reiterated that the Plaintiff's fear is that the Plaintiff may not be able to refund the decretal sum if the Appeal succeeds as the Plaintiff has not demonstrated by way of an Affidavit of means or documentary proof that it will be in a position to refund the same if the money is placed in its hands. She cited the case of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another* [2018] eKLR.

10. In respect to whether the Application has been brought "without unreasonable delay", Counsel submitted that the Judgment was delivered on 2/2/2024 and shortly thereafter, the Plaintiff filed an Application seeking costs whose Ruling was delivered on 1/3/2024, that the Defendant lodged an Appeal against both the Judgment and the Ruling on costs and filed the present Application, that as such, the Application was filed without unreasonable delay. On the issue of "security" for due performance of the decree, Counsel submitted that Defendant is ready and willing to comply with the provisions of Order 42 Rule 6 of the *Civil Procedure Rules* but which should not be punitive and unreasonable so as to impede the Defendant's right to access justice as guaranteed under Articles 22 and 48 of the *Constitution*. She cited the case of *Westmont Holdings SDN BHD v Central Bank of Kenya & 2 Others* (Petition 16 (E023) of 2021) [2023] KESC 11 (KLR) (17 February 2023 and also the case of Focin Motorcycle Co. (*supra*).

11. In response to the Plaintiff's allegation that no Notices of Appeal were filed, Counsel submitted that the Court record will bear witness that 2 Notices of Appeal and letters requesting for proceedings dated 5/2/2024 and 8/3/2024, respectively, were lodged against both the Judgment delivered on 2/2/2024 and the Ruling made on 1/3/2024 and Court fees receipt issued. She submitted further that upon lodging the Notice of Appeal dated 5/2/2024 and the letter bespeaking proceedings of even date, the same was served upon the Plaintiff's Advocates and that as such, the issue of there being no Notice of Appeal filed or served does not arise. She maintained that what an Applicant in an Application of

this nature ought to demonstrate is the lodging of a Notice of Appeal and which is self-evident from the Court record, that when determining this Application, the issue of service of a Notice of Appeal is not within the province of this Court to address but the Court of Appeal. Counsel urged that the Application is properly before this Court and warrants consideration, that the process of lodging an Appeal has its own legal framework and is not within the jurisdiction of this Court to delve into but squarely lies with the Court of Appeal, and that in any event, the lodging of an Appeal is not one of the factors to be taken into consideration when determining an Application of this nature and as such, this Court should disregard the challenge.

12. Counsel then returned to the issue of the Plaintiff's ability to refund the decretal sum and reiterated that nothing has been presented to show that the Plaintiff is capable of refunding the over 1 Kshs billion which it is now demanding, if the Appeal eventually succeeds, that the fact that the Plaintiff was awarded a contract more than 2 decades ago is not proof of capability to pay, and that it is not lost to this Court that most companies are currently facing liquidity issues and are on their death bed hence the need to stay the execution. She also returned to the issue of "security" and urged that the security to be offered is at the Court's discretion but ought to be reasonable so as not to prevent the Defendant from accessing justice before the Court of Appeal. In conclusion, she submitted that no prejudice will be suffered by the Plaintiff if the orders are issued as none has been demonstrated to prevent this Court form exercising its discretion in favour of the Defendant. She urged the Court to adopt the reasoning in the case of *Butt v Rent Restriction Tribunal* (Nairobi Civil Application No. 6 of 1979).

Plaintiff's Submissions

13. Counsel for the Plaintiff., Mr. Havi, reiterated that no Notice of Appeal was filed or served upon the Plaintiff in respect to the Judgment delivered on 2/02/2024 as required by Order 42, Rule 6 (1) of the *Civil Procedure Rules*, that no evidence of filing or service of the exhibited Notice of Appeal dated 5/04/2024 has been tendered and that in the circumstances, there is no jurisdiction to entertain a request for stay in respect to the Judgment. He cited the case of *University of Eldoret & Another v Hosea Sitienei & 3 Others* [2020] eKLR. Counsel further submitted that the Defendant's payment of the decretal sum will not amount to "substantial loss" for purposes of Order 42, Rule 6(2)(a) of the *Civil Procedure Rules*. He cited the case of *Kenya Shell Limited v Kiburu & Another* (1986) KLR 410 and also the case of *Sbg Securities Limited (Previously Known As Cfc Financial Services Limited) v Mariam Awinja Akwera* [2016] eKLR and submitted that in the two decisions, the Application for stay of execution was dismissed, a course which asked this Court to follow in this case. In the conclusion, he submitted that if stay of execution is to be granted, the decretal amount should be secured by a bank guarantee or by deposit of the decretal sum in a joint account. He cited the case of *Endebess Development Company Limited v Coast Development Authority* [2021] eKLR, the case of *Ernest Omondi Owino & Another v Felix Olick & 2 others* [2021] eKLR and also the case of *Purity Kathoki Maweu v Hezekiah Njuki Mwangi* [2022] eKLR.

Determination

14. The issue that arises herein for determination is "whether an order of stay of execution of the decree herein pending Appeal should be issued".

15. The Court's power to grant stay of execution pending Appeal is provided under Order 42 Rule 6(2) of the *Civil Procedure Rules* as follows:

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

a. the Court is satisfied that substantial loss may result to the Defendant 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 Defendant."

16. Therefore, an Applicant for stay of execution of a decree or order pending Appeal is required to satisfy the conditions set out above. The first one is whether the Application has been made "without unreasonable delay", the second is to demonstrate that "substantial loss" may result to the Applicant unless the order is granted, and the third is the Applicant's willingness or its readiness to "deposit security" for due performance of the decree or order.

17. However, in this case, doubts have been raised whether the Defendant has indeed filed the requisite Notice or Notices of Appeal which would be a prerequisite for this Court to assume jurisdiction to entertain the Application for stay of execution pending Appeal. My perusal of the Court file reveals that on 5/02/2024, the Defendant filed the Notice of Appeal of the same date giving notification of its intention to Appeal against the Judgment delivered on 2/02/2024 (1st Notice of Appeal). Also filed on the same date is the Defendant's letter, also of the same date, bespeaking proceedings. On the face of the letter, it is indicated that it is copied to the Plaintiff's Advocates. There is also evidence that Court fees was paid for the above items. I have not however been supplied with evidence that the Notice of Appeal was indeed so served. The Plaintiff denies being served but the Defendant insists that service was indeed effected. Service of the 1st Notice of Appeal therefore remains in dispute.

18. I have also established that, subsequently, on 12/03/2024, the Defendant filed the 2nd Notice of Appeal giving notification of its intention to challenge the Ruling delivered on 1/03/2024. Also filed was the letter dated 8/03/2024 bespeaking proceedings. There is also evidence of payment of Court fees for both the said items. For this 2nd Notice of Appeal and the letter, service upon the Plaintiff is not disputed.

19. Should the absence of evidence that the 1st Notice of Appeal was served lock out the Defendant's Application for stay from being entertained herein? I do not think so. To me the fact that the Notice was duly filed is sufficient for the purposes of the Application. The controversy on whether or not the same was served should not, in my view, derail the Application. Doing so will be against the interest of justice. First, it has not even been conclusively established that, indeed, the Notice was not served. It is only that service is disputed. Secondly, the Defendant has not claimed that it was not aware of the Notice of Appeal and thirdly, the Plaintiff has demonstrated any prejudice that it has suffered assuming that service was not effected as alleged.

20. I also agree with the Defendant's Counsel that the issue whether or not the Notice of Appeal was served is a matter that should more appropriately be raised before the Court of Appeal in an Application for striking out of the Notice. In adopting this view, I am fortified by the holding of the Court of Appeal in the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR. In that case, while dealing with a similar objection raised against an Application for stay pending Appeal filed under Rule 5(2) of the *Court of Appeal Rules*, the Court held as follows:

> "Mr. Ohagga, learned counsel for the respondents ..... tried to argue before us that the notice of appeal filed by the applicant is invalid and that, therefore, the Court cannot grant the order of stay prayed for. We, however, take note of the fact that no application has been made by the respondents for the striking out of the notice of appeal and as the Court has

repeatedly pointed out *Rule 5 (2) (b)* does not provide that "..... where a valid notice of appeal ....;" the Rule simply provides that:-

"In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74.....

Rule 74 itself does not talk about a valid notice of appeal. The validity or otherwise of a notice of appeal is to be determined in accordance with the provisions of Rule 80 under which a notice of appeal can be struck out. We do not see any reason for determining the validity or otherwise of a notice of appeal when an application under Rule 5 (2) (b) is being considered."

21. Granted, the above decision was made pursuant to an Application brought under the Court of Appeal Rules in which the considerations are different. However, what is important is the ratio decidendi put forward and which I adopt herein. In any case, under Article 159(2)(d) of the *Constitution*, Courts are encouraged to administer justice "without undue regard to procedural technicalities".

22. For the said reasons, I overrule the challenge made by the Defendant and raised on the basis of alleged non service of the 1st Notice of Appeal.

23. Regarding the merits of the Application, the first condition that I need to consider is whether the Application has been made "without unreasonable delay". In this case, the Judgment was delivered on 2/02/2024. On 27/02/2024, the Plaintiff filed an Application under the "slip rule" seeking to be awarded costs of the suit. The Ruling on this Application was then delivered on 1/03/2024. The Defendant then filed this instant Application on 5/06/2024. In view of this chronology of events, and although there is no explanation why it took the Defendant 3 months to file the Application, I am satisfied that the period taken does not amount to inordinate or "unreasonable delay". In any event, I note that the Plaintiff has not raised the issue of delay.

24. The second condition is whether the application would suffer "substantial loss" should the order not be granted. As to what constitutes "substantial loss", F. Gikonyo J in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, stated as follows:

"

"11. 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. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under *Order*

42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

> "... 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."

With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion under *order 42 Rule 6 of the CPR* only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above."

25. Further, Platt, Ag. JA (as he then was) in *Kenya Shell Limited v Kibiru* [1986] KLR, expressed himself as follows:

> "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 corner stone of both jurisdictions for granting a 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".

26. On his part, Gachuhi, Ag. JA (as he then was) in the same case, stated as follows:

> "It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement."

27. The Judgment sum herein was for the sum of Kshs 185,305,011.30 plus costs and interest that has accrued from the date that the suit was filed in the year 1999. According to the Defendant, the Plaintiff's computation of the decretal sum aggregates to an amount in excess of Kshs 1 billion. It cannot therefore be disputed that the amount is colossal and enormous by any standards. According to the Defendant, there is doubt over the Plaintiff's ability to refund the money should it be paid to the Plaintiff and subsequently, the Judgment is overturned on Appeal. On the issue a decree-holder's ability to refund the decretal sum, the Court of Appeal in the said case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike* (*supra*) guided as follows:

> "This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge — see for example *section 112 of the Evidence Act*, Chapter 80 Laws of Kenya.
>
> The 1st respondent swore the replying affidavit in this matter and in Paragraph 1 thereof, he swore that he is the Chief Executive Officer of and the principal shareholder in the second

respondent. He did not disclose the value of his share-holding in the 2nd respondent; nor did he say if he earns a salary and if so how much. In Paragraph 11 of the replying affidavit, the 1st respondent set out the contracts in which the 2nd respondent was engaged in but the values of those contracts were not disclosed. ..... On the material before us, the means or resources of the 1st respondent remain wholly unknown and in those circumstances, we agree with Mr. Laibuta that if the decretal sum was paid over to the 1st or even to the 2nd respondents, the two might not be able to repay it back and in that case, if the applicant's intended appeal were to succeed, that success would be rendered nugatory."

28. Applying the above principles to this case, I find that the Plaintiff has not provided any evidence to demonstrate its ability to refund the decretal sum should the Appeal succeed. Considering that the Defendant is a public institution of higher learning, I agree with the Defendant that execution of the decree for such a colossal sum has the potential to disrupt and paralyse its operations, and that if execution proceeds, it will adversely affect the students and the public at large. I also take into account the fact that the Defendant, being a public institution as aforesaid, draws its funding largely from the taxpayers to run its affairs. In the circumstances, I am satisfied that execution before the Appeal is heard and determined will cause a great deal of pain and hardship to the Defendant and the taxpayer. The description I have given no doubt amounts to "substantial loss" as contemplated under Order 42(6)(2)(a) of the *Civil Procedure Rules*. In view of the foregoing, I find that the Defendant has satisfied the requirements and met the threshold required in Applications of the nature herein. Consequently, I grant stay of execution pending Appeal as prayed.

29. On the third condition, deposit of "security", Counsel for the Defendant alluded that the Defendant is ready and willing to comply with the conditions that the Court may impose that are "reasonable" and "not punitive". Tactfully, however, she avoided giving any proposal of her own of what conditions, in her view, would be "reasonable" or "not punitive". The Plaintiff, on the other hand, proposes that the Defendant should secure the decretal amount by way of a bank guarantee or by depositing the decretal sum in an interesting earning joint account. In my view, considering the enormity of the amount of money at stake, I find it to be "punitive" and unjust to insist on the Defendant depositing the money. Doing so will be tantamount to giving the order of stay on one hand and again taking it away with the other.

30. Taking into account all relevant factors and in striving to maintain a balance between the interests of the two respective parties, I will impose upon the Defendant the condition that for the order of stay of execution to remain in force, the Defendant shall execute a bank guarantee as security for performance of the decree. Considering that the costs and interest are yet to be computed, appreciating the large amount of the decretal sum, and being cognisant of the reality that the Defendant, being a government/public institution that has been in existence for many years, is well secured and is unlikely to suddenly just vanish or disappear from the face of earth, I limit the amount to be secured by the bank guarantee to only the Judgment sum.

Final Orders

31. The upshot of the above is that the Application succeeds. Consequently, I order as follows:

    i. The Applicants' Notice of Motion dated 2/04/2024 is allowed in terms of prayer 4 thereof. Accordingly, pending the hearing and determination of the intended Appeal, an order of stay of execution is hereby granted suspending, barring and/or prohibiting execution of the Judgment entered herein on 2/02/2024 or of the decree arising therefrom, including the order awarding costs to the Plaintiff as made on 1/03/2024, but on the condition that the Defendant shall, within a period of sixty (60) days from the date hereof, execute and file in Court a bank

guarantee in the Judgment sum of Kshs 185,305,011.30 at a reputable commercial bank, as security for performance of the Decree herein..

ii. In the event of default in complying with the conditions given hereinabove within the timelines stipulated, the orders of stay of execution shall lapse and the Plaintiff shall be at liberty to execute the Decree.

iii. The order of stay of execution issued herein shall not however affect or bar the taxation of the Plaintiff's Bill of Costs. The Deputy Registrar is therefore at liberty to proceed with the taxation.

iv. Costs of the Application herein shall be borne by the Defendant.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 17TH DAY OF OCTOBER 2024

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WANANDA J. ANURO

JUDGE