Kitoo v Muli & another (Civil Appeal E224 of 2023)
[2024] KEHC 16758 (KLR) (4 November 2024) (Ruling)

Neutral citation: [2024] KEHC 16758 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E224 OF 2023

NIO ADAGI, J

NOVEMBER 4, 2024

BETWEEN

BRYAN KITOO .... APPELLANT

AND

MACDONALD DAVID MULI .... 1ST RESPONDENT

SAMUEL MUTHEE KAMUNYA .... 2ND RESPONDENT

RULING

1. The Appellant/Applicant's Notice of Motion application is dated 15/9/2023 and filed under Certificate of Urgency. It is premised on Sections 3A, 79G and 95 of the *Civil Procedure Act*, Order 22 Rule 22, Order 42 Rule 6 and Order 42, Rules 1 and 3, of the Civil Procedure Rules 2010, and all other enabling provisions of the law. The application is supported by the affidavit sworn by the Applicant on the even date.

2. The Applicant herein prays to Court as follows:

   a) Spent

   b) Spent

   c) That this honorable court be pleased to order a stay of execution of the judgment/decree delivered on 11th August,2023 by Honourable A. Nyoike sitting in Machakos in CMCC No.806 OF 2021 pending the hearing and determination Appellant's Appeal filed at the High Court of Kenya at Machakos.

   d) That this Honourable Court allow the Applicant to furnish the Court with security in the form of a Bank Guarantee from a reputable Bank pending the full hearing and determination of this Appeal.

e) Spent

f) That the costs of this Application abide the outcome of the Appeal.

Some of the grounds that the Applicant relied on include:

a) That Judgement in CMCC No. 806 of 2021 was delivered on the 11th August,2023 and the 30 days stay of execution granted by the Honourable court lapsed. The Appellant/Applicant has since exercised the right to Appeal and filed his Memorandum of Appeal. The Applicant further states that the appeal is merited, arguable and it raises pertinent points of law and facts thus it has overwhelming chance of success. The Applicant further expresses his apprehension that the Respondents would proceed to levy execution and the Appeal would be rendered nugatory should the Appellant proceed to execute the judgement.

b) The Appellant also expresses suspicion that the judgement is of a substantial amount and if the Applicant/Appellant is successful they may not recover from the Respondents. That the Respondents have not disclosed nor furnished the Court with any documentary evidence to prove his financial standing. The Appellant's/Applicant's Insurer is ready, willing and able to furnish the Court with a Bank Guarantee as security to the court. This Application is made in good faith and will not occasion any prejudice to the Respondents. This Application has been brought without any undue delay in the circumstances.

3. The application is opposed by the Respondents vide the Replying Affidavit sworn by the 1st Respondent on 6/10/2023 and request this honorable court to dismiss the application with costs to the Respondent for the reasons that the application is brought in bad faith and is an afterthought whose sole aim is to delay the finalization of the matter and deny the Respondents the enjoyment of their lawfully and legally obtained judgment. The Respondent object to the bank guarantee and argues that the same is not sufficient security considering that this is a money claim. In addition, the 1st Respondent avers that he is a man of means thus in the unlikely event that the appeal successful, he is willing and able to refund the decretal sum. The Respondents proposes that half the decretal sum plus costs be deposited with his advocates and the other half to be deposited into a joint interest earning account in the names of both Parties advocates on record.

Factual Background

4. The Respondents instituted the suit herein against the Appellant in Machakos CMCC No. 806 of 2023 and the matter was prosecuted to finality and Judgment was entered in favour of the Respondents and apportioned liability at 90%:10% and general damages of Kshs.200,000/= plus costs and interest. The Applicant/Appellant being dissatisfied with the said judgment lodged appeal and application herein.

Analysis and Determination

5. I have considered the application, the supporting affidavit, the replying affidavit, and the rival submissions filed by Parties' counsel as well as the judicial decisions relied upon. In my view, the issues for determination are as follows:

a. Whether the Applicant/Appellant has met the criteria for grant of orders of stay pending Appeal.

b. Who shall bear costs of the application?

a. Whether the Applicant/Appellant has met the criteria for grant of orders of stay pending Appeal.

6. The law relating to stay pending Appeal is Order 42 Rule 6 (2). It is also important to state that the power to grant an order of stay is discretionary and is dependent on certain conditions being met.

7. Order 42 rule 6(1) and (2) of the Civil Procedure Rules,2010 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. In Vishram Ravji Halai vs. 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 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely:

i. establishment of a sufficient cause,

ii. satisfaction of substantial loss and

iii. the furnishing of security.

9. Further the application must be made without unreasonable delay.

To the foregoing, Justice Odunga in Michael Ntouthi Mitheu v Abraham Kivondo Musau [2021] eKLR held that:

> "I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. According to Section 1A (2) of the *Civil Procedure Act*:"the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective."

10. Under Section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

11. In Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009, Nyamu, JA on 20/11/09 held inter alia that the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way.

    The same Judge in Kenya Commercial Bank Limited vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010 held that:

    > " where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplement them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case."

12. It therefore follows that all the pre-overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the *Civil Procedure Act* are attained. It is therefore important that the court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the court do not render nugatory the ultimate end of justice.

13. The court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.

14. In Butt Vs. Rent Restriction Tribunal [1979], the Court of Appeal gave pointers on what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court stated thus:

    i. The power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an Appeal.

    ii. 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.

    iii. 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.

iv. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

15. On the first criterion as set out in Order 42 Rule 6 (2) i.e. Whether Applicants/Appellants have brought this application without unreasonable delay. The judgment before the trial court was delivered on 11/8/2023 and 30 days stay of execution granted which would lapse on 11/9/2023. The Memorandum of Appeal dated 4/9/2023 was lodged in court on 11/9/2023 while the instant application dated 15/9/2023 was filed in court on 20/9/2023 which was thirty-nine days after delivery of the judgment. In the circumstances, I find that application has been brought without unreasonable delay.

16. The second criterion is whether the Applicant/Appellant has demonstrated that he is bound to suffer substantial loss if orders of stay of execution are not granted. The question that follows is what comprises substantial loss. In Silverstein Vs Chesoni (2002)1 KLR 867 it was held that

> " 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"

17. The Appellant/Applicant has deposed that he stands to suffer loss if orders sought are not granted. judgment was entered in favour of the Respondents, who might commence execution against the Applicant. If the orders sought are not granted, the Intended Appeal will be rendered nugatory, and the Applicant will stand prejudiced and suffer substantial loss. The Applicant submits that the Respondents have not presented before court any evidence showing their financial capacity to reimburse the decretal sum if the same is paid to the Respondents.

18. The Applicant prays that this court finds that he has demonstrated that substantial loss will be occasioned to him should the court fail to grant the prayers sought in the application. The Applicant invites this court to be persuaded by the holding in the case of Nicholas Stephen Okaka& Another v Alfred Waga Wesonga (2022) eKLR where the court held that:-

> " in this case, the Respondent has not given any material as to his ability to repay the decretal sum in case the appeal succeeds and in light of the depositions by the applicant's counsel that they shall suffer substantial loss if stay is not granted. Accordingly, I am persuaded that substantial loss has been proved.

19. The court is under a duty to hold the rings of justice even handed; it should not offer any illegitimate advantage to either party. The Appellant/Applicant appeal to this Honourable Court to maintain the status quo as has been to enable the Applicant an opportunity to be heard on their Appeal.

20. The Respondent submits that a bank guarantee is not security and that the Respondents stand to suffer great loss if the application is allowed, as it will deny then enjoyment of their lawful and legally obtained judgment. The Respondents submit that the application was filed about a month after the delivery of the judgment when the Applicant realized that stay that was granted by the trial court was lapsing, as such the appeal and application herein are an afterthought whose sloe intent is to deny the Respondents the enjoyment of fruits of their judgment.

21. In granting an order of stay of execution, the court should not be seen to interfere with a party's enjoyment of the fruit of the judgment. See the case of Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No.6726of 1991 where the court stated as follows: -

> " The financial ability of a decree-holder solely is not a reason for allowing stay, it is enough that the decree-holder is not a dishonourable miscreant without any form of income. Suffice to state that the respondent, at this moment, is the successful party and in order to deny him the fruits of his success, it is upon the applicant to prove that he is unlikely to make good whatever sum he may have received in the meantime."

22. The loss the Applicant has alluded to is that the appeal herein will be rendered nugatory should the stay order be declined. It is my considered view that this being a monetary claim, any loss to be suffered by either party can adequately be compensated by an award in damages. Both the Applicant and the Respondent have not shown by evidence through an affidavit that the Respondents are incapable of refunding the amount in dispute should the appeal succeed.

23. The third criterion is that the Applicant/Appellant must furnish security for the due performance of the decree. I am fully aware that the court has a delicate task of balancing the interests of both the Appellant and the Respondent. The Appellant who seek 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. It is true that under Order 42 rule 6 aforesaid, the Applicant is required to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder. I agree with the position in Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others [2015] eKLR, where it was held that:

> " ... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ''ultimately be binding' are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick."

24. I also associate myself with the holding in Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd [2019] eKLR, where the court observed:

> " ... 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 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 degree in order to enjoy the fruits of his judgment in case the appeal fails.
>
> 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 judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... This 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."

25. The law is that, where the Applicant intends to exercise its undoubted right of appeal, and in the event, it were eventually to succeed it should not be faced with a situation in which it would find itself 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. The issue of adequacy of security was dealt with by the Court of Appeal in Nduhiu Gitahi vs. 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".

26. The Applicant has submitted that they he willing to avail a bank guarantee from Family Bank as security for costs. This proposal is opposed by the Respondent who submit that a Bank guarantee is not sufficient security as this is a money claim and that the security ought to be in form of money. Although the Respondent does not expound on why it prefers security in form of money and not a bank guarantee. This court will not hesitate to consider the Bank guarantee that is availed before this court is suitable form of security in the circumstances of this matter.

Whether a Bank Guarantee is a Suitable Form Security.

27. Under Order 42 rule 6 aforesaid, the applicant is required to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been

offered in deciding an application thereunder. I am in agreement with the position in Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others [2015] eKLR, where it was held that:

> " ... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ''ultimately be binding' are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick."

28. Similarly, I associate myself with the holding in Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd [2019] eKLR, where the court observed:

> " ... 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 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 degree in order to enjoy the fruits of his judgment in case the appeal fails. 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 favor. 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 judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... This 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."

29. 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".

30. This Court notes that there is an agreement dated 6th July 2023 exhibited between Family Bank and the directors of Direct Line Assurance Company Limited who is the insurer of the Applicant. The same is for a sum of kshs.200,000,000 million. It is for a period of 12 months with an option to renew the guarantee was received by the said bank on 6th July 2023 which time this application and ruling hereof were not anticipated.

31. This Court further takes note of the fact that Applicant is not a party to the said agreement as the said agreement is between the Applicant insurer's Directors and Family Bank. There is no evidence that the bank guarantee herein is for the intent and purpose of this matter.

32. This Court finds and agree with the Counsel for the Respondent that the said bank guarantee is not suitable in this present case. It is in a nutshell general bank guarantee it has not stated how each party will benefit from it hence it will pose hindrance at the time of enforcement.

33. In the end, the Applicants submit that the application dated 8/4/2024 is merited and ought to be allowed.

b) Who should bear the cost of this application?

34. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. In Jasbir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 others SC. Petition No. 4 of 2012: [2014] eKLR. The Supreme Court held that costs follow the event and that the Court has the discretion in awarding such costs.

35. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the *Civil Procedure Act*, I find and hold that the Appellant/Applicant hasfulfilled the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules.

36. Accordingly, I hereby allow the Applicant's/Appellants' application dated 15/9/2023 and grant stay of execution of the Judgement in CMCC No. 806 of 2021 was delivered on the 11th August,2023 pending the hearing and determination of the appeal on the following conditions:

    a. The Appellant/ Applicant shall deposit half of the decretal sum being Kshs.140,151.50/= of Kshs.280,303/=with the Respondent's advocate on record within Fifteen (15) days of this ruling.

    b) The Appellant/ Applicant shall deposit the remaining half of the decretal sum being Kshs.140,151.50/= into an interest earning account in a reputable commercial Bank, to be held by both advocates for the Parties to this appeal, within Thirty (30) days of this ruling;

    b. The Appellant to file and serve a record of appeal within sixty (60) days of this ruling;

c. Costs shall be in the cause;

d. The appeal shall be mentioned before the Deputy Registrar for compliance on a date to be fixed at the registry.

37. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS 4TH DAY OF NOVEMBER 2024

NOEL I. ADAGI

JUDGE