Mokoosio v Angela Mulwa t/a Mulwa & Partners Advocates (Miscellaneous Application E250 of 2023) [2024] KEHC 15746 (KLR) (Commercial and Tax) (6 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15746 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E250 OF 2023

FG MUGAMBI, J

DECEMBER 6, 2024

BETWEEN

MARTIN LEMAIYAN MOKOOSIO ..... APPLICANT

AND

ANGELA MULWA T/A MULWA & PARTNERS ADVOCATES .... RESPONDENT

RULING

Background and introduction

1. This court delivered a ruling on 19th July 2024 allowing the OS filed by the client, and held as follows:
    i. The respondent shall pay to the applicant the amount of Kshs. 16,991,428/=, in honoring the professional undertakings given on 4th and 13th October 2022, together with interest calculated at commercial rates from the date of completion of registration of unit 6 and 18, until payment in full within;
    ii. Payment shall be made 30 days from the date of this judgment, failing which the applicant shall be at liberty to execute the same;
    iii. The applicant shall also have the costs of the application.
2. Dissatisfied with the finding of this court, the advocate seeks to appeal the decision and has filed the Chamber Summons application dated 6th August 2024, under Order 42 Rule 6 of the *Civil Procedure Rules* seeking stay of execution of the ruling of 19th July 2024. The advocate further seeks to stay and the proceedings in the arbitration between the parties pending hearing of her intended appeal.

3. The application is supported by the grounds on its face as well as the supporting and further affidavits sworn by Advocate Angela Mulwa on 6th August 2024 and 25th October 2024 respectively. The advocate also filed written submissions dated 25th October 2024.

Response:

4. The client opposes the application through a ground of opposition dated 11th October 2024, a replying affidavit and written submissions all of even date.

5. The client's case is that the application does not meet the threshold provided for under the law for grant of stay of execution orders. Further the client argues that the stay of the arbitral proceedings was not a subject of the ruling and that this court has no jurisdiction to order such a stay.

Analysis and Determination

6. I have carefully considered all the pleadings, submissions and evidence presented as well as the authorities cited by the parties.

7. The prayer for stay of execution is anchored on Order 42 Rule 6 of the *Civil Procedure Rules*. Rule 6(2) provides the threshold that an applicant must meet to be successful in such an application. It particularly provides that:

> "(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.
>
> (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application."

8. The court's power to grant stay pending appeal is discretionary but fettered by the above three conditions. Additionally, it is crucial for the court to strike a balance between the applicant's right to appeal and the respondent's right to enjoy the fruits of their judgment. In exercising this discretion, the court must ensure that its decision does not render a successful appeal nugatory. This principle is well-articulated in the decision in *Butt v Rent Restriction Tribunal*, [1979] KECA 22 (KLR).

9. In *Vishram Ravji Halai v Thornton & Turpin*, [1990] KLR 365, the Court of Appeal observed 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, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing 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. My inquiry into the threshold under Rule 6(2) of Order 42 begins with an assessment of the timely filing of the application. The impugned ruling was delivered on 19th July 2024, and the present application was filed 18 days later, on 6th August 2024. I find, therefore, that the application was filed without inordinate delay.

11. The advocate contends that she will suffer substantial loss if a stay is not granted, as the judgment amount of Kshs. 16,991,241/- is significant. She further avers that immediate execution would place considerable financial strain on the law firm and expose it to undue hardship, particularly since the funds in question were not retained by the firm but were instead forwarded to HHL in compliance with the Joint Venture Agreement (JVA).

12. Conversely, the client argues that no substantial loss will be suffered by the advocate, as the judgment amount was entrusted to her to hold in trust for the client, stemming from the sale proceeds of the houses. He asserts that an appeal against a monetary decree cannot be rendered nugatory solely because the decretal sum has been paid prior to the appeal's determination, as it can be refunded.

13. Furthermore, he claims he is financially capable of refunding the decretal sum should the appeal succeed, citing his status as a person of means, gainful employment, and ownership of real property in Kenya, including Original Title LR No. Ngong/Ngong/13113, which measures approximately 16.125 acres.

14. The advocate, however, counters that the client has failed to substantiate his ability to refund the decretal sum. She argues that his assertions regarding financial capability and property ownership are bare averments, unsupported by any concrete evidence.

15. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another*, [2006] eKLR the Court of Appeal surmised 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."

16. Guided by the above, I find that the advocate has demonstrated that she will suffer substantial loss if stay is not granted.

17. On the question of security, the advocate references the case of *Arun C. Sharma v Ashana Raikundalia T/A Raikundalia & Co. Advocates & 2 Others*, [2014] eKLR to support the argument that it falls within the court's discretion to determine security based on the circumstances and facts of each case. The advocate further demonstrated a willingness to provide security for the due performance of the decree under appeal. Consequently, I find that the advocate has established a sufficient basis for granting a stay of execution pending appeal.

18. The next issue for determination is whether the advocate has established sufficient grounds for a stay of the arbitral proceedings. The advocate contends that the client acted separately and maliciously by initiating arbitration proceedings against HHL while simultaneously suing her and HHL in different forums over the same JVA issues. She argues that the client did so deliberately so as to make isolated representations to secure orders favorable to him, without full disclosure of his misconduct or acknowledgment of the responsibilities owed by both the client and the advocate's law firm to other parties involved.

19. The advocate further contends that the arbitration proceedings are fundamentally defective ab initio since the JVA involves Martin Lemaiyan Mokoosio and Florence Ngendo Mokoosio as the land proprietors, yet Florence Ngendo Mokoosio is not a party to the current proceedings.

20. She asserts that, due to this omission, she has repeatedly requested the arbitrator to stay the proceedings to allow these issues to be addressed against the appropriate party and before a mutually agreed arbitrator. However, the arbitrator has ignored these requests, allowing the arbitration to proceed in the absence of HHL and its advocates. This, the advocate argues, confirms the concern that the arbitral tribunal is prejudiced and biased, as the matter has been heard entirely ex parte.

21. On his part, the client submits that the Court has no jurisdiction to stay the arbitral proceedings between him and HHL because the advocate is not a party in the arbitration. The client also argues that the judgment of 19th July, 2024 did not deal with the arbitration proceedings.

22. Indeed, the advocate admits that she is not a party in the arbitration proceedings. As such, I agree that she lacks the locus standi to seek stay of arbitral proceedings and even more, in this matter. In any case, I have already pronounced myself in the impugned ruling that the subject of the dispute before the court is the enforcement of the professional undertakings given by the advocate pursuant to the JVA between the client and HHL. The advocate's claim is not a suit about the JVA or the rights and obligations thereunder. The disputes relating to the JVA are reserved for resolution through arbitration. There is therefore no basis for the prayer for stay of the arbitral proceedings.

23. The cardinal principle captured in *Century Oil Trading Company Ltd v Kenya Shell Limited*, (HC Misc Civil Appln No. 1561 of 2007 regarding stay of arbitral proceedings is that:

> " Where parties have agreed to resolve a dispute through arbitration, the courts are required to give effect to the wishes of the parties by enabling the parties to conclude with finality the determination of the dispute by arbitration."

24. On the strength of the court's observation above, and for other reasons as I have stated, the prayer for stay of the arbitral proceedings pending appeal fails.

Disposition

25. Accordingly, the advocate's application dated 6th August 2024 is partially allowed in the following terms:

    i. The execution of the Ruling delivered on 19th July, 2024 in High Court Misc. E250 of 2023 (OS) be and is hereby stayed pending hearing and determination of the appeal filed by the advocate, on condition that the advocate shall deposit the entire decretal sum into an interest earning account in a reputable commercial bank, to be held by both advocates for the parties to this appeal, within 30 days of this ruling;

ii. In event of failure to comply with (1) above, the stay orders will automatically lapse with no further reference to the advocate;

iii. The Record of Appeal shall be filed and served in the 30-day period; and

iv. The advocate shall bear the costs of this application.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 6TH DAY OF DECEMBER 2024.

F. MUGAMBI

JUDGE