Ricrac Company Limited & another v Kenya National Highway Authority & another (Petition 50 of 2016) [2021] KEHC 126 (KLR) (13 October 2021) (Ruling)

Neutral citation: [2021] KEHC 126 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION 50 OF 2016

JM MATIVO, J

OCTOBER 13, 2021

BETWEEN

RICRAC COMPANY LIMITED ..... 1ST PETITIONER

ERIC KIBAARA NDERITU ..... 2ND PETITIONER

AND

KENYA NATIONAL HIGHWAY AUTHORITY & ANOTHER .... RESPONDENT

RULING

1. By a Notice of Motion dated 13th July 2021, the Respondent/ applicant prays for stay of execution of the order issued by the Deputy Registrar on 7th July 2021 and dated 12th July 2021 preventing the Petitioners or anyone acting through them from executing the said orders against the applicant pending the hearing and determination of the appeal. Also, the applicant prays for an order that this court sets aside the said order on the grounds set out in the Memorandum of Appeal annexed to the application. Further, the applicant prays for costs of the application and the appeal be borne by the Respondents. Lastly, the applicant prays that this court grants such further other orders as it may deem fit and just to grant. Prayers (1), (2) and (3) of the application are spent.

2. The application is premised on the grounds listed on the face of the application and the supporting affidavit of Mr. Lawrence Maruti dated 12th July 2021 annexed thereto. Essentially, the grounds are that the court issued a NTSC dated 27th October 2021 for the applicant's Director General to show cause as to why he should not be committed to Civil Jail in execution of the decree. Further, on 7th July 2021, the Deputy Registrar issued orders against the applicant's Director General to show cause as to why he should not be committed to civil jail. The applicant states that it is aggrieved by the said decision and has filed a Memorandum of Appeal seeking to set aside the entire decision.

3. Further, the applicant states that the prayers sought ought to be granted to avert irreparable substantive loss because: - (a) the applicant is a statutory body and any execution proceedings against it or its officers

must be conducted in accordance with the provisions of the Government Proceedings Act[1] and the Kenya Roads Act,[2] hence, failure to grant the orders would amount to sanctioning an illegality in contravention of mandatory statutory provisions and procedures. (b) the precedent that would be set by allowing parties to circumvent the mandatory statutory provisions with respect to execution against the government would expose the applicant and its officers to constant threat of execution against them in person. (c) the threat of embarrassment with respect to personal execution portents a risk of discouraging them from performing their duties.

4. Further, the applicant states that application has been brought without any inordinate delay and that the applicant is ready to abide by any orders as may be made by this court regarding security. Additionally, that the applicant undertakes to prosecute the intended Appeal expeditiously. Lastly, that it is in the interest of justice that the prayers sought be granted.

The Respondent's/Petitioners Replying affidavit

5. On record is the Replying affidavit of Joseph Karanja Kanyi, the applicant's advocate dated 24th March 2021. The nub of the affidavit is that judgment was passed on 7th November 2017 for Kshs. 3,000,000/= together with costs and interests, and, that, on 15th December 2017 the judgment debtor was served through its advocates with a judgment notice and the decree was issued on 26th February 2018. Further, a Certificate of Costs for Kshs. 242,360/= was issued on 30th August 2018 and both the decree and Certificate of Costs were served upon the judgment debtor to comply and the judgment debtor requested for the Petitioners advocates Bank account details to pay, and thereafter it requested for more time to effect the payment but it refused to pay. Mr. Kanyi deposed that the Notice to Show Cause was served severally upon the judgment debtor, i.e. on 15th February 2019, 13th March 2019, 2nd April 2019, 5th March 2021 and 16th June 2021 as evidenced by copies of the Notices to Show Cause and affidavits of Service marked as JKK4 and on 27th May 2021 this court dismissed an application for stay of execution pending a purported appeal.

6. He averred that the Deputy Registrar allowed the Notice to Show Cause and issued Warrant of Arrest against the Respondent's Director General after affording both parties a hearing. He also averred that the applicant seeks stay pending the hearing and determination of an un filed appeal. Also, he deposed that prior to the issuance of the Warrant of Arrest, the judgment Debtor had been served with sufficient notice and is always represented in by its advocates. Further, that the applicant is guilty of indolent and contempt of court for deliberate disregard of a court decree. Also, the advocates purporting to act for the Director General are the same advocates acting for the Respondent.

The applicant's/Respondent's advocates submissions

7. Counsel submitted that the impugned orders were issued contrary to section Sections 42 and 68 of the Kenya Roads Act. He argued that the officer sought to be committed, Engineer Peter Mundinia retired from the applicant's employment on or about 31st July 2021, so, the orders granted by the Hon. Deputy Registrar have already been overtaken by events. He submitted that there is no basis in law to allow execution against the Director General and if the execution is allowed, it would be unlawful and contrary to law. He argued that section 42 stipulates that the applicant's employees cannot be held personally liable to any action against the Authority. He cited *Kenya National Highways Authority*

1 Cap 40, Laws of Kenya.

2 Act No. 2 of 2007.

v Ahmednassir M Abdullahi[3] and submitted that under Section 68, the Respondents can only seek orders that the applicant's Director General (D.G) ought to pay the decretal amount promptly.

8. Counsel argued that if the orders sought are not granted the applicant stands to suffer irreparable loss because the precedent that would be set by allowing parties to circumvent the mandatory statutory provisions with respect to execution against the government would expose the applicant and its officers to constant threat of execution being carried out against them in person. Further, sanctioning the actions of the Respondent would effectively amount to carrying out execution against the (former) D.G. in his personal capacity. He argued that the threat of embarrassment caused by personal execution against government officers may make the officers reluctant to perform their mandates for fear of execution which may injure service delivery to the public. Counsel submitted that the applicant is a statutory body and any execution proceedings against it or its officers must be conducted in accordance with the provisions of Section 21 of the Government Proceedings Act[4] and sections 42 and 68 of the Kenya Roads Act, hence, failure to issue the orders sought would amount to sanctioning an illegality.

9. He submitted that unless this court grants the orders sought, the intended appeal which has an overwhelmingly chance of success will be rendered nugatory and the applicant will definitely suffer loss and be exposed to execution. Lasty, counsel submitted that the applicant is willing to abide by any orders on security as may be made by this court.

The Petitioner's/Respondent's advocates submissions

10. The Petitioner's counsel submitted the only restriction under section 68 is in respect of property but not against officers of the authority. He also submitted that the applicant cannot appeal against a decision of the High Court to the High Court. He also submitted that if at all the applicant seeks to file a reference, then, the procedure is provided under Rule 11 (2) of the Advocates Remuneration Order nor can the court grant an order which is not specifically sought. (Citing *Bernard Njoroge Kibaki t/a Njowa Njemu Enterprises v Equity Bank Limited & another*[5]). Additionally, counsel argued that if the applicant's grievance is that it was not heard by the Registrar, then it ought to apply to set aside the orders, hence, an appeal is an abuse of court process.

Determination

11. I will first address the argument by the Petitioner's/Respondent advocate that "the applicant cannot appeal against a decision of the High Court to the High Court; that if the applicant seeks to file a reference, then, the procedure is provided under Rule 11 (2) of the Advocates Remuneration Order; and, if the applicant's grievance is that it was not heard by the Registrar, then it ought to apply to set aside the orders, hence, an appeal is an abuse of court process.

12. The Petitioner's/Respondent's argument in the context of the instant application is legally frail. It ignores the express provision of Order 49 Rule (7) of the *Civil Procedure Rules, 2010* which provides that (1) The Registrar may—

    (a) give directions under Order 42 rule 12 and Order 51 rule 8;

    (b) hear and determine an application made under the following Orders and rules-

        (i) Order 1, rules 2, 8, 10, 17 and 22;

[3] {2021} e KLR.

[4] Cap 40, Laws of Kenya.

[5] {2020} e KLR.

(ii) Order 2, rules 1 and 10;

(iii) Order 3, 5 and 9;

(iv) Order 6;

(v) Order 7, rules 16 and 17(2);

(vi) Order 8;

(vii) Order 10, rules 1 and 8;

(viii) Order 20;

(ix) Order 21, rule 12;

(x) Order 22 other than under rules 28, and 75;

(xi) Order 23, 24, 25, 26, 27, 28, 30, 31 and 33; and

(xii) Order 42, rule 14.

(2) An appeal from a decision of the registrar under the Orders referred to in subrule

(1) shall be to a judge in chambers.

(3) The memorandum of the appeal, setting out the grounds of the appeal shall be filed within seven days of the decision of the registrar.

13. The above provisions extinguish the Petitioner's/Respondent's advocates reproduced above. Clearly, the impugned decision is appealable before a judge. In the same vein, and with the same measure of force, if not more, the above provisions hammer the final nail which will bury the Respondent's/applicant's application. Sub-rule (3) is explicit that the Memorandum of Appeal shall be filed within (7) days. No appeal has been filed so far. The applicant only annexed a Memorandum of Appeal an exhibit to the application. The period prescribed by the above application lapsed many months ago.

14. It is informative to note the use of the word shall in the above provisions. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of the effect to be given to their directions.[6] There is a distinction between a case where the directions of the legislature are imperative and a case where they are directory.[7] The real question in all such cases is whether, a thing, has been ordered by the legislature to be done, and what is the consequence, if it is not done. The general rule is that an absolute enactment must be obeyed, or, fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

15. It is the duty of courts to try to get at the real intention of the legislation by judiciously attending to the whole scope of the statute. The Supreme Court of India pointed out that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these

6 *Dr Sanjeev Kumar Tiwari*, //*Interpretation of Mandatory and Directory Provisions in Statutes*:*A Critical Appraisal in the Light of Judicial Decisions*.*International Journal of Law and Legal Jurisprudence Studies*: ISSN:2348-8212 (Volume 2 Issue 2).

7 Ibid.

are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

16. The word "shall" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[8] The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory.[9] Typically the words 'shall' and 'must' are mandatory and the word 'may' is directory.

17. A correct construction of the above Rule leads to the conclusion that it is couched in mandatory terms. Two consequences flow from the foregoing. One, to the extent that no appeal has been filed as contemplated under the said provision, the application before me is a non-starter. Dead on arrival. Two, the consequence is that the orders sought as framed cannot be granted because the application has no legs to stand on. Simply put, the application is incompetent. The inevitable conclusion is that the application is fit for dismissal.

18. I now turn to address the merits of the application. Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules, 2010 provides: -

> 1. No appeal or second appeal shall operate as a stay of execution or proceedings 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 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.
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> 2. No order of stay shall be made under sub rule (1) unless-
>
> a. The court is satisfied that substantial loss may result to the applicant unless the order is made and 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.

19. The policy of the court is to exercise leeway in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. However, it is necessary to consider the considerations for granting

[8] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[9] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

applications for stay pending hearing and determination of an appeal. The Court of appeal in *Butt v Rent Restriction Tribunal*[10] stated as follows: -

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

b. The general principal 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. 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. 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.

20. An appraisal of Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 shows that the corner stone of the jurisdiction of the court under the said Rule is three-fold. One, that substantial loss would result to the applicant unless a stay of execution is granted.[11] Two, that the application has been made without unreasonable delay. Three, that 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. (See *Andrew Okoko v Johnis Waweru Ngatia & another*[12] and *James Wangalwa & Another v Agnes Naliaka Cheseto*[13]).

21. As was held in *Elena D. Korir v Kenyatta University*[14] : -

> "the application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & another vs Thornton & Turpin Ltd*[15] where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that "The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must be made without unreasonable delay.
>
> In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo vs Straman EA Ltd*[16] (2013) as follows:-

10 Civil App No. NAI 6 of 1979

11 See Gikonyo J in HCC No. 28 of 2014, *Trans world & Accessories (K) Ltd v Commissioner of Investigations & Enforcement*

12 {2018} e KLR.

13 HC Misc. No. 42 of 2012, {2012} e KLR

14 {2012} e KLR

15 {1993} KLR 365

16 {2013} e KLR

> "In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other".

22. Perhaps the best definition of substantial loss was enunciated in *Bansidhar v Pribhu Dayal*[17] which held that substantial loss should be a loss more than what should ordinarily result from the execution of the decree in the normal circumstances. The applicant should go a step further to lay the basis upon which the court can make a finding that it will suffer substantial loss. The applicant should go beyond the vague and general assertion of substantial loss in the event a stay order is not granted. It is not merely enough to repeat the words of the Civil Procedure Act and state that substantial loss will result, the kind of loss must be given and the conscience of court must be satisfied that such loss will really ensure.[18]

23. An applicant is required to place before the court sufficient evidential support, establishing substantial loss. The words "substantial loss" or cannot mean the ordinary loss or inconvenience which every judgment-debtor is necessarily subjected when he loses his case and is deprived of his property or freedom in consequence.[19] 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 and different from that."[20] Viewed from the lens of the foregoing jurisprudence, I find that the applicant has not established substantial loss. The grounds cited by the applicant are with respect arguments in support of his appeal. This court is not hearing the appeal. Its handling an application under Order 42 of the Civil Procedure Act, 2010. The conditions set out in the said provision do apply.

24. Since no appeal has been filed, I find no basis to address the test whether the appeal will be rendered nugatory nor will it serve any utilitarian value to address the question whether the appeal has chances of success.

25. Apart from proof of substantial loss and filing the application without delay, an applicant is enjoined to provide security.[21] Even though the applicant said that it is willing to abide by any conditions this court my impose, there is no offer of security. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay.[22] The offer for security must come from the applicant as a price for stay. (See *Carter & Sons Ltd. v Deposit Protection Fund Board & 2 Others*.[23]) In *Equity Bank Ltd v Taiga Adams Company Ltd*[24] it was held: -

> " ...of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought...let me conclude by

17 AIR 1954 Raj 1, Learned Judge Dave

18 Ibid.

19 See *Anandi Prashad v. Govinda Bapu,* AIR 1934 Nag 160 (D), Judge Vivian Bose A. J. C.

20 Ibid.

21 See *Republic vs Commissioner for Investigations & Enforcement,* Misc. App no 51 of 2015 (NBI),

22 Ibid

23 Civil Appeal No. 291 of 1997

stressingthat of all the four, not one or some, must be met before this court can grant an order of stay...” This proposition of the law was applied in *Carter & Sons Ltd vs Deposit Protection Fund Board & 3 others*.[25]

26. Next is the question whether the applicant has demonstrated grounds for this court to exercise its discretion its favour. A common definition of judicial discretion is the act of making a choice in the absence of a fixed rule, i.e., statute, case, regulation, for decision making; the choice between two or more legally valid solutions; a choice not made arbitrarily or capriciously; and, a choice made with regard to what is fair and equitable under the circumstances and the law. Whenever the court is invested with the discretion to do certain act as mandated by the statute, the same has to be exercised judiciously and not in an arbitrary manner and capricious manner. The classic definition of `discretion' by Lord Mansfield in *R. v Wilkes*[26] that `discretion' when applied to courts of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, `but legal and regular.'

27. The exercise of the court's discretionary power is influenced by considerations of justice and fairness, having regard to the facts and circumstances in the particular matter before it. It could also be exercised in order to stall the dilatory tactics adopted in the process of hearing a suit, and to do real and substantial justice to the parties to the suit.[27]

Conclusion

28. Preferring of an appeal does not operate as stay of the decree or order appealed against. To secure an order of stay merely by preferring an appeal or even intending to appeal is not a statutory right conferred on an appellant. A court is not ordained to grant an order of stay merely because an appeal has been preferred or is intended and an application for an order of stay has been made. Depending on the facts and circumstances of a given case the court, while passing an order of stay, must try and put the parties on such terms the enforcement whereof would satisfy the demand for justice of the party found successful at the end of the appeal.

29. The court must take into account all the circumstances of the case. A stay is the exception rather than the general rule. The party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted. In exercising its discretion, the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered. The court should take into account the prospects of the appeal succeeding. Only where strong grounds of appeal or a strong likelihood of success is shown should a stay be considered.[28]

30. The proper approach is to make the order which best accords with the interest of justice.[29] If there is a risk that irremediable harm may be caused to the Plaintiff if a stay is ordered but no similar detriment

24 Supra

25 Supra note 14

26 1770 (98) ER 327

27 See Sir Dinshah F. Mulla, Supra, at page 1381.

28 [2011] EWHC 3544 (Fam)

29 *Philips LJ in Linotype-Hell Finance Limited v Baker* [1992] 4 All ER 887, at page 3

to the defendant if it is not, then a stay should not normally be ordered.[30] Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered.[31] This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice.[32]

31. The grant of the order of stay pending hearing of an appeal is not as a matter of course, though a discretionary remedy[33] which must be exercised both judiciously and judicially.[34] The court in exercising its discretion must consider the balance of the competing interests and rights of the parties and justice of the case. The effect of the order is to deprive the successful party the profits of his judgment, a practice which the courts are reluctant to do. There must therefore, in order to succeed in an application for stay pending appeal, be a cogent, substantial and compelling reasons to warrant the deprivation of the victory of the successful party. The facts must be disclosed in the affidavit in support of the application otherwise the application is bound to fail.[35]

32. The ultimate principle that the judgment creditor is entitled to the fruits of his litigation can only be defeated by special circumstances which render it inequitable for him to enjoy the benefit of his victory.[36] The applicant must show special and exceptional circumstances clearly showing the balance of justice in his or her favour. Special circumstances which have received judicial approval are when execution would: -[37] (a). Destroy the subject matter of the proceedings. (b). Foist upon the court a situation of complete helplessness. (c). Render nugatory any order or orders of the appeal Court. (d). Paralyze in one way or the other, the execution by the litigant of his constitutional right of appeal. (e). Provide a situation in which even if the appellant succeeds in his appeal there could be no return to the status quo.

33. Considering the circumstances of this case, it is my finding that the Respondent's/ applicant's application is a non-starter as concluded earlier. Second, the application does not meet any of the tests discussed above. The upshot is that the applicant's Notice of Motion dated 13th July 2021 is unmerited. Accordingly, I dismiss the said application with costs to the Petitioner/Respondent.

Orders accordingly

SIGNED AND DATED AT NAIROBI THIS 13TH DAY OF OCTOBER 2021

30 Ibid

31 Ibid

32 Ibid

33 *Vas wani Trading Company v Savalak & Co* (1972) 12 SC. 77

34 *Mobil Oil (Nig) Ltd. v Agadowagbo* (1988) 12 NWLR (Pt 77) 383, *Marina v Niconnar Food Co. Ltd.* (1988) 2 NWLR (Pt 74) 75, *Balogun v Balogun* (1969) 1 All NLR 349, *Okafor v Nnaife* (2001) 14 NWLR (pt 734) 699, *Okafor v Nnaife* (1987) (1987) 4 NWLR (pt. 64) 129

35 *Onzulobe v Commissioner for Special Duties Anambra State* (1990) 7 NWLR (pt 161) 252.

36 *Fawehinmi vs. Akilu* (1990) 1 NWLR (Pt. 127) 450 @ 460.

37 *UNIPORT vs. Kraus Thompson Organization Ltd*. (1999) 11 NWLR

JOHN M. MATIVO

JUDGE