Sidhani & 2 others v Aketch (Civil Appeal 128 of 2019)
[2021] KEHC 243 (KLR) (11 November 2021) (Ruling)

Neutral citation: [2021] KEHC 243 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 128 OF 2019

MW MUIGAI, J

NOVEMBER 11, 2021

BETWEEN

OCHAKO DOMINIC SIDHANI ..... 1ST APPLICANT

AMIKORO HOLDINGS LIMITED ..... 2ND APPLICANT

REMBO SHUTTLE SACCO LIMITED ..... 3RD APPLICANT

AND

DOUGLAS OGOLLA AKETCH ..... RESPONDENT

RULING

1. The Notice of Motion for determination is dated 18th November, 2019 filed under Certificate of Urgency on 21st November, 2019.The Applicants seek stay the execution of the judgement and/or decree of Hon. Agonda (SRM) in Mavoko CMCC No. 911 of 2016 delivered on 13th September, 2019 pending the hearing and determination of this application as well as the Appeal herein. The Trial Magistrate awarded the Respondents damages in the sum of Kshs. 128,000/- plus interest and costs of the suit.

2. The application is based on grounds that the stay of execution of the judgement granted by the lower court on 13th September, 2019 when it delivered the judgement lapsed on 13th October, 2019 hence lack of stay of execution will render the Appeal herein nugatory. The Applicants state that they will suffer irreparable loss and damage should the Respondent proceed to execute the judgement as there is a likelihood that they will be unable to recover the decretal sum from the Respondent. According to the Applicants, they are apprehensive that the Respondent will levy execution against them. The Applicants state that the application is made with good faith. According to the Applicants, the Respondent will not suffer any prejudice or damage. The Applicants have stated that they are willing to comply with the court's reasonable conditions imposed upon them to enable them pursue their appeal.

3. The Application is supported by the affidavit of the Joy Cherop Sitienei, the Applicants advocate on record.

4. In opposition to the application, the Respondent swore a replying affidavit on 17th March, 2021. However the court notes that the affidavit is in opposition to an application dated 11th March, 2021 where the Applicants had sought for extension of interim orders as result of the court not sitting on 21st November, 2019. The Respondent has deposed that the Applicants have not come to court with clean hands since they have not been able to explain why an application filed in November ,2019 has not been prosecuted. The Respondent deposed that the application is merely meant to frustrate his efforts of reaping the fruits of the judgement. According to the Respondent, the application does not comply with the requirements set out for grant of orders of stay. It is a tactic by the Applicants to delay the Respondent from realizing justice.

SUBMISSIONS

5. The Respondent relied on his replying affidavit sworn on 17th March, 2021.

6. On behalf of the Applicants, it is submitted that they have an arguable appeal since their appeal is premised on the ground of fraud that the Respondent was not involved in the accident and was never treated in any of the hospital after the alleged incident. As regards substantial loss, it is submitted that the Respondent's means are unknown hence the likelihood of not being able to return the decretal sum in the event that the appeal succeeds. According to the Applicants, the Respondent has not furnished court with any documentary evidence to prove his financial standing. Reliance is placed on the cases of *Edward Kamau & Another vs. Hannah Mukui Gichuki & Another* [2015] eKLR on the need to provide an affidavit of means and in *Recoda Freight & Logistics Ltd vs. Elishana Angote Okeyo* [2015] eKLR on shifting of burden of proof once the Applicant pleads that the Respondent is not possessed of means to refund the decretal sum. The Applicants also relied on Section 112 of the *Evidence Act*.

7. As regards the Applicants appeal being arguable and has high chances of success, reliance is placed on the case of *Bake 'N' Bite (Nrb) Limited vs. Daniel Mutisya Mwalonzi* [2015] eKLR. According to the Applicants, Kshs.128, 000/- plus costs and interest is substantial sum hence the inability by the Respondent will render the appeal nugatory causing the Applicants to suffer substantial damage.

8. On furnishing court with security for the due performance of the decree, it is submitted that the Applicants have stated that they are willing to furnish security in the form of a bank guarantee of the decretal sum from a well-known and functioning bank. It is submitted that in the submissions, the Applicants have attached an agreement between the bank issuing a guarantee as security and the Applicant's insurer.

9. According to the Applicants, the application was filed within reasonable time. It is submitted that judgement was delivered on 16th September, 2020 and 30 days stay was granted. According to the Applicants, the application was filed before the lapse of the 30 days stay having filed the Memorandum of Appeal dated 30th September, 2019.

10. In conclusion, the Applicants submitted that the balance tilts in favour of granting the stay of execution orders. It is submitted that the costs of the application abide by the outcome of the appeal.

DETERMINATION

11. I have considered the application, affidavits in support and in opposition and the written submissions.

12. The application is premised on Order 42 Rules (2) of the *Civil Procedure Rules, 2010* wherein it is stipulated as follows:-

> (2) 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 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.

13. The Court of Appeal in *Vishram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nairobi 15 of 1990 [1990] KLR 365 stated as set out hereunder: -

> " 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 42 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."

14. On the first condition, the court in *Tropical Commodities Suppliers Ltd and Others vs. International Credit Bank Limited (in liquidation)* (2004) E.A. LR 331,defined substantial loss in the sense of Order 42 rule 6 as follows:-

> " ...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal..."

15. According to the Applicants, there is a likelihood that they will be unable to recover the decretal sum awarded hence the Applicants will suffer substantial loss and damage. The Applicants are apprehensive that execution proceedings against them by the Respondent will commence.

16. In *Masisi Mwita vs. Damaris Wanjiku Njeri* [2016] eKLR, Mativo J. relied on the case of *Equity Bank Ltd vs. Taiga Adams Company Ltd*, [2006] eKLR to explain the onus of the Applicant where the court stated a follows: -

> " ...The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out-in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the appellant."

17. However in *James Wangalwa & Another vs. Agnes Naliaka Cheseto*[2012]eKLR it was stated that:-

> " 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."

18. In *Kenya Shell Limited vs. Kibiru* [1986] KLR 410 Gachuhi, Ag.JA (as he then was) at 417 held:

> " 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."

19. The evidential burden shifted to the Respondent once the Applicants state that they have reasonable fear that the Respondent would be unable to repay the decretal amount in the event the appeal is successful. In *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & another* [2006] eKLR Court of Appeal held thus:

> " 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..."

20. The Respondent has not stated in his replying affidavit, whether the Respondent would be capable of refunding the decretal amount. The Respondent's averments were in opposition to the application dated 11th March, 2021 and not the application before court for determination. On the part of the Applicants, they have also not demonstrated the damage they would suffer if the order for stay is not granted.

21. The supporting affidavit to the application was supported by the averments of the Applicants advocate. It is trite that where the facts are in dispute or contested, an advocate ought not to swear an affidavit. The Respondent asserted that the application does not comply with the requirements set out under Order 42 Rule 6(2). The capability to repay the decretal amount is only within the knowledge of the applicants and not their advocate. The advocate did not state whether the applicants were unavailable to swear the affidavit or not.

22. Indeed, in *China Wu Yi Limited & another vs. Irene Leah Musau* [2019] eKLR where an advocate swore a replying affidavit in opposition to the application seeking stay of execution, it was stated that:-

> " Therefore, as regards the competency of the replying affidavit, the law, as I understand it, is that an advocate is not competent to swear an affidavit on disputed facts. An advocate, as an officer of the court, should avoid as much as possible situations which may place him in the embarrassing circumstances of having to go into the witness box in a matter in which he is acting as an advocate and to swear an affidavit on issues of fact is one of the ways in which to invite such exposure. In the case of Yussuf Abdulgani Vs. Fazal Garage (1953) 28 LRK 17 it was held that an advocate should not swear a belief affidavit on information supplied by his client if his client is available to swear of his own...
>
> 27..... In my view, however innocent an averment may be, counsel should desist from the temptation to be the mouthpiece through which such an averment is transmitted."

23. The Applicants have not demonstrated that they will suffer substantial loss if the stay of execution is not granted.

24. On the second condition, the trial court judgement was delivered on 13th September, 2019 as per the Memorandum of appeal hence the 30 days stay of execution lapsed on 13th October, 2019. The

application herein was filed a month later on 21st November, 2019. The delay of a month after the stay of execution orders lapsed was not an undue delay. The application has therefore been filed without unreasonable delay.

25. On the provision of security for the due performance of the decree, it is submitted that the Applicants have stated that they are willing to furnish security in the form of a bank guarantee of the decretal sum from a well-known and functioning bank. It is submitted that in the submissions, the Applicants have attached an agreement between the bank issuing a guarantee as security and the Applicant's insurer. The Applicant's advocate has not averred in her affidavit of the applicants willingness to provide security. It is trite that submissions cannot take the place of evidence as stated by the Court of Appeal in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR.

26. As regards the requirement of provision of security, in *Equity Bank Ltd vs. Taiga Adams Company Ltd*[2006] eKLR it was held that:-

> " 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 stressing that of all the four, not one or some, must be met before this court can grant an order of stay..." which principle was also emphasized in Carter & Sons Ltd –vs- Deposit Protection Fund Board & 3 Others".

27. In *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another* [2018] eKLR, it was stated that:-

> " Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay."

28. In her averments, the Applicants advocate stated that the applicants were ready and willing to comply with reasonable conditions granted by court. The advocate did not state whether any security was to be offered by the Applicants. The Applicants advocate attached a copy of the bank guarantee to the written submissions. The Court notes that the bank guarantee was/is only valid for one year from the date issuance or until cancelled or becomes void.

29. The Court of Appeal in *Butt vs Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how a court should exercise discretion and held that:

> " 1. 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.
>
> 2. 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 that appeal court reverse the judge's discretion.
>
> 3. 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.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

30 The Applicant has informed this Court that the Court granted interim orders of stay of execution pending hearing and determination of the instant application on 5th December 2019, however, on the day the Court did not sit and the application was not heard nor the interim orders extended.

31 The Applicant contests the issue whether the Respondents were involved in the road traffic accident or not and allege fraud of their claim, that was the subject of proceedings and judgment CMCC 911 of 2016.

32 On the other hand, the Respondents contend the appeal is to delay and frustrate efforts of reaping fruits of the judgment. Secondly since leave to appeal was granted and directions given, the Appellant has not shown evidence to demonstrate that since 2019 they have tried to trace the Trial Court's case file, for purposes of preparing for the appeal.

33 The Court has considered the rival concerns raised by both parties and finds as follows;

34 This Court recognizes an aggrieved party's right of appeal. However, the Applicant ought to demonstrate the appeal/application was filed without delay, prove that if not granted stay of execution substantial loss would ensue and that the Appellant shall provide security.

35 Although, Kshs.128,000/-, the decretal sum, is not a substantial amount that would cause substantial loss and damage to three Applicants especially wherein the 3rd Applicant is a Sacco, the fact of whether in the event of the outcome of the appeal the amount maybe recoverable from the Respondent, remains live and relevant. Secondly, the issue of whether the Appellants were involved in the accident that gave rise to the claim subject of the judgment contested herein is one that ought to be allowed to be considered on appeal and determined on its merits. If funds are released before the outcome of the appeal and determined it would cause financial loss.

DISPOSITION

In the circumstances, and to err on the side of caution, favor tilts towards maintaining status quo pending appeal. Stay of execution is granted on the following conditions;

1. The advocates on record for both parties shall within 60 days open a joint interest earning account where the appellant shall deposit the decretal amount of KShs 128,000/- to be held in trust and awaiting the outcome of the intended appeal.

2. In default of compliance of the deposit of the decretal amount within the 60 days the stay of execution shall vacate forthwith.

3. The Deputy Registrar Machakos High Court shall facilitate the availability of Court File CMCC No 911 of 2016 Mavoko Law Courts to this Court.

4. In default the parties/counsels to provide pleadings for re-construction of the court file. Further mention after the 60 days.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 11TH DAY OF NOVEMBER 2021. (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

Ms Gathenya holding brief for Laboso - for Applicants

No Appearance for Respondent

Geoffrey - Court Assistant