Mramba & another v Mutuja (Civil Appeal E164 of 2023)
[2024] KEHC 983 (KLR) (31 January 2024) (Ruling)

Neutral citation: [2024] KEHC 983 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E164 OF 2023

HM NYAGA, J

JANUARY 31, 2024

BETWEEN

MERCY JOAN MRAMBA ..... 1ST APPLICANT

ANN WAMBUI KIMANI ..... 2ND APPLICANT

AND

JOSHUA NJOGU MUTUJA ..... RESPONDENT

RULING

1. Vide a Notice of Motion dated 31st August, 2023 the Applicants seek stay of the execution of the judgment and/or decree delivered on 16th June,2023 pending the hearing and determination of this appeal and for costs of the Application.
2. The application is predicated on grounds on its face and supported by an affidavit sworn by the 2nd Applicant herein, Ann Wambui Kimani on 9th August, 2023. She averred that judgement was delivered on 16th June,2023 in favour of the Respondent wherein Liability was entered at 100% against the Applicants and damages of Kshs 208,950/= plus costs and interest was awarded to the Respondent.
3. She deponed that the Applicant has lodged an appeal against the judgement.
4. She is apprehensive that the Respondent will commence execution against her thus rendering the Appeal lodged nugatory.
5. She deposed that they are ready, willing and able to furnish a bank guarantee from Family Bank of the entire principal amount in Court as security for the due performance of the judgment/decree or order as shall be directed by this Honourable Court pending the hearing and final determination of the Appeal.

6. She deponed that they the Respondent's means is unknown and they are reasonably apprehensive that if the decretal amount is paid to the respondent he may not be in a position to refund the same in the event the Appeal Succeeds.

7. She urged this Court to exercise its discretion and allow the Application.

8. In response to the application, the Respondent through his replying affidavit sworn on 22nd September, 2023, averred that the Application offends the provisions of Order 42 Rule 6 of the *Civil Procedure Rules* and aimed at denying him the fruits of his judgement.

9. He deponed that in the interest of justice three quarters of the decretal sum be released to him because he sustained serious injuries and the appeal is only on quantum.

10. He is opposed the facility of Bank Guarantee proposed by the Applicant for grounds that the same has been overtaken by events since its duration was for 12 months from 18th February, 2022 which duration has already lapsed and is defective as it is unsigned.

11. He contended that the Applicant's Appeal raises no triable issues and lacks chances of success.

12. He prayed that the application be dismissed with costs.

13. The Application was canvassed through written submissions. Only the Respondent's submissions are on record.

Respondent's Submissions

14. The Respondent submitted that the Applicants have not demonstrated the substantial loss they will suffer if the application is disallowed.

15. He submitted that his financial status should not be a ground to deny him the fruits of his judgement. He referred this Court to the cases of:

    a) *Kenya Women Microfinance Ltd v Martha Wangari Kamau* [2020] eKLR where the Court held *inter alia* that the mere fact that the decree holder is not a man of means does not necessarily justify him being barred from benefiting from the fruits of his judgement;

    b) *Machira t/a Machira & Co Advocates v East African Standard* [2002] eKLR for the proposition that The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage;

    c) *Mutua Kilonzo v Kioko David* [2008] eKLR where the Court stated;

> " To my mind, the Applicant has failed to establish what loss he will suffer if the decree is executed. I say this with respect because Lillian Munyiri aforesaid is an officer at Gateway Insurance Company Ltd and has not stated that she personally knows the means of the Respondent. She merely states that from evidence at the trial he is a man of straw. How that conclusion is reached and based on what evidence, I cannot tell. It is now a catchphrase that every Respondent in an application for stay of execution is called a man of no means. That is all fine if there is evidence to back up that position..."

16. On whether the Applicants have given any security, the Respondent reiterated that the bank guarantee is not viable mode of security as he will be left to wait indefinitely to enjoy the fruits of his judgement. He posited that the bank guarantee proposed is defective as it is not properly executed and cannot

be relied on. In buttressing his submissions, he cited the case of *Luxus Woods (K) Limited v Patrick Amugune Kamadi* [2016] eKLR where the Court disallowed an application for stay of execution for reason that the applicant had not demonstrated the substantial loss it will suffer if the decretal sum was to be paid to the Respondent.

17. The Respondent urged the Court to find the application lacks merit and to dismiss it with costs to him.

Analysis & determination

18. Having considered the application, affidavits and the submissions on record, it is my considered view that the following issues fall for determination: -

    a. Whether the Applicants have met the threshold for grant of stay pending appeal.

    b. What would be the most appropriate security to grant under the circumstance?

Issue No 1. Whether the Applicants have met the threshold for grant of stay pending appeal

19. Order 42 Rule 6(2) of the *Civil Procedure Rules* provides:

> "(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."

20. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the Court of Appeal gave guidance on how a Court should exercise discretion in an application of stay of execution and held that:

> "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.
>
> 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.
>
> 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.
>
> 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.
>
> 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."

21. In *Vishram Ravji Halai v 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, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.

22. With the above in mind, the Court must then determine what substantial loss the Appellants will suffer if stay of enforcement of the judgment of the subordinate Court is not made in their favour.

23. On whether the Appellants will suffer substantial loss, substantial loss would entail what was aptly discussed by Kimaru, J in *Century Oil Trading Company Ltd v Kenya Shell Limited Nairobi* (Milimani) HCMCA No 1561 of 2007 where he stated that:

> " The word "substantial" cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. 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 all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The Court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The Court has to balance the interest of the applicant who is seeking 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."

24. In the instant case the Applicants claim that in the event the Appeal is successful the Respondent will not be in a position to compensate them for the losses that may be incurred as he is not a person of means.

25. The law is that once an Applicant expresses apprehension about the Respondent's ability to refund the decretal amount, the evidential burden of proof shifts to the Respondent to rebut that apprehension. This preposition was re-iterated by the Court of Appeal in *ABN Amro Bank NK v Le Monde Foods Limited*, Civil Application No 15 of 2002 [NRB] where it stated as follows:

> " ....in those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal was to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on..."

26. In this case, the Applicants' claim that the Respondent is not a man of means and he may be unable to refund the decretal amount if the appeal is successful has not been rebutted by any evidence.

27. It is worth noting that the Respondent's replying affidavit did not contain any averment regarding his financial standing. In the premises, I am satisfied that the Respondent has failed to establish that he is capable of refunding the decretal amount should the appeal succeed. As a corollary, I am persuaded to find that the Applicants have demonstrated that they are likely to suffer substantial loss as defined by Gikonyo J in *James Wangalwa & another v Agnes Naliaka Chesoto*, [2012]eKLR if the stay orders sought are not granted.

28. In regards to whether this Application has been filed without unreasonable delay, I note the Lower Court judgement was indisputably delivered on 16th June, 2023 and this application was subsequently filed on 10th August,2023. The application herein ought to have been filed on or before the 16th

July,2023. There was a delay of about one month which in my view is not ordinate. I therefore hold that the application herein was filed without inordinate delay.

29. With regards to security, the Applicants have shown willingness to offer security by way of a bank guarantee for due performance of the decree.

Whether the Appellants, have an arguable appeal?

30. Clearly this is a question to be answered by the Appellate Court. However, having perused the Draft Memorandum of Appeal it is basically on the quantum of damages awarded by the Trial Court. The Applicant terms the same as manifestly excessive.

31. An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before Court; one which is not frivolous.

32. The three (3) prerequisite conditions set out in the aforesaid Order 42 Rule 6 of the *Civil Procedure Rules, 2010* cannot be severed. The key word is "and". It connotes that all three (3) conditions must be met simultaneously. In the case of *Trust Bank Limited v Ajay Shah & 3 others*, [2012] eKLR at page 23 the Court stated that;

> " The conditions set out in Order 42 Rule 6(2) (a) and (b) are cumulative. All the three must be satisfied before a stay can be granted. The Applicant only satisfied one condition and failed to satisfy the others. For the foregoing reasons, I find that the Plaintiff's Notice of Motion dated 24th April, 2012 it without merit."

33. In the instant case the Applicant has satisfied the three (3) prerequisite conditions set out in the aforesaid Order 42 Rule 6 of the *Civil Procedure Rules, 2010*. Consequently, I hereby grant stay of execution pending hearing and determination of the Appeal.

Issue No 2- What would be the most appropriate security to grant under the circumstance?

34. The Applicants propose a provision of a bank guarantee of the decretal sum while the Respondent in his affidavit proposes that three quarters of the decretal amount plus costs of the suit to be released to him and the balance to be deposited in Court.

35. The Respondent avers that the bank guarantee offered as security is unsafe. I have considered his averments and submissions in that regard. The Applicants have neither advanced any grounds in support of its proposal nor controverted the Respondent's averments thereof.

36. In determining the security, the Court has to strike a balance on the interests of the Appellant and those of the Respondent. In striking such a balance the Court exercises a discretion which must at all times be geared towards the achievement of the justice between the parties.

37. In the case of *Henry Sakwa Maloba v Bonface Papando Tsabuko* [2020] eKLR the High Court reiterated the finding in the case of *Century Oil Trading Company Limited v Kenya Shell Limited Nairobi* [2008] eKLR, where the Court stated:

> " Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The Court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The Court has to balance the interest of the applicant who is seeking 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 judgment".

38. In conclusion, I find that the application dated 9th August,2023 meets the threshold for the grant of stay of execution. I therefore order as follows;

    a. That execution of the judgment and the ensuing Decree in Nakuru CMCC No 75 of 2020 be and is hereby stayed pending the hearing and determination of the appeal on condition that the Applicant pays to the Respondent half the decretal sum, being Kshs 104,475/= within 30 days of the date hereof.

    b. The balance of the decretal sum to await the determination of the appeal herein.

    c. In default of payment of (a) above, the stay orders shall lapse automatically without further reference to the Court.

    d. Costs of the subject application shall abide the appeal.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 31ST DAY OF JANUARY, 2024.

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H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Ms. Sitati for Respondent

Ms. Cherotich for Appellant