Kiragu v Njogu & another (Suing as the Administrators of the Estate of Julius Mwangi Ndung'u) (Civil Appeal 76 of 2023) [2024] KEHC 1951 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1951 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL 76 OF 2023

FN MUCHEMI, J

FEBRUARY 29, 2024

BETWEEN

PATRICK MWANGI KIRAGU ..... APPELLANT

AND

NJERI MWANGI NJOGU ..... 1ST RESPONDENT

JOHN MUNDATI ..... 2ND RESPONDENT

SUING AS THE ADMINISTRATORS OF THE ESTATE OF JULIUS MWANGI NDUNG'U

RULING

Brief facts

1. The application dated 2nd June 2023 seeks for orders for stay of execution of the ruling delivered on 31st May 2023 and judgment of 31st March 2023 in Ruiru SPMCC no E66 of 2022 pending the hearing and determination of the appeal.

2. In opposition to the application, the respondents filed a Replying Affidavit dated 7th July 2023.

Applicant's Case

3. The applicant states that the Ruiru court in SPMCC no E66 of 2022 delivered a ruling on 31st May 2023 dismissing his application dated 14th April 2023 which sought for orders of setting aside the *ex parte* proceedings therein and judgment delivered on 31st March 2023. Being aggrieved by the decision, the appellant lodged the instant appeal formerly Kiambu HCCA no E165 of 2023.

4. The applicant avers that the appeal is arguable and meritorius and it has overwhelming chances of success. The applicant further avers the award is of a substantial amount and he is apprehensive that if the respondents proceed to execute against the said judgment and the appeal is successful, he might not

be able to recover the decretal amount from the respondents. The applicant is apprehensive that if stay of execution is not granted, the appeal will be rendered nugatory and he will suffer irreparable loss and damage. The applicant avers that the respondent will not be prejudiced in any way if the application is allowed.

5. The applicant states that the application has been brought promptly and without unreasonable delay. The applicant further states that his insurance company, Directline Assurance Limited is willing and able to furnish the court with a bank guarantee from Diamond Trust Bank Limited as security for performance of the decree.

The Respondents' Case

6. The respondents oppose the application on the premise that it is an afterthought, frivolous, vexatious and a total abuse of the court process.

7. The respondents state that the instant appeal is premised on the ruling of the trial court delivered on 31st May 2023 whereas the appellant's application to set aside judgment delivered on 31st March 2023 was dismissed. The respondents contend that judgment was delivered in the presence of both parties and the appellant's advocate was granted 30 days stay of execution yet the appellant's advocates never intimated that they intended to file any application to set aside the impugned proceedings.

8. The respondents contend that the appellant herein entered appearance in the trial court and he filed all his documents in support of his defence. However when the matter came up for hearing, the respondents state that the applicant failed to attend court despite being aware of the same. Furthermore, the applicant never tendered any cogent evidence as to why he never attended court when the matter came up for hearing. Despite the applicant knowing that the suit had proceeded in his absence, he never bothered to move the court appropriately. The trial court having been satisfied that the applicant was aware of the hearing date, proceeded to close the defence case and directed that parties proceed and file their written submissions. The respondents aver that the applicant was duly notified of those orders vide the official court email.

9. The respondents contend that the applicant never moved the trial court with an application to set aside the judgment. Thus, the respondents served the applicant with their submissions as directed by the trial court. The respondents argue that the applicant did not file an application to arrest the judgment if indeed he was keen on having the proceedings set aside. After judgment was delivered on 31st March 2023, the respondents state that they wrote to the applicant's advocates on 4th April 2023 calling for the decretal sum together with the tabulated costs, which was duly received by the applicant's advocates.

10. The respondents argue that the applicant has now opted to take another try before the instant court to delay them from enjoying the fruits of their judgment. Moreover, the respondents contend that the applicant has failed to show that he has an arguable appeal to warrant the grant of the orders sought.

11. The parties herein agreed to dispose of this application by way of written submissions. However, the applicant did not file his submissions for reasons known only to him.

The Respondents' Submissions

12. The respondents submit that the applicant has not met the conditions for grant of stay of execution and thus the application ought to be dismissed. Relying on the case of *Andrew Okoko v Johnis Waweru Ngatia & another* [2018] eKLR the respondents argue that the applicant has not challenged their ability to refund the decretal sum. Further, the respondents contend that the applicant has not presented any cogent evidence to show that the intended appeal is arguable and has high chances of

success. To support their contentions, the respondents rely on the case of *Kivanga Estates Limited v National Bank of Kenya Limited* [2017] eKLR.

13. The respondents rely on the case of *Machira t/a Machira Co. Advocates v East African Standard* [2002] eKLR and submit that the sole purpose of the application is to deny them the fruits of their judgment. The respondents contend that the applicant has never approached the trial court to set aside the proceedings or arrest the judgment when the same proceeded in his absence and yet he was aware of all the proceedings before the trial court. Furthermore, the respondents submit that the applicant never bothered to settle the decretal sum despite it being reasonable in the circumstances. The applicant opted to wait and derail the proceedings by filing the instant application.

The Law

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

14. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) *Civil Procedure Rules*. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:-

    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 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 orders set aside.

    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 1st 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.

15. Thus under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:

    1. Substantial loss may result to him/her unless the order is made;

    2. That the application has been made without unreasonable delay; and

    3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

16. Substantial loss was clearly explained in the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR:-

> "No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. 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...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 applicant in his affidavit contends that the decretal sum is of a substantial amount and should the respondents proceed with execution and the appeal ends in his favour, he may not recover the decretal sum from the respondent.

18. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show how execution shall irreparably affect him or will alter the *status quo* to his detriment therefore rendering the appeal nugatory. In the instant case, the applicant has shown that he does not know the respondents' financial capabilities and the decretal sum being a substantial amount, he is apprehensive that he may not recover the said amount from the respondent in the event the appeal succeeds. The evidentiary burden at this point shifts to the respondents to show that they are persons of means and would be able to settle the decretal sum should the appeal succeed. The respondents herein failed to discharge that burden. Thus, it is my considered view that the applicant has demonstrated that he shall suffer substantial loss in the event that the respondent is unable to refund the decretal amount in the event that the appeal succeeds.

19. I have further perused the court record and noted that the ruling dated 31st May 2023 dismissed the application dated 14th April 2023 which sought to set aside the judgment delivered on 31st March 2023. Notably, the court cannot grant stay of the impugned ruling dated 31st May 2023 as it dismissed the said application which in essence is a negative order and incapable of execution. This principle was enunciated by the Court of Appeal in *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR where the court held as follows:-

> An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with.

20. Similarly in *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others* [2016] eKLR the Court of Appeal expounded on stay of execution stating:-

> In *Kanwal Sarjit Singh Dhiman v Keshavji Juvraj Shah* [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows:-
>
> > The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.
> >
> > The same reasoning was applied in the case of *Raymond M. Omboga v Austine Pyan Maranga* (*supra*) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:-

> The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order....The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....

21. In light of the foregoing, the order being a negative order that did not order any of the parties to do anything or restrain from doing anything is incapable of execution and thus the court cannot order stay of execution of that negative order.

Has the application has been made without unreasonable delay.

22. The ruling was delivered on 31st May 2023 and the applicant filed the instant application on 5th June 2023. As such, this application was filed timeously.

Security of costs.

23. The purpose of security was explained in the case of *Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR the court stated:-

> " The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the *Civil Procedure Rules* acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

24. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicant has stated that its insurer Direct line Assurance Company Limited is ready and willing to furnish the court with a bank guarantee from DTB Bank as security. I have perused the bank guarantee as annexed by the applicant and noted that the bank guarantee dated 18th February 2022 is for a period of one year, which has since lapsed and therefore it is not viable. Furthermore, the bank guarantee is between Family Bank and the insurer, and does not mention the applicant and his interests. The applicant in my view has not provided security of costs herein owing to the expired banking guarantee.

25. It is noted that the right of appeal must be balanced against an equally weighty and rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR the court stated:-

> " The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is *prima facie* entitled to fruits

of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion."

26. The court in granting stay has to carry out a balancing act between the rights of the two parties. The issue is whether there is just cause for depriving the respondent his right of enjoying his judgment. I have perused the grounds of appeal and without going into the merits of the appeal it is noted that the said grounds do not raise any arguable points of law.

27. All considered it is my finding that the applicant has not met the threshold of granting stay of execution pending appeal. Accordingly, the application dated 2nd June 2023 lacks merit and is hereby dismissed.

28. The applicant shall meet the costs of this application.

29. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 29TH DAY OF FEBRUARY 2024.

F. MUCHEMI

JUDGE