KENYA LAW
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Mwanza v Ruguru (Civil Appeal E065 of 2023)
[2024] KEHC 1846 (KLR) (26 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1846 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CIVIL APPEAL E065 OF 2023

DKN MAGARE, J

FEBRUARY 26, 2024

BETWEEN

BENJAMIN MULINGE MWANZA .... APPELLANT

AND

LEAH MUTHONI RUGURU .... RESPONDENT

RULING

1. The Applicant herein filed an appeal from the judgment and decree of the Honourable C Kithinji given on 22/11/2023 in Voi CMCC E063 of 2023. Simultaneously, they filed the Application herein dated 1/12/2023, supported by the affidavit of Kevin Kitavi seeking the following prayers: -
    a. Spent
    b. Spent
    c. There be Stay execution of the Judgement and Decree given on 22/11/2023 (in Voi CMCC E063 of 2023) pending the hearing and determination of the Appeal herein.
    d. Costs of this Application be in the intended Appeal.
2. The words in parenthesis are the court's reconstruction of the prayers and removal of unnecessary cross-referencing. The application was premised on the usual ground of irreparable loss while declaring that they moved to court with speed and alacrity.
3. They stated that they are willing to comply with the conditions of the court. Of course, they forgot to add such reasonable conditions as the court may grant. They state that a declaratory suit may be filed and render the Appeal nugatory. They state that the respondent is not engaged in any known economic activity and as such the Applicant will not recoup the judgment sum, if the same is paid out.

4. It was his case that they were willing to deposit the decretal sum in a joint interest-earning account. This was modified in the affidavit to a maximum of 3,000,000/. The Respondent indicated that there was no irreparable loss. It was their case they were entitled to the fruits of judgment.

5. The Respondent did not address the issue of Section 5(b)(iv) of Cap 405.

6. It was unnecessary to file submissions, though I granted parties the liberty to do so, they did not exercise that option

Analysis

7. I was not impressed by the Respondent on how they tackled the question of what should be released. The Appellate court, to be able to deal with the aspect of quantum that is not disputed should have sufficient material from the lower court, including but not limited to submissions by the parties, concessions made, plaint, and a breakdown of damages. With these documents, the court will be in a fairly good position to find amounts that can be safely said not to be contested.

8. The overarching question therefore is whether the Applicant has met the threshold for grant of the order of stay. The amounts in dispute are humongous. There has been no material placed before me to show that the Appeal is frivolous. There is no material to show that half of the decretal sum will be recoverable if the same is due or a substantial portion thereof.

9. The Respondent eschewed the question of whether he is a man of means and not a man of straw. The averment of irreparable loss carries with it the understanding that the Respondent's means are unknown. In *Eldoret Steel Mills Ltd v Elijah Mosota* [2007 eKLR, the late Justice Kaburu Bauni stated as doth in regard hereof to the question of men of straw:

> "The applicant has already appealed. He has stated that the appeal has high chances of success and it will be rendered nugatory if the stay is not granted. This contention was not challenged. The other issue is that the respondent was a man of straw and may not be able to refund the decretal sum. This fact was deponed to by the applicant. The respondent did not swear any affidavit to restate that Akeremut intended it was his counsel who swore an affidavit to state that he runs matatu business. With respondent the counsel could not swear to such a fact. It is only the deponent who could have done so. The counsel could not say if the respondent is a man of straw or not even if he know his business. He does not run that business and does not know the income of the respondent. That akeremution that the respondent is a man of straw – was not rebutted. If indeed he is a man of straw he may not be able to refund the decretal sum if the appeal succeeds. That would lead to irreparable loss to the appellant."

10. I *Said Salimu Amur v Said Dena Mwaringa* [2021] eKLR, Justice Olga Sewe stated as doth: -

> "... [Given] that posturing, the burden of proof shifted to the respondent to prove that he is not a man of straw as asserted by him. The respondent however proceeded on the misguided belief that the onus was on the appellant to demonstrate that he is unable to refund the decretal sum, and therefore missed the opportunity to allay the appellant's apprehensions

as to his ability to pay back the decretal sum in the event of a successful appeal. Thus, at paragraph 5 of his Replying Affidavit, the respondent deposed that:

> …the Appellant herein has Not enquired from me if I am able to refund the decretal sum and the allegations that I am not able to refund the decretal sum are false and are Not supported by any evidence."

(13) In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR, the Court of Appeal made it clear that:

> 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."

(14) Moreover, it matters not that the decree sought to be stayed is a money decree. In *Kenya Hotel Properties Ltd v Willesden Properties Ltd* the Court of Appeal held that:

> The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a "man of straw" but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree."

(15) I am therefore satisfied that the apprehensions of the appellant that he stands to suffer substantial loss are warranted; the respondent having failed to demonstrate that he will be in a position to refund the decretal sum should he be required to so in the event of the appeal succeeding.

The foregoing is informed by section 112 of the *Evidence Act*. It is the Respondent who knows his wealth. It is within his special knowledge on how much he is worth. Courts have to make a negative inference when such evidence is not tendered.

11. In the case of *Nesco Services Limited v CM Construction [EA] Limited* [2021] eKLR, justice G V Odunga as then he was stated as doth:

> " In my view, the fact that the document in question was authored by the Appellant's agent and was produced by consent of the parties themselves entitled the learned trial magistrate to rely on it. The Court of Appeal in *Ephantus Mwangi and Another v Duncan Mwangi* Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 had this to say on the issue:
>
> > Where documents are put in by consent, as for example an agreed bundle of correspondence, the usual agreement is that they are admitted to be what they purport to be (so as to save the necessity for formal proof of each document)."

41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In *Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others* [2012] eKLR the court stated as follows:

> Section 112 of the [*Evidence Act*]() Chapter 80 of the laws of Kenya provides:
>
> > 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'
>
> Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make the adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of *Kimotho v KCB* (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

12. It is thus clear that execution may render the Appeal herein academic. The Respondent's means are unknown and as such it is proved that the Applicant would suffer irreparable harm. The Appeal is not idle. The amounts awarded are not modest. I understand that during the appeal, the trial court will have to exercise discretion The aspect of discretion was settled in *Mbogo & Another v Shah* [1968]EA 93 at page 96, where the legendary Sir Charles Newbold P elucidated the point in the most poignant way as hereunder: -

> :"...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice...."

13. The Respondent is entitled to the fruits of the judgment while the Applicant has the right of Appeal which they had given away but seek the intervention of court to redeem it. In my view the injustice to the Applicant if the Application is dismissed exceeds the prejudice to the Respondent if the Application is allowed. In *Harris Horn Senior, Harris Horn Junior v Vijay Morjaria* Nyeri Civil Appeal No. 223 of 2007 when confronted with similar arguments, the Court made observations therein inter alia as follows:

> (32) As for the need to do justice to the parties before it, we have no doubt that this is the core business of the Court. However, a court of law cannot ignore principles of substantive law or case law governing the particular aspect of justice sought from its seat. Its primary role is to ensure that the justice handed out is kept anchored on both the law and the facts of each case."

14. The principles guiding the grant of a stay of execution pending appeal which are well settled. These principles are provided for under Order 42 rule 6(2) of the [*Civil Procedure Rules*]() which provides:

> " 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.

15. Stay may only be granted for sufficient cause. A 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.

16. Section 1A(2) of the *Civil Procedure Act* provides that "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" while under section 1B some of the aims of the said objectives are; "the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties."

17. An Applicant seeking stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2) namely (

    a. Substantial loss may result to the applicant unless the order is made.

    b. The application has been made without unreasonable delay.

18. In this case the Appellant's insurers have offered security as the court may order for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

19. In the case of *Antoine Ndiaye v African Virtual University* [2015] eKLR, Justice Francis Gikonyo stated as follows; -

> " The Applicant seems to rely more on the success of the appeal to the extent of almost urging the grounds of appeal on immunity. The inquiry for purposes of stay pending appeal under Order 42 Rule 6 of the *CPR*is not really about the merits of the appeal but rather the loss which will be occasioned by satisfaction of the appeal in the event the appeal succeeds. I have extensively discussed this matter above and I cite the case of *Jason Ngumba* [2014] eKLR that:
>
> > ...Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.
>
> But what was stated in the case of *Absalom Dova v Tarbo Transporters* [2013] eKLR is relevant, that:
>
> > The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination".

20. How, therefore, will the court balance the rights of parties in the circumstances of this case?

21. The courts have addressed the question as to what amounts to substantial loss. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the court observed that:

> "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."

22. Therefore, the Applicant is willing to deposit security. The Applicant has to deposit funds within a timeline to be fixed by this Court as a condition. How much will be deposited? The Applicant's insurers will be bound ultimately to pay a sum of 3,000,000/=, costs and interests flowing therefrom.

23. Section 5 (b) (iv) of the *Insurance (Motor Vehicle Third Party Risks) Act* states as follows: -

    5. Requirements in respect of insurance policies

    In order to comply with the requirements of Section 4, the policy of insurance must be a policy which –

    (a) Is issued by a company which is required under the *Insurance Act*, 1984 (Cap 487) to carry on motor vehicle insurance business; and

    (b) Insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:

    Provided that a policy in terms of this section shall not be required to cover –

    i) Liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

    ii) Except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or

    iii) Any contractual liability.

    iv) Liability of any sum in excess of three million shillings, arising out of a claim by one person

24. Whereas ultimately, the court will decide how much is to be paid out, it does not make sense to as the insurer deposit security exceeding what they are liable to pay. There is no indication of how much

costs, the respondents are entitled. Therefore, I do not see how the Respondent will be prejudiced if the court orders for the principal amount under section 5(b)(iv) of the *Insurance (Motor Vehicle Third Party Risks) Act*. Costs and interest payable can be ascertained after the judgment in this court.

25. In the circumstances, I find the Application merited and allow the same as aforesaid.

Determination

26. The upshot of the foregoing is that I allow the Notice of Motion dated 6/12/2023 as follows:

    i. The Main Appeal shall be fixed before the Court for directions upon filing.

    ii. There be Stay execution of the Judgement and Decree given on 22/11/2023 (in Voi CMCC E063 of 2023) pending the hearing and determination of the Appeal herein.

    iii. The Applicant shall deposit security of Ksh 3,000,000/ = into a Joint Interest-Earning Account in the name of the Advocates for the Parties or in court within 45 days.

    iv. Directions on 31/3/2024 before the trial court.

DELIVERED, DATED, AND SIGNED AT MOMBASA ON THIS 26TH DAY OF FEBRUARY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Ngiri for Uvyu for the Respondent

Miss Atieno for the Appellant

Court Assistant - Brian