Matata & another v Rono & another (Civil Appeal E034 of 2024)
[2024] KEHC 2799 (KLR) (19 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2799 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E034 OF 2024

FR OLEL, J

MARCH 19, 2024

BETWEEN

PHILOMENA KATHEU MATATA ..... 1ST APPELLANT

GREEN ALLIANCE LIMITED ..... 2ND APPELLANT

AND

SUZZAINE MWIREBANGA RONO ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

RULING

A. Introduction

1. The application before this court is the Notice of Motion application dated 16th February 2024 brought pursuant to provisions of Section 1A, 1B, 3, 3A of the *Civil Procedure Act*, Order 22, Rule 22Order 51 rule 1 of the *Civil Procedure Rules*, and all other enabling provision of law. The applicant seeks for orders that;

    a. Spent

    b. Spent

    c. That this Honourable court be pleased to issue an order staying the execution of the judgement dated 18th January 2023, for the sum of Kshs.1,132,000/= against the Appellants/Applicants pending hearing and determination of the intended Appeal

    d. That costs of this Application be provided for.

2. The application is supported by the ground on the face of the said application and the supporting affidavit of Philomena Katheu Matata dated 16th February 2023 and opposed by the respondents who filed a replying affidavit through the 1st respondent Suzzaine Mwirebanga Rono dated 1st March 2024.

B. Pleadings

3. The 1st Appellant does depone that judgement had been made in favor of the respondents in the sum of Kshs.1,132,000.00/= being plus costs and Interest. Being dissatisfied by the said award, they had filed this appeal, which appeal had overwhelming chance of success based on the various grounds of appeal raised. The applicants further averred that unless stay of execution was granted, the respondents would embark on execution process, which would be highly prejudicial to them and that would render the appeal filed to be nugatory. Finally they also averred that they were ready and willing to abide by any order of this court as shall be issued with regard to security.

4. This application is opposed by the Respondents through the Replying Affidavit's dated 29th September 2023 sworn by the 1st respondent Suzzaine Mwirebanga Rono, who maintained that the said application was brought in bad faith, the appeal had no chance of success and the appeal was filed with ill intention to obstruct and delay the course of justice. The applicant further averred that she operated a Mpesa shop, together with other banking services as an agent of Equity Bank and Kenya Commercial Bank amongst others and therefore the decretal sum of Kshs.1,000,000/= was merger and she was in a position to refund the same without any problems should the Appellant be successful. The 1st Respondent thus urged this court to dismiss the said application dated 16th February, 2024.

Analysis & Determination

5. I have carefully considered the Application, Supporting Affidavit, and the Respondent's Replying Affidavit. The only issue which arise for determination is whether this court should grant stay of execution of the Judgment/Decree dated 18th January 2024 issued in Mavoko PMCC No 49 OF 2020.

6. Stay of Execution is provided under Order 42 Rule 6 of the *Civil Procedure Rules* 2010 as follows;

> "(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 order set aside.
>
> (2) No order for stay of execution shall be made under subrule (1) unless –
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> (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."

7. The three conditions to be fulfilled can therefore be summarized as follows;

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

b. application has been made without unreasonable delay

c. security as the court orders for the due performance

8. These principles were enunciated in *Butt v Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -

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

b. Secondly, 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 the appeal court reverse the judge's discretion.

c. Thirdly, 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. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order for stay of execution to lapse.

i. Undue Delay

9. As to whether the Application has been filed without undue delay, judgment was entered on 18th January 2024. The memorandum of appeal was filed on 16th February 2024, simultaneously with this application, all of which were done within one month. This court thus finds that the appeal and this application for stay of execution has been filed without undue delay.

ii. Substantial Loss

10. On the issue of substantial loss, Ogolla, J in *Tropical Commodities Suppliers Ltd & Others v International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 stated that:

> " 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.'

11. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR the court expressed itself as hereunder:

> " 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."

12. The same position was adopted 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."

13. The respondent did file a replying affidavit to rebut the averments made by the applicants in the supporting affidavit, but never filed any affidavit of means to show or prove that indeed if she is paid the decretal sum and the appeal is successful, she will be in a position to refund the decretal sum paid to her. It may well be true that she runs a successful Mpesa shop and Banking Agency shop, but that by itself did not prove that she is financially liquid and capable of refunding the decretal sum if paid out.

14. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* (2006) eKLR the Court of Appeal held thus;

> " Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge."

15. Guided by the above authorities and in the absence of the requisite proof from the 1st Respondent that she is a person of means, I find that the Appellants have satisfied this court that they will suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.

iii. Security

16. As regards deposit of security, the court observed in the case of *Gianfranco Manenthi & Another v Africa merchant Assurance Co. Ltd* [2019] eKLR it was held that:-

> " The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

> Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....
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> Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree."

17. The Court must similarly consider the overriding objective and balance the interest of the parties to the suit while considering the issue of security to be offered. The law is that where the applicant intends to exercise his undoubted right of appeal, and in the event, that he were eventually to succeed, he should not be faced with a situation in which he would find himself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.

18. The issue of adequacy of security was dealt with by the Court of Appeal in *Nduhiu Gitahi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 where the Court of Appeal expressed itself as follows:

> " The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them.
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> So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it".

19. The applicants did state with regard to the issue of security that, they were ready to abide by any conditions that may be impose by court. The 1st Respondent on the other hand submitted that the appellant should pay out the decretal sum, which she was in a position to refund, should they lose this Appeal. The appellant has challenged the entire Judgment finding them liable for malicious prosecution

Disposition

20. Taking all relevant factors into consideration and in order not to render the intended appeal illusory, and since based on the grounds of appeal, the same is as against quantum awarded, I do grant stay of execution of the decree herein on condition that;

    a. The Appellant/Applicant do deposit a sum of Kenya shillings five hundred thousand (Kshs.500,000/=) into court as security of this Appeal

    b. This condition is to be met within 45 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.

21. The costs of this Application will be in the cause.

22. It is so ordered.

RULING WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 19TH DAY OF MARCH, 2024

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 19TH DAY OF MARCH, 2024

In the presence of: -

Mr. Kimunda for Appellant

Mr. Kipkima for Kamolo for Respondent

Sam Court Assistant