Oduol v Nation Media Group Limited (Civil Suit 71 of 2017)
[2024] KEHC 3512 (KLR) (Civ) (19 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3512 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 71 OF 2017

CW MEOLI, J

MARCH 19, 2024

BETWEEN

JAMES OCHIENG ODUOL ..... PLAINTIFF

AND

NATION MEDIA GROUP LIMITED ..... DEFENDANT

RULING

1. For determination is the motion dated 27.03.2023 by Nation Media Group Limited (hereafter the Applicant). Seeking primarily to stay execution of the judgment delivered on 16.02.2023 in favour of James Ochieng Oduol (hereafter the Respondent), pending hearing and determination of the appeal in the Court of Appeal. The motion is expressed to be brought pursuant to Order 42 Rule 6 of the *Civil Procedure Rules (CPR)*, on grounds on the face of the motion, as amplified in the supporting affidavit sworn by Sekou Owino, described therein as the Applicant's head of Legal and Training, and authorized to depose on its behalf.

2. The gist of the affidavit is that on 16.02.2023 judgment was entered against the Applicant in the sum Kshs 7,000,000/- with costs and interest, and that aggrieved by the judgment the Applicant filed a Notice of Appeal in the Court of Appeal. He deposes that upon delivering the judgment, the court granted an interim stay of execution which lapsed on 16.03.2023. He asserts that the Applicant stands to suffer substantial loss if execution proceeds while the appeal is pending. Because the means and assets of the Respondent are unknown, and it may prove difficult for the Applicant to recover the decretal sum in the event the appeal is successful. Thus, occasioning the Applicant substantial loss.

3. Asserting that the Applicant is a well-established company with assets whose value exceed Kshs. 8.57 billion, the deponent states that the Applicant has the necessary means to satisfy any eventual decree in the event the appeal fails. For the same reason, the deponent states that there is no justification for the judgment sum to be deposited in an interest earning account, offering instead a bank guarantee as

security for the performance of the decree. In conclusion, he deposes that it is only just and fair that the motion be allowed in order to safeguard the Applicant's right of appeal.

4. The Respondent opposes the motion by way of a grounds of opposition dated 30.03.2023 and a lengthy replying affidavit dated 20.04.2023. He takes issue with the motion on grounds that the judgment involves a money decree, hence any monies paid over in satisfaction thereof can be refunded, that alleged substantial loss has not been demonstrated, and that the denial of stay of execution would not render the appeal nugatory, therefore. Citing the Applicant's total assets and cash reserves as evinced in the supporting affidavit, he deposes that it is improbable that the Applicant would suffer substantial loss on account of the judgment sum herein. He attacks the viability of the Applicant's intended appeal and expresses apprehension that if the decretal sum is not paid over, the Applicant will employ dilatory tactics while purporting to pursue a frivolous appeal.

5. He asserts his means to refund the decretal sum, if the appeal succeeds, citing his standing as an advocate for over twenty (20) years, a farmer and businessman. Further stating that the Applicant has approached the court with unclean hands, having defied this court's order issued on 28.03.2023 requiring it to deposit into court the sum of Kshs. 2,000,000/- while proposing to provide a bank guarantee from Standard Chartered Bank. He maintains that the Applicant should provide security by way of deposit of the decretal sum in an interest earning account. In his view, the motion is devoid of merit and intended to cause delay or deny the Respondent enjoyment of the fruits of his judgment. Thus, urging that the application be dismissed with costs.

6. The motion was canvassed by way of written submissions. As regards the applicable principles in respect of stay of execution pending appeal, counsel for the Applicant anchored his submissions on the provisions of Order 42 Rule 6(2) of the *CPR* and the decision in *Halai & Another v Thornton & Turpin (1963) Ltd* [1990] eKLR. Supporting his submissions on substantial loss, counsel called to aid the decisions in *Rhoda Mukuma v John Abuga* [1988] eKLR and Civil Application No. 353 of 2009, *Nation Media Group Limited & Wangethi Mwangi v Hon. Amb Chirau Ali Mwakwere* to argue that notwithstanding the Respondent's means, if the decretal sum is paid over, the Applicant will have to pursue the Respondent in the event the appeal succeeds. Further that, even where a respondent demonstrates that he is capable of refunding the judgment sum if the appeal succeeds, the court still has to consider the balance of convenience.

7. Counsel contended that the motion was timeously filed on 27.03.2023, the judgment having been delivered on 16.02.2023. Concerning security, he submitted that the Applicant has already provided part security by depositing the sum of Kshs. 2,000,000/- into court while offering additionally to furnish a bank guarantee for the balance of Kshs. 5,000,000/- with the Standard Chartered Bank. Citing *Nation Media Group Limited* (*supra*), *Kenya Women Microfinance Ltd v Martha Wangari Kamau* [2020] eKLR and *Edward Kamau & Anor v Hannah Mukui Gichuki & Another* [2015] eKLR, counsel invited the court to hold that there is sufficient cause to grant stay of execution. That the overriding objective of the court is to facilitate a just resolution of the dispute herein by allowing the application for stay of execution on condition that the Applicant provides a bank guarantee as security.

8. On behalf of the Respondent, counsel stated the thrust of his argument to be that the Applicant has not satisfied the conditions for grant of stay of execution pursuant to Order 42 Rule 6 of the *CPR.* Addressing the question of substantial loss, counsel argued that based on the depositions in the supporting affidavit, there is no demonstration of substantial loss. He asserts that the burden of proof in that regard is upon the Applicant. It was further submitted that the Applicant's claim regarding the Respondent's lack of means to refund any monies paid over has been disapproved through material in the replying affidavit. Counsel here citing the court's decision in *Jessikay Enterprises Ltd v George Kahoto Muiruri [*2022] eKLR.

9. As concerns security, it was argued that the conditions for stay are sequential and conjunctive and if an Applicant fails to satisfy one of the conditions the motion ought to be disallowed. Citing the decision in *Jessikay Enterprises Ltd* (*supra*) counsel contended that since the Applicant has failed to establish substantial loss, the Applicant's offer of security via a bank guarantee is of no moment. Besides, the said choice of security has not been justified, the longstanding practice being that decretal sums are secured in joint interest earning account in the names of the respective law firms. In summation it was submitted that the Applicant has failed to satisfy the court that is deserving of the order sought.

10. The court has considered the material canvassed in respect of the motion. The court is not concerned with the merits of the appeal at this stage. That would be a consideration before the Court of Appeal in an application brought under Rule 5(2)(b) of the *Court of Appeal Rules*. That said, the power of this court to grant stay of execution of a decree pending appeal is discretionary, but the discretion should be exercised judicially. See *Butt v Rent Restriction Tribunal* [1982] KLR 417.

11. The Applicants' prayer for stay of execution pending appeal, is brought specifically pursuant to Order 42 Rule 6 of the *CPR* which provides that:

> "(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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—
>
> (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".

12. No doubt, the Applicant moved expeditiously in bringing this motion. The cornerstone consideration in a motion to stay execution is whether the Applicant has demonstrated the likelihood of suffering substantial loss if stay is denied. One of the most enduring legal authorities on the issue of substantial loss is the case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the *Shell Case* are especially pertinent. These are that: -

> "1. .....
>
> 2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.

3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.

4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid."

13. The decision of Platt Ag JA, in the *Shell Case*, in my humble view sets out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Platt Ag JA (as he then was) stated *inter alia* that:

> "The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the *Civil Procedure Rules* was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts... (emphasis added)".

14. The learned Judge continued to observe that: -

> "It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money." (Emphasis added).

15. Earlier on, Hancox JA in his ruling observed that: -

> "It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would, ...render the appeal nugatory. This is shown by the following passage of Cotton L J in *Wilson -vs- Church* (No 2) (1879) 12ChD 454 at page 458 where he said: -
>
> > "I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory."
> >
> > As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause."

16. The Applicant by its affidavit in support of the motion has expressed apprehension that it stands to suffer substantial loss if execution proceeds while the appeal is pending, because the Respondent's means to refund any payment made in satisfaction of the decree are unknown. And that it may be

difficult for the Applicant to recover the decretal sums in the event the appeal is successful, leading to substantial loss. The Respondent's response was that being an advocate of repute and good standing for over twenty (20) years, a farmer and businessman, he can repay the decretal sums (See Annexure Joo-1).

17. On this question, the Court of Appeal in the renowned case of *National Industrial Credit Bank Ltd* stated that:

> " This court has said before and it would bear repeating that while the legal duty is on an Applicants 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 Applicants 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 – see for example Section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya."

18. The judgment of this court is in the sum of Kshs. 7,000,000/-. This is a substantial sum. Upon the Applicant expressing apprehension about the Respondent's capacity to repay any monies in the event of the appeal succeeding, the burden shifted on the Respondent to controvert the assertion by proving his own means. The Respondent, in rebutting the apprehension raised by the Applicant exhibited in his affidavit material some title to property and funds in dollar denomination in a fixed deposit account in the sum of the tune of Usd 100.781.40. (See Annexure Joo-1).

19. From the above annexure, it appears to the court that the Respondent is a person of means. However, the liquidation of assets is not always an easy or straight forward path in this jurisdiction, whereas the fixed deposit account was set to mature on or before 03.05.2023, which is long past. Additionally, the Respondent has not offered an express guarantee or undertaking that the said funds or assets will be retained and made available for purposes of refunding any monies received from the Applicant, in the event that the appeal concludes in the Applicant's favour. As earlier noted in the Shell case, substantial loss likely to render the appeal nugatory is what must be prevented.

20. Difficulty in the recovery of decretal sums upon a successful appeal, not just the impossibility of recovery, is in some cases a relevant factor in considering the likelihood of substantial loss to an applicant. Or in the alternative, and in proper cases, such demonstrated difficulty would qualify as sufficient reason (as anticipated in Order 42 Rule 6(1) of the *Civil Procedure Rules*) to be considered by the court. Here, the Applicant has raised the possibility of such difficulty in pursuing the Respondent for recovery of monies paid over. Without seeming to demean or cast doubt on the financial stature of the Respondent, the court does not consider such apprehension farfetched.

21. Whatever the case, in the exercise of its discretion, the court must balance the competing interests of the parties so as not to prejudice the matter pending appeal. In *Nduhiu Gitahi & Another v Anna Wambui Warugongo* [1988] 2 KAR, the court citing the decision of Sir John Donaldson M. R. in *Rosengrens -vs- Safe Deposit Centres Limited* [1984] 3 ALLER 198 and Others, held that:

> " We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff.....

It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal…"

22. On this score, the Applicant has expressed willingness to offer security by way of bank guarantee which form of security was vehemently opposed by the Respondent. The court notes that the Applicant has complied with the initial order attached to interim stay of execution by depositing into court the sum of Kshs. 2,000,000/-. Moreover, by its own admission, the Applicant owns assets whose value exceed Kshs. 8.57 billion. Evidently, therefore, it has the necessary means to deposit the entire decretal sum or a substantial portion thereof as security for the due performance of the decree.

23. In the circumstances, and in order to preserve the rights of both parties pending appeal, the Court will allow the motion dated 27.03.2023 on condition that the Applicant, shall deposit into a joint interest earning account in the names of the parties' advocates, the sum of Kes.7000,000/- (Seven Million) as security, within 60 days of today's date. For this purpose, the court makes an order that the sum of Kes. 2000,000/- already deposited into the court by the Applicant shall immediately be released to them. The costs of the motion shall abide the outcome of the appeal in the Court of Appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 19TH DAY OF MARCH 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Ochieng

For the Respondent: Mr. Echesa

C/A: Carol