



Kitetei v Paul (Civil Appeal E269 of 2023) [2024] KEHC 4546 (KLR) (30 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4546 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

CIVIL APPEAL E269 OF 2023

MW MUIGAI, J

APRIL 30, 2024

BETWEEN

JAMES MUEMA KITETEI APPELLANT

AND

WINFRED NDUNGWA PAUL RESPONDENT

*(Being an Appeal from the judgment of Hon. C. N. Ondieki (Principal Magistrate)
in Machakos CMCC No. E50 OF 2021 dated and delivered on 28.09.2023)*

RULING

Notice Of Motion Application

1. Vide application dated 13/10/2023 brought under Section 3A, 79G and 95 of the [Civil Procedure Act](#), Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rules 1 and 3 of the [Civil Procedure Rules, 2010](#) the Applicant sought the following orders, that;
 - a. Spent
 - b. Spent
 - c. The Court stay the execution of the judgment/Decree delivered on 28/09/2023 by Hon. C. N. Ondieki (P.M) in Machakos Chief Magistrate Court Civil Suit No. E50 of 2021 pending the hearing and determination of the Appellant's Appeal.
 - d. This court allows the Appellant/Applicant to furnish the Court with security in the form of a bank guarantee from a reputable Bank pending the full hearing and determination of this Appeal.
 - e. spent
 - f. The costs of and incidental to this Application be provided for.



2. The Application is supported by an affidavit sworn by James Muema Kitetei the Applicant herein sworn on 13th October, 2023 stating as follows; that the Applicant being dissatisfied with the judgment of the Trial Court delivered on 28/09/2023 which found him liable 100% intends to appeal the decision and has in this regard lodged a Memorandum of Appeal to that effect; that the intended Appeal has high chances of success; that the Respondent may proceed and levy execution against the Applicant after the lapsing of 30 days stay granted by the Trial Court hence rendering the Applicant's Appeal nugatory and the Applicant will suffer irreparable loss and damages; that if the Respondent is paid the decretal amount and in the event the appeal is successful, the Applicant might not be able to recover the same from the Respondent since the Respondent has not disclosed nor furnished the Court with any documentary evidence to prove her financial standing; that the Applicant insurance is ready, willing and able to furnish the Court with a Bank Guarantee as security to the Court; that the Applicant has appealed against the Judgment of the Trial Court particularly on Liability which were excessive as the third party was the one liable for the accident and finally that the Respondent will not suffer any prejudice or any damage not capable of being compensated by way of costs.

Replying Affidavit

3. The Respondent opposed the Application through a Replying Affidavit sworn on 01.11.2023 deposed by Winfred Ndungwa Paul in which she stated as follows; that the instant application is made in bad faith to deny her the fruits of her rightfully obtained judgment; that the Respondent is employed by Samkya Co. Ltd hence can be able to repay back the decretal sum in the event the appeal succeeds; that the Applicant has not shown whether he will suffer any irreparable loss and damage; that the insurance party mentioned by the Appellant is not a party to these proceedings; that the Bank Guarantee attached is a general one and it is not clear it is for how many cases and finally that the appeals in money decrees are never rendered nugatory for one can sue for refund.
4. The Application was canvassed by way of written submissions.

Applicant's Submissions Dated 26.01.2024

5. On the issue of whether the Appeal herein is arguable, it is submitted that the Appeal herein raises serious points of law and facts that warrant this Court's intervention to avoid injustice or inadvertence errors.
6. Reliance is made in the case of *Shah v Mbogo & Anor* [1967] E.A. 116 at 123 BC on the principles governing the exercise of the Court's discretion to set aside a judgment obtained ex-parte the Court stated that;

“the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors, but is not designed to assist a person who had deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice”
7. On the issue of whether the Applicants have demonstrated that substantial loss will occur unless stay is granted, the Respondent herein has not demonstrated her financial status and thus her means are unknown and it is highly unlikely that the Respondent will be capable of refunding the decretal amount in the event that the Applicant's Appeal succeeds. Reliance is made in the case of *Edward Kamau & Anor v Hannah Mukui Gichuki & Anor* [2015] eKLR and *Tabro Transporters Ltd v Absalom Dova Lumbasi* [2012] eKLR.



8. The Trial Court judgment was delivered on 28.09.2023 and the instant application was filed on 17.10.2023 therefore there was no inordinate delay in filing of the application.
9. On the issue of security it is submitted that the Applicant's Insurer is ready and willing to provide a Bank Guarantee as a security for stay of execution pending appeal.

Respondent's Submissions Dated 13.12.2023

10. On behalf of the Respondent, it is submitted that for this Court to grant stay it has to be satisfied that:
 - a) There is an appeal with chances of success and if stay is not granted, the appeal will be rendered nugatory.
 - b) Substantial loss will be suffered if stay is not granted.
 - c) Application is made without unreasonable delay
 - d) Such security as Court may order in due performance of the Decree.
11. On the issue of whether the appeal has chances of success the Applicant herein failed to satisfy the condition for stay in order to have the Court to exercise its discretion. The Applicant did not blame the Respondent at all but put blame on a third party who is not a party to these proceedings. Reliance is made in the case of *Michael Chesikaw v Kenya Anti – Corruption Commission* – CA NO. E537/2023.
12. On substantial loss it is submitted that the Respondent has stated that she is working and can be able to repay back the decretal sum if the appeal succeeds. The Applicant did not raise any doubt as to capability of the Respondents inability to pay. Reliance is made in the cases of *Indus Trading limited & Anor –v Charles Aricha* – MKS HCCA No. E36 of 2021, *Kenya Shell Ltd-v- Benjamin Karuga Kibiru & Anor* CA 1982 – 1988[IKAR.1018] and *Mutua Kilonzo-v- Kioko David* – MKS HCCA 62 of 2008.
13. On the issue of decretal sum it is submitted that the stay prayed for should not deny a successful litigant from enjoying the fruits of its rightfully obtained judgment. Therefore this Court to order the Applicant to deposit half decretal sum in Court. Reliance is made in the cases of; *Mohan Meakin limited –v- Mutunga Kiundi* – CA Civil Application No. 252/2000 and In the case of *Kioko Peter – v- Kisakwa Ndolo King'oku* – MKS HCCA.31 of 2019.
14. Finally it is submitted that the Bank Guarantee the Applicant is proposing to give is not for this case as the same was obtained on 6/07/2023 before the Appeal herein was filed.

Determination

15. The court has considered the Application, the Response thereto and the submissions on record and the issue for determination is whether the Applicant should be granted an order of stay of execution pending appeal.
16. Stay of Execution is provided by the proviso 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 –
 - (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.”

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

that substantial loss may result to the applicant unless the order is made
application has been made without unreasonable delay
security as the court orders for the due performance

18. 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.



Substantial Loss

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

20. 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.”

21. The applicant contends that the appeal shall be rendered nugatory if the orders sought herein are not granted as the Respondent may proceed to execute the decree.

Arguable Appeal

22. The Applicant has submitted that it has a strong arguable appeal which has high chances of success that will be rendered nugatory if the orders sought are not granted.

Undue Delay

23. As to whether the Application has been filed without undue delay, judgment was entered on 28.09.2023 and this application was filed on 17.10.2023, less than a month later. The court finds that the Application has not been filed without undue delay.

Security

24. 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....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.”

25. The Applicant contended that it is willing and ready to abide by any reasonable condition set forth by the Court in due performance of the decree pending the hearing and determination of the appeal and proposed furnishing security in terms of a bank guarantee, a proposal which was vehemently opposed by the Respondent terming the bank Guarantee as a general one and not clear how many cases it had been used for.
26. This Court is persuaded that the Applicant has demonstrated that it has met the threshold for grant of stay of execution.

Disposition

1. In balancing the rights of the parties and in exercise of the court’s discretion, I direct as follows;
 - a. Stay of execution pending Appeal of Machakos CMCC No. E50 of 2021 is granted on condition that the Applicant deposits half of the decretal amount in a joint interest earning account of both Advocates on record and other half in a bank guarantee issued within 90 days from the date hereof and in default, the application for stay shall stand dismissed.
 - b. The costs of this application abide the outcome of the appeal.

It so ordered.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT MACHAKOS THIS 30TH DAY OF APRIL, 2024 (VIRTUAL/PHYSICAL CONFERENCE).

M. W. MUIGAI

JUDGE

