Shahbaz & 2 others v Deshpande (Civil Appeal E810 of 2024) [2025] KEHC 97 (KLR) (Civ) (16 January 2025) (Ruling)

Neutral citation: [2025] KEHC 97 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E810 OF 2024

CW MEOLI, J

JANUARY 16, 2025

BETWEEN

MUHAMMAD YOUNAS SHAHBAZ .... 1ST APPLICANT

MUHAMMAD ALI MIRZA .... 2ND APPLICANT

IQ HOLDINGS LIMITED .... 3RD APPLICANT

AND

SATISH NAGRAJ DESHPANDE .... RESPONDENT

RULING

1. For determination is the motion dated 17.07.2024 filed by Muhammad Younas Shahbaz, Muhammad Ali Mirza and IQ Holdings Limited (hereafter the 1st, 2nd & 3rd Applicant/Applicants) seeking to stay execution of the judgment entered in SCCC No. E1130 of 2024 on 01.07.2024 against the Applicants pending hearing and determination of the appeal. The motion is expressed to be brought among others pursuant to Order 42 Rule 6 of the *Civil Procedure Rules* (CPR), and based on grounds on its face, as amplified in the supporting affidavit sworn by 1st Applicant, described as a director of the 3rd Applicant therefore duly authorized to swear the affidavit.

2. To the effect that judgment was entered in favour of Satish Nagraj Deshpande (hereafter the Respondent) and that the Applicants are thereby aggrieved and stand to suffer irreparable loss. Because its effects include the requirement that they release the motor vehicle registration number KCP 238U (hereafter suit motor vehicle) to the Respondent who is yet to complete payment for the same. That while the Respondent has evinced his intention to execute the judgment, the Applicants have an arguable and or meritorious appeal, which will be rendered nugatory if stay of execution is not granted. He maintains that the judgment sum is substantial and that the Respondent's ability to return the suit motor vehicle to the 3rd Applicant is unknown. In summation, he deposes that the Applicants filed

the motion without delay, and it is in the interest of justice that the motion be allowed so as not to render the appeal nugatory.

3. The motion was opposed through a replying affidavit by the Respondent. He views the motion as a non-starter, unmerited, bad in law and liable for dismissal with costs. That the Applicants have failed to meet the criteria contemplated in law to warrant issuance of an order to stay execution, and hence the application is fatally defective. He asserts that he has always had quiet possession of the suit motor vehicle at all material times leading up to the judgment of the trial Court. Therefore, he is the one who stands to suffer substantial loss if execution of decree were to be stayed. He further states that since July 2023, the Applicants have neglected, refused and or ignored to release the suit motor vehicle's logbook for purposes of effecting transfer of ownership to his name meanwhile the purpose of the lower Court proceedings was to obtain a specific performance order as against the Applicants to facilitate the transfer of ownership of the suit motor vehicle to his name.

4. He states that he has since initiated execution proceedings against the Applicants who have failed to release the logbook and the present motion is an attempt at relitigating the matter. He concludes by stating that the Court ought to reject the motion for stay in its entirety, as he stands to suffer significantly by continuing use of a motor vehicle which is not registered in his name.

5. The motion was canvassed by way of written submissions. On the part of the Applicants, counsel submitted that the judgment of the trial Court ordered the Applicants to transfer the logbook of the suit motor vehicle to the Respondent's name. Hence it is imperative that in order to protect both the Applicants proprietary rights and interest as well as the substance of the appeal, an order of stay of execution be granted. It was further contended that the main concern of the Court at this stage is always to do justice and that the Applicants adduced sufficient evidence before the trial Court that it was indeed the Respondent who breached the agreement between the parties.

6. That the appeal raises arguable issues with a high chance of success and if stay is denied, the Applicants are likely to suffer irreparable harm as they will have to release the logbook or worse have their properties attached. While calling to aid the decisions in *Lalji t/a Vakkep Building Contractors v Carousel Ltd* [1989] KLR and *Doughlas Wambua Mutula v Kenya Port Authority* [2020] eKLR, counsel posited that the Applicants motion has met the threshold for grant of an order of stay of execution pending appeal, also pointing out that the motion has been presented without unreasonable delay. Therefore, the Court was urged to exercise its discretion by allowing the motion with costs.

7. On behalf of the Respondent, counsel condensed her submissions around two issues. On the nature of the decree of the lower Court, it was pointed out that the decree arising from the judgment of the trial Court is in the form of a negative order in so far as it dismissed the Applicants' counterclaim and being a negative order cannot attract an order to stay its execution. The decision in *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR as cited with approval by the Court of Appeal in *Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v Millimo, Muthomi & Co. Advocates & 2 others* (Civil Appeal (Application) E383 of 2021) [2022] KECA 491 (KLR) was relied on.

8. Concerning whether the Applicants have made a case for an order to stay execution, counsel anchored her submissions on the provisions of Order 42 Rule 6 (2) of the *CPR*. In supporting the submission that the Applicants have not demonstrated that they are likely to suffer substantial loss in the event stay is not granted pending appeal. That it is trite law that execution of the decree is not a sufficient basis to warrant stay given the decree-holder's entitlement to enjoy the fruits of the outcome of the proceedings in the trial court. It was further submitted that the Applicants have an obligation to go beyond merely asserting the execution of the decree as a basis for seeking stay and must demonstrate

irreparable harm that cannot be reversed by a successful appeal. The decision in *James Wangalwa & Another v Agnes Cheseto Naliaka* [2012] KEHC 1094 (KLR) was cited in that regard.

9. Counsel further asserted that the Respondent has had possession of the suit motor vehicle since 2023 and he has been unable to renew its insurance cover as the vehicle is not registered in his name. That the Applicants have not demonstrated any evidence that the Respondent will dispose of the suit motor vehicle. Hence it is the Respondent who stands to suffer loss being the person in possession of the suit motor vehicle that he is unable to utilize. Counsel equally submitted that the Applicants memorandum of appeal does not demonstrate an arguable appeal as it is raises issues of fact which are not amenable to appeal before this court under the *Small Claims Court Act*, while no security has been offered. In summation, counsel urged the Court to dismiss the motion with costs.

10. The Court has considered the material canvassed in respect of the motion. First, despite the parties' respective rival submissions, it is pertinent to state that at this stage, the Court is not concerned with the merits of the appeal. It is trite that the power of the Court to grant stay of execution of a decree pending appeal is discretionary, however the discretion should be exercised judicially. See *Butt v Rent Restriction Tribunal* [1982] KLR 417.

11. However, before addressing the substance of the Applicant's motion, the Court proposes to address a preliminary contention by the Respondent. The latter summarily argues that the decree of the lower Court is a negative order dismissing the Applicants' counterclaim hence incapable of being stayed. The Applicants offered no answer to the contention. As rightly argued by the Respondent and held by the Court of Appeal in *Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme* (*supra*), a negative order in the form of dismissal is incapable of being stayed. However, as admitted by the Respondent, he had filed a claim against the Applicants seeking inter alia an order of specific performance against the Applicants to facilitate the transfer of ownership of the suit motor vehicle to his name. Invariably, therefore the Applicants' counterclaim was a byproduct of the Respondent's claim.

12. It is not in dispute that the Respondent succeeded in his claim and the resultant judgment is the subject of the Applicants appeal. Consequently, it is the Court's finding that the Respondent's objection is not well taken. Pursuant to impugned decision by the trial Court, the Applicants were directed and or ordered to perform certain actions which are capable of being stayed in a proper case. Notwithstanding the fact that the Respondent having successfully prosecuted his claim, the Applicants counterclaim was dismissed in the process.

13. Moving on to the crux of the matter, the Applicants prayer for stay of execution pending appeal, is brought under 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".

14. The cornerstone consideration in the exercise of the discretion is whether the Applicants have 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."

15. The decision of Platt Ag JA, in the *Shell case*, in my humble view set 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)"

16. 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)

17. 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 v Churc*h (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."

18. The Applicants have underscored the fact that they have an arguable appeal which will be rendered nugatory if stay of execution is not granted given that the Respondent's ability to return the suit motor vehicle to the 3rd Applicant is unknown. The Respondent riposte is that he has always had quiet possession of the suit motor vehicle at all material times leading up to the judgment of the trial Court and that to justify a stay order, the Applicants' mere assertion of execution is inadequate, without a demonstration of irreparable loss that cannot be reversed by a successful appeal.

19. Execution in satisfaction of a decree is a lawful process, and the Applicants are duty bound to demonstrate how substantial loss would arise, by showing where a money decree is involved, either that if the appeal were to succeed, the Respondent would be unable to refund any monies paid to him under the decree, or that payments in satisfaction of the decree would occasion difficulty to the Applicant. As stated in the *Shell case*, without a demonstration of substantial loss, it would be rare that any other event would render the appeal nugatory and justify keeping the decree holder out of his money. The Applicant has precisely expressed the apprehension of the Respondent's ability to return the suit motor vehicle if the appeal were to succeed, but on his part, the Respondent has not tendered any material in rebuttal.

20. The decree herein is not a money decree. From a perusal of the annexure marked "Exhibit 1" it is evident that the decree in question involves an order of specific performance directed towards the Applicants to transfer the logbook in respect of the suit motor vehicle to the Respondent. At the risk of repetition, the decree of the Court required the Applicants to perform certain actions in favour of the Respondent. Further a perusal of the annexure marked ''Exhibit 2" reveals that the Applicants' counterclaim against the Respondent was for an alleged unpaid balance in the sum of Kshs. 325,000/- deemed was payable by the Respondent. The counterclaim did not concern itself with the disposition and or interest in the suit motor vehicle per se.

21. Thus, in the Court's view, even if execution were to proceed, the transfer of the logbook of the suit motor vehicle to the Respondent's name does not appear tantamount to substantial loss on the part of the Applicants. More so as the Applicants have not demonstrated that the Respondent is incapable of paying the sums claimed in counterclaim as unpaid purchase price should the appeal succeed. Or is intending to dispose of the suit motor vehicle or is attempting to leave the jurisdiction of this Court, and that, if their appeal is successful in respect of their counterclaim, they would be unable to execute against the Respondent. Their counterclaim did not seek return of the suit vehicle now adverted to in the motion, but payment of the outstanding purchase price by the Respondent. The vehicle was sold

to the Respondent, and not treated as a collateral for payment of any or the claimed outstanding sums. Nor was its return the subject of the lower court dispute.

22. Moreover, if the Applicants are apprehensive that the suit motor vehicle is likely to be disposed of, appropriate prayers to the Court and or caveats with the National Transport and Safety Authority could secure the suit motor vehicle. In this case, the asserted apprehension regarding Respondent's ability to return the suit motor vehicle is a tangential matter not amounting to sufficient demonstration of substantial loss. Substantial loss in its various forms is the cornerstone of the Court's jurisdiction for granting stay, and what has to be prevented. As stated in the Shell case, without a demonstration of substantial loss, it would be rare that any other event would render the appeal nugatory and justify keeping the decree holder fruits of their successful litigation.

23. In *George Gathura Karanja v George Gathuru Thuo & 2 Others* [2019] eKLR, the Court of Appeal stated that:

> " [A]n appeal/intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible. See the case of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others*, Civil Appeal No. 31 of 2012 where this Court stated inter alia thus:
>
> > " Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is irreversible, or if it is not reversible whether damages will reasonably compensate the aggrieved party."

24. On the facts of this case, the court agrees with the Respondent that no irreversible outcome appears possible because, even if stay is denied, the Applicants if successful on appeal will be at liberty to execute in the recovery of any sums found due to them.

25. Therefore, the Court is not persuaded that the Applicants have established the likelihood of substantial loss through the appeal being rendered nugatory. Without this evidence, it is difficult to see why the execution process should be stayed. In the circumstances, the motion dated July 17, 2024 is found to be devoid of merit and is hereby dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 16TH DAY OF JANUARY 2025.

C. MEOLI

JUDGE

In the presence of:-

For the Applicant:

For the Respondent:

C/A: Erick