



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC CIVIL APPLICATION NO. 115 OF 2021

MWANGI NJENGA

T/A MWANGI NJENGA & CO. ADVOCATES...APPELLANT/APPLICANT

VERSUS

SHEZAN AZAK KARA.....RESPONDENT

R U L I N G

1. The Applicant **MWANGI NJENGA T/A MWANGI NJENGA & CO. ADVOCATES** approached this court vide a **Notice of Motion** dated **27th August, 2021** seeking stay of execution in respect of a **Ruling** delivered on **4th August, 2021** pending the hearing of the Applicant's appeal.
2. The application is premised on the grounds on the face of the application and the **Supporting** and **Further Affidavits** of **Mwangi Njenga**, sworn on **27th August, 2021** and **22nd September, 2021** respectively.
3. The Respondent opposed the application through the **Replying Affidavit** sworn on **12th September, 2021**.
4. The parties agreed to have the application canvassed by way of written submissions, both dated **22nd September, 2021**.
5. I have given due consideration to the application, the affidavits on record and the rival written submissions filed on behalf of the parties as well as the authorities cited. Having done so, I find that the only issue arising for determination is *whether to grant the stay of execution as sought in the application*.

6. Order 42 Rule 6 of the **Civil Procedure Rules** provides as follows:-

(1) "No appeal or second appeal shall operate as a stay of execution or proceedings 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."

7. In the case of **Vishram Ravji Halai –vs- Thornton & Turpin, civil Application No.Nai.15 of 1990[1990]KLR 365**, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under **Order 41 Rule 6** of the **Civil Procedure Rules** is fettered by three conditions namely, *establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security*. Further, *the application must be made without unreasonable delay*.

8. With regard to the first condition on whether the application was filed without undue delay. From the court record, the Ruling by the trial court was delivered on the 4th August 2021. The application herein was filed on the **27th August, 2021**. In view of this, the application was brought within a reasonable time.

9. On the second condition of substantial loss, the Applicant is apprehensive that the Respondent will not be in a position to refund the decretal sum if the appeal succeeds. Further, the items that have been inventoried for sale by the Respondent are the Applicant's tools of trade and should execution proceed then the Applicant stands to suffer substantial loss which the court ought to prevent. On the other hand, the Respondent has deposed that he has financial means hence capable of refunding the money.

10. In the case of **Kenya Shell Limited –vs- Kibiru [1986] KLR 410**, at page 416, **Platt, Ag.JA** (as he then was) expressed himself as follows:

“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 corner stone of both jurisdictions for granting a 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”.

11. On the part of **Gachuhi, Ag.JA** (as he then was) at 417, he held:-

“It is not sufficient by merely stating that the sum of Shs.20,380.00 is a lot of money and the Applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the Applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before Judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his Judgment.”

12. Dealing with the contention that there was no evidence that the 1st Respondent would be able to refund the decretal sum if paid over to the Respondent, **Hancox, JA** (as he then was) in the above cited case when he expressed himself as follows:

“I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my Judgment no justification whatsoever for holding that there is a likelihood that the Respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first Respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first Respondent will not remain in his job until pensionable age.”

13. In my view, the Applicant in the instant case may suffer substantial loss if the Respondent proceeds with the already commenced execution and sells his tools of trade.

14. As regards the offer of security, in the case of **Focin Motorcycle Co. Limited –vs- Ann Wambui Wangui & Another [2018]eKLR**, the Court held that: -

“...Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay...”

15. Taking all relevant factors into account and in order not to render the appeal illusory while at the same time securing the interests of the successful Plaintiff, I would grant a stay of execution of the decree but with conditions that the Applicant deposits the entire decretal sum in an interest earning account in the joint names of the parties advocates within 30 days from the date of this ruling and in default the application shall be deemed to have been dismissed with costs and the Respondent will be at liberty to execute.

16. In conclusion, the application dated **27th August, 2021** be and is hereby allowed in the following terms:-

a. That there be a stay of execution of the Ruling delivered on 4th August, 2021 pending the hearing and determination of the Applicant's appeal on condition that the Applicant deposits the entire decretal sum in an interest earning account in the joint names of counsel for the parties within thirty (30) days from the date of this Ruling.

b. That in default of (a) above, the Application dated 27th August, 2021 shall be deemed to have been dismissed with costs and the Respondent will be at liberty to execute.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF JANUARY, 2022

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Otwona counsel holding brief for Mr. Gachui Kariuki for Applicant

No appearance for Respondent