



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

MISC. CIVIL APPLICATION CASE NO. E031 OF 2021

ELVIS TOLE RIGHAAPPLICANT

VERSUS

JOSEPH TOLE MAGHANGA.....RESPONDENT

RULING

1. Vide a plaint dated 12th July, 2018, Joseph Tole Maghanga (hereinafter the respondent) sued Elvis Tole Righa (hereinafter the applicant) for a refund of Kshs 230,000 being money paid to him for the purchase of land which sale never materialized. The defendant having filed a defence bordering on admission of the claim, judgment was entered on the respondent's own admission.

2. However, the court proceeded with the hearing of a counter claim for the applicants (defendant) and claim for interest by the respondent (plaintiff). After the hearing, the court delivered its judgment on 24th March, 2021.

3. Consequently, the respondent (plaintiff) moved the court to draw a decree and issue a certificate of costs. Subsequently, the respondent commenced the process of execution which exercise aggrieved the applicant herein culminating to the filing of a notice of motion dated 3rd December, 2021 seeking;

a. Spent

b. That the appellant be granted leave to appeal out of time against the judgment, decree and all consequential orders of the resident magistrate's court at Wundanyi delivered on 24th March, 2021 without notice to the respondent.

c. That this honourable court do grant a stay of execution of the judgment delivered on 24th March, 2021 pending hearing and determination of the intended appeal filed in the high court of Kenya

d. That costs of this application be provided for.

4. The application is based on the grounds stated on the face of it and averments contained in the affidavit in support sworn on 3rd December, 2021. It is the applicant's case that the respondent extracted a decree on 23rd September, 2021 and served it upon the defendant without first taxing the bill of costs. That the notice to show cause issued on 9th November, 2012 issued on 1st December, 2021 in execution of the judgment delivered on 24th March, 2021 was irregular.

5. That the appellant will suffer substantial loss should the illegally and unprocedurally extracted decree be executed. He further averred that the intended appeal will be rendered nugatory if the order of stay is not granted. He attached a draft memorandum of appeal in attempt to show that the appeal is arguable raising triable issues.

6. In reply, the respondent filed a replying affidavit sworn on 8th December, 2021 giving a chronology of events preceding extraction of the impugned decree and subsequent issuance of notice to show cause.

7. According to the respondent, judgment against the appellant was entered on his own admission and that since 24th March, 2021 no appeal had been preferred. That his advocate procedurally applied for a decree which was regularly issued. That the same was served upon the applicant on 23rd September 2021 but he never responded.

8. He averred that assessment of bill of costs was procedurally done and in accordance with the practice in Wundanyi law courts where taxation of a bill of costs is not necessary. That the application is a delaying tack meant to delay execution of the order.

9. He further averred that the application is frivolous and an abuse of the court process. That even if execution was to proceed, the money can be recovered from the respondent who is a professional auditor hence a man of means.

10. When the matter came up for directions on 9th December, 2021, parties agreed by consent for the appellant to be granted leave to appeal out of time. The court granted the said leave and the applicant then directed to file the intended appeal within 14 days and the respondent to file his response within 14 days after service. It was further agreed that the Status quo was to be maintained pending hearing of the application for stay of execution dated 3rd December, 2021. Further, parties were directed to file their submissions within 14 days to dispose the application.

Applicant's submissions

11. The applicant filed his submissions on 15th December, 2021 through the firm of Mwazighe & Co advocates. Learned counsel submitted that unless stay of execution is granted, the applicant will suffer substantial loss. Counsel urged the court to exercise its discretion in favour of the applicant so as not to hinder the right to hearing. To support that position, the court was referred to the case of **Branco Arabe Epanol vs Bank of Uganda (1999) E.A 22** for the proposition that hearing of disputes should be fostered rather than being hindered.

12. Counsel submitted that a court only issues but it does not draft a decree as it happened in this case contrary to order 21 rule 8 of Civil Procedure Rules. Learned counsel contended that leave of the court before execution of the decree without first taxing the bill was not sought pursuant to section 94 of the civil procedure rules. To buttress this position counsel relied on section 94 Cap 21 Laws of Kenya and several authorities among them **Bamburi Port land Cement Co. Ltd Vs Hussein (1995) LLR 1870** and **David Makau Vs Maina Mutie Ndunda (2017) e KLR**.

13. Touching on the issue of costs, counsel submitted that costs follow the suit.

Respondent's submissions.

14. Through the firm of Elizabeth Isika, the respondent filed submissions on 24th January, 2022 stating that the grounds for stay of execution have not been satisfied. That there is no proof or likelihood to suffer substantial loss. In this regard, the court was referred to the holding in the case of **Congress Rental South Africa vs Kenyatta International Convention Centre; Cooperative Bank of Kenya Limited and another (garnishee) (2019) e KLR** where the court stated that to prove substantial loss, the applicant ought to establish that execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as a beneficial party in the appeal.

15. Further reliance was placed in the holding in the case of **Pius kipchirchir Kogo Vs Frank kimeli (2018) e KLR** where the court stated that irreparable injury must be one that cannot be adequately be compensated for in damages and the existence of premafacie case is not sufficient.

16. It was counsel's submission that the applicant has not shown that if he paid the respondent is not a person of means and therefore will not be able to refund.

17. It was further contended that the respondent is entitled to enjoy the fruits of his judgment as was held in the case of **Machira T.A Machira & Co. Advocates vs East African standard (No 2) (2002) KLR 63**

18. Counsel submitted that the application was filed after inordinate delay without explanation. That delay of a period of about 9 months is unreasonable. In this regard, the court was referred to the case of **Samuel Kimutai Korir (suing as a personal and legal representative) of the estate of cherangat Silevia vs Nyanchwa Adventist Secondary School & Nyanchwa Adventist College (2010) e KLR** where delay of five months in filing an application for stay of execution was taken to be unreasonable.

19. As to whether the decree was procedurally issued, counsel submitted that in the lower court bills are assessed and not taxed hence it was proper for parties not to attend. Accordingly, reliance was placed on the case of **Nyamogo and Nyamogo advocates Vs panAfrican Insurance Company Limited and another (2016) e KLR.**

20. Regarding costs, counsel submitted that the application should be dismissed and the applicant ordered to pay costs.

Determination.

21. I have considered the application, response thereto and oral submissions by both learned counsel. The court is being called upon to issue a stay of execution order to stop execution of a money decree in favour of the appellant arising out of a judgment delivered on 24th March, 2021 awarding the appellant a sum of 230,000.

2. The principles for grant of stay of execution orders are clearly outlined under Order 42 rule 6 (2) which provides that before a court could issue a stay order the applicant must prove that;

a. He is likely to suffer substantial loss in the event the order is not granted.

b. That the application has been filed without inordinate delay.

c. That security for due performance of the decree has been finished.

23. The above conditions are the foundation for grant of stay of execution order. See **Carter sons Limited Vs Deposit Protection Fund Board and 2 others CA No 291 of 1997** and **Shell Limited Vs Kibiru and another (1986)**

24. However, it should be born in mind that to issue or not to issue an order for stay is purely a matter of discretion by the presiding court. See **Butt Vs Rent Restriction Tribunal (1979) KLR** where the court stated that grant for an order of stay is a matter of discretion of the court to be exercised in such a way as not to hinder an appeal.

25. In this case, the issue at hand is payment of money decree amounting to about kshs 230,000. The applicant claims that he is likely to suffer loss if the amount due from him is paid. However, he did not state specifically which loss he is likely to suffer. He did not for instance prove or even claim that the respondent is a person of straw who will not be able to refund the money if the appeal goes through.

26. In the case of **Jethwa Vs Shah T/a supreme styles (989) KLR** quoted in the case of **Paul Njuge vs Samuel Gatonye Robert and 2 others (2006) e KLR** the court had this to say;

“ As the applicant had a monetary decree against him, besides demonstrating that any success in the intended appeal would be rendered nugatory, the applicants had to persuade the court that the respondent was so impecunious would never be able to get his money back”

27. In his reply, the respondent stated that the applicant is a cousin who knows that he is a professional auditor. This averment was not controverted. Accordingly, I do not find any substantial loss likely to be suffered by executing the decree as any damage suffered would easily be compensated monetarily. In so holding, I am guided by the holding in the case of **Congress rental South Africa vs Kenyatta International Conference Centre (Supra)**.

28. After considering the nature of the claim which is a money decree, I am satisfied that no substantial loss will be suffered.

29. As regards delay in filing the application, it is clear that the same was filed nine months since the impugned judgment was delivered. No attempt whatsoever has been made to justify the said delay. In the case of **Samuel Kimutai korir (supra)** the court said 5 Months delay in filing the application was inordinate delay as there was no justification. In my view, the applicant has casually approached the court seeking for a stay order as if it is a ritual which must automatically issue. To that extent that ground fails.

30. As concerns depositing security, this is meant to protect a successful litigant from vexatious and frivolous applications. Although I have stated that there is no proof of substantial loss, there is already leave granted to file an appeal out of time to avoid rendering the appeal nugatory. In the interest of justice, I am inclined to direct the applicant to deposit the full amount stipulated in the impugned decree within 30 days. Stay of execution shall therefore issue on condition that the full decree sum is deposited in court within the stipulated period in default execution shall proceed.

31. Regarding costs, the same shall be dealt with after the hearing of the main appeal.

DATE, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 28TH DAY OF FEBRUARY, 2022

J. N. ONYIEGO

JUDGE