



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. E517 OF 2021

NICODEMUS O. MAKORI.....1ST APPELLANT/APPLICANT
COSMAS ONYANCHA.....2ND APPELLANT/APPLICANT
ROBERT KENYANYA.....3RD APPELLANT/APPLICANT
ERICK MAKORI.....4TH APPELLANT/APPLICANT
ANDREW O. MATICHA.....5TH APPELLANT/APPLICANT
DISMAS OSEKO.....6TH APPELLANT/APPLICANT

(Sued as officials of New Sengera 2011 Self-Help Group)

-VERSUS-

KEPHA O. ONCHOKE.....1ST RESPONDENT
JEPHITER O. OKEMWA.....2ND RESPONDENT
ENOCK O. NYANDWARO.....3RD RESPONDENT
EVANS NYAMBANE.....4TH RESPONDENT
POLYCARP M. MOGUSU.....5TH RESPONDENT
JORAME O. MAKORI.....6TH RESPONDENT
CHRIS M. MOSOTI.....7TH RESPONDENT
JOHN M. ONCHOKE.....8TH RESPONDENT
OBADIAH O. OKIOMA.....9TH RESPONDENT

RULING

1. The motion dated 24th August, 2021 by **Erick Makori** (hereafter the Applicant) seeks inter alia an order of stay execution of the ruling, orders and warrants issued on 13th August, 2021 issued in **Milimani CMCC No. 892 of 2012** in favour of **Kepha O. Onchoke, Jephiter O. Okemwa, Enock O. Nyandwaro, Evans Nyambane, Polycarp M. Mogusu, Jorame O. Makori, Chris M. Mosoti, John M. Onchoke** and **Obadiah O. Okioma** (hereafter the Respondents), pending the hearing and determination of the appeal herein. The motion is expressed to be brought principally under Order 42 Rule 6 of the Civil Procedure Rules. On grounds, among others that, being dissatisfied with the

ruling of the subordinate court delivered on 13th August, 2021, the Applicants have preferred an appeal.

2. The grounds are amplified in the affidavit in support of the motion sworn by **Erick Makori** who describes himself as the 4th Appellant, conversant with all the facts in issue, duly authorized by the other Applicants sued as officials of **New Sengera 2011 Self Help Group**, and hence competent to depose the affidavit. The gist of his deposition is that judgment in **Milimani CMCC No. 892 of 2012** was delivered on 27th May, 2019 and subsequently the subordinate court issued a notice to show cause against the Applicants and upon hearing, a ruling was delivered on 13th August, 2021 ordering issuance of warrants of arrest against the Applicants. That dissatisfied with the ruling of the subordinate court, they filed the instant appeal, which arguable; that should the warrants of arrest be issued the Applicants would risk committal to civil jail as the Self-Help Group has no funds, and the appeal would be rendered a mere academic exercise.

3. The motion is opposed by way of replying affidavit deposed by **Kepha O. Onchoke** (hereafter the 1st Respondent) who asserts to have been duly authorized to swear the affidavit on behalf of the Respondents. The gist thereof is that the appeal has little chance of success as it raises issues arising from the judgment of the subordinate court delivered on 27th May, 2019, which the Applicants have never appealed and that the said judgment found them individually liable to settle the decretal sum. He further deposes that the motion ought to be dismissed with costs, but should the court be inclined to allow it, it ought to require the Applicants to give such security for the performance of the decree.

4. The motion was canvassed by way of written submissions. As regards the applicable principles, the Applicant's counsel anchored his submissions on the provisions of Order 42 Rule 6 of the Civil Procedure Rules and the decisions in **Victory Construction v BM [2019] eKLR** and **New Stanley Hotel Ltd v Arcade Tobacconists Ltd HCCC. No 2260 of 1982 (1986) eKLR**. He further contended that the Applicants stand to suffer substantial loss as they will be committed to civil jail, rendering the appeal nugatory if stay of execution is not granted. Counsel highlighted the fact that the motion was timeously lodged after seven days of the ruling of the lower court, and that an order by this court requiring security would effectively deprive the Applicants of their right of appeal. The court was urged to allow the motion unconditionally.

5. On the part of the Respondents, equally citing the applicable principles on an application for stay of execution, counsel based his submissions on the provisions of Order 42 Rule 6 of the Civil Procedure Rules and cited several decisions including **Amal Hauliers Limited v Abdulnadir Abubakar Hassan (2017) eKLR**, and **Jackson Kaio Kivuva v Penina Wanjiru Muchene**. He submitted that the motion does not rise to the threshold for grant of an order of stay as they have failed to demonstrate substantial loss to be suffered if the orders sought are not granted. It was further submitted that parties cannot ventilate the merits of their appeal at this stage to avoid embarrassing the court when it comes to hearing the appeal. Finally, calling to aid the decision in **Richard Muthusi v Patrick Gituma Ngomo & Another [2017] eKLR** counsel submitted that the right of appeal must be balanced against an equally weighty right of the Respondents to enjoy the fruits of their judgment, a right that cannot be delayed or denied save for just cause. The Respondents therefore urged that the application be dismissed.

6. The court has considered the material canvassed in respect of the motion. First, 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**.

7. The Applicants' motion essentially seeks an order to stay of execution of the ruling of the lower Court by which it was ordered that warrants of arrest issue against them. The ruling arose from the execution proceedings taken by the Respondents in respect of the Court's judgment delivered in their favour on 27th May, 2019. It is common ground that no appeal has been filed against that judgment. The motion herein is brought under Order 42 Rule 6 of the Civil Procedure Rules 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”.

8. The key consideration in the exercise of the court's 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.”

9. 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)”

10. 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)

11. 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.”

See also **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 OF 1997.**

12. Arrest and detention are a lawful form of execution like any other and is allowed by sections 38 and 40 of the Civil Procedure Act. Rules 31 to 34 of Order 22 govern the procedure to be followed where the decree-holder elects such a mode of execution. The mere fact that such execution is commenced against a judgment debtor is not evidence of substantial loss. The Applicants have maintained that should the warrants of arrest be issued in accordance with the ruling appealed from, they will be committed to civil jail, with cost to their liberty, and thereby rendering the appeal a mere academic exercise. The Applicants were duty bound to demonstrate how substantial loss would arise in this instance, by showing, either that the Respondents would be unable to refund any monies paid to them under the decree, or that payments in satisfaction of the decree would occasion difficulty to the Applicants.

13. The Applicants have variously asserted that the Self-Help Group in which they acted as officials and in which capacity they were sued, has no funds to settle the decree. Granted, the question whether the Applicants are personally liable to settle the debts of the said group is raised in the grounds of appeal, and will, rightfully or wrongly inevitably be canvassed at the hearing of the appeal and the Court will have to determine whether that is a question already determined in the judgment of 27th May, 2019 in regard to which no appeal has been filed; and ultimately, whether execution proceedings against the Applicants was procedural and lawful.

14. In the scenario before the Court, it is foreseeable that the Applicants could end up in civil jail on account of the unsatisfied decree. Loss of liberty in such a situation could well amount to a form of difficulty that qualifies as substantial loss. More so as they assert that the self-help group of which they were officials is currently impecunious. If the Applicants were sent to civil jail, they would not recover from the suffering of loss of liberty even if their appeal were to succeed, thus rendering the appeal somewhat nugatory. The Court cannot contemplate a worse incidence of substantial loss. As stated in the **Shell** case, substantial loss is what must be prevented.

15. In the peculiar circumstances of this case, the court is satisfied that there is sufficient cause to exercise its discretion in the Applicants' favour. However, in doing so, the court must be careful to balance the competing interests of the parties so as not to prejudice the matter pending appeal, and the words stated in **Nduhiu Gitahi & Another v Anna Wambui Warugongo [1988] 2 KAR**, citing the decision of **Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198** and others, are apt:

“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.....”

16. The judgment sum herein is Shs. 544,556/- with costs and interest. The Court is not persuaded by the reasons given for Applicants' plea that they should not be required to furnish security. There is a judgment of a competent court and decree that has neither been challenged on appeal, nor satisfied. The Respondent is entitled to some form of security for the future performance of the decree if execution is to be stayed. In the circumstances, the Court will stay the execution of the ruling dated 13th August 2021 and orders arising therefrom pending the determination of this appeal. The stay order is granted on condition that each of the Applicants will individually deposit a sum of **Shs. 50,000/- (Fifty Thousand)** into Court within 45 (forty-five) days of today's date, failing which the stay order will lapse as against the individual defaulting Applicant, thus paving the way for execution to proceed against such defaulting party. The costs of the motion will abide the outcome of the appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24TH DAY OF FEBRUARY 2022.

C.MEOLI

JUDGE

In the presence of:

For the Applicants: Mr Ng'ang'a

For the Respondents: Mr Wabale

C/A: Carol