



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**HCC CASE NO. 26 OF 2018**

**EKT (Suing through father And next friend JKK).....PLAINTIFF**

**-VERSUS-**

**POA LINKS SERVICES LIMITED.....1<sup>ST</sup> DEFENDANT**

**PATRICK ATARO OTWANI.....2<sup>ND</sup> DEFENDANT**

**JOHN NJOROGE MBURUR.....3<sup>RD</sup> DEFENDANT**

**Coram: Hon. Justice R. Nyakundi**

**Kamau Lagat & CO. Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> defendant**

**M/S Tunoi & CO. Advocates**

**RULING**

**Introduction & Background**

1. The application dated the 24<sup>th</sup> of November 2020 before court primarily seeks stay of judgement and decree delivered on the 18<sup>th</sup> of December 2019 in Eldoret Civil Appeal No. 16 of 2020. The application is supported by the affidavit of Patrick Ataro Otwani, the 2<sup>nd</sup> defendant/applicant sworn on even date.
2. The gravamen of the application is the court via judgement delivered on the 18/12/2019 awarded the plaintiff/respondent Kshs 18,565,907/= and a further Kshs 624,966 as party and party costs. It is against this judgement/decree that the plaintiff/respondent seeks to execute and which the applicants contend may render their appeal nugatory. Furthermore, the 1<sup>st</sup> and 2<sup>nd</sup> defendants/applicants contend that they stand to suffer substantial loss and damage unless the orders sought herein are granted. They have also offered a title deed as security in addition to paying Kshs 3,000,000 as part payment of the decretal dues to the plaintiff/respondent.
3. The application was opposed by the respondent/plaintiff via the plaintiff/respondent's replying affidavit sworn on the 24<sup>th</sup> of June 2021 wherein he deponed that the application is fatally defective, incompetent, bad in law and ought to be dismissed. In particular, the respondent argued that the application does not meet the conditions set out under Order 42 rule 6(2) since the applicants have not proved the substantial loss that would result and secondly, no security has been furnished.
4. The respondent further averred that the application was brought after inordinate delay given the fact that the applicants made a formal application for stay on the 12<sup>th</sup> of October 2020 while the court had delivered its judgement on the 18<sup>th</sup> of December 2019 and granted the applicants 30 day-stay, which lapsed on the 18<sup>th</sup> of January 2020.
5. On the 6<sup>th</sup> of July 2021, the court directed the application be canvassed by way of written submissions and both parties have duly filed their submissions

**Analysis and Determination**

6. After careful consideration of the pleadings, submissions and annexures of the parties, it is my finding that the singular issue for

determination is whether the applicants have met the threshold for grant of the stay orders sought.

## **THE LAW.**

7. The principles that guide Court when deciding an application for stay of execution pending appeal are clearly set out under **Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules**, which provides:

**“(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 sub-rule (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. A stay of execution under order 42 of the Civil Procedure Rules is thus an interim order to suspend the rights of one party who is aggrieved with the judgment of the trial; court or tribunal and wishes to exercise his or her right of appeal. Its main objective is to protect the substratum of the suit by delaying the execution process like attachment until the determination of the appeal.

9. Being a discretionary remedy, the applicant must demonstrate that he or she has approached the court of equity with clean hands as succinctly stated in the case of **Jajbhay v Cassim 1939 AD 537-551** where the court held on this maxim that: **“All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice.”**

10. The general principle of law is that the successful litigant in possession of a valid court judgement is entitled to the fruits of judgement unless there exist exceptional circumstances to deny him or her that right. Therefore, in considering an application for stay of execution courts must be guided by the principles espoused in the case of **Butt vs Rent Restriction Tribunal Civil App No. NAI 6 of 1979 (Madan, Miller and Porter JJA)** where the following guidelines were given: -

**“The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**

**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 that appeal court reverse the judge’s discretion. 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. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”**

11. The provisions of Order 42 Rule 6 thus indicate two things. First, the high court is empowered to order stay of execution pending appeal either in exercise of its inherent jurisdiction or under the provisions of Order 42 Rule 6 of the Civil Procedure Rules. This position finds support in **Singh v Runda Estates Ltd (1960) EA 263** and was reiterated by court in **Paul Kamura Kirunge v John Peter Nganga [2019] eKLR**.

12. However, this power is discretionary and must be exercised judiciously as was held in **Canvass Manufacturers Ltd vs Stephen Reuben Karunditu, Civil Application No.158 of 1994, (1994) LLR 4853**.

13. This is because in the exercise of this power, the court has to balance between the right of a successful litigant to enjoy the fruits of his/her Judgment with the right of appeal of a dissatisfied litigant whose appeal should not be rendered nugatory in case his or her appeal succeeds and the order of stay was not granted. After all the purpose of stay is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. **See Odunga’s Digest on Civil Case law and Procedure, 2nd Edition, Volume 4, Law Africa 2010 at 3749.**

14. Secondly, the provisions of Order 42 Rule 6 anticipate that for an application for grant of stay to be successful, an applicant must prove the following conditions:

a. That substantial loss may result unless the order is made

b. That the application has been brought without undue delay and lastly

c. That such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

15. These conditions/criteria are central to the decision as to whether the order of stay of execution of decree/judgment may be granted by court. In **Civil Appeal No.107 of 2015, Masisi Mwita vs. Damaris Wanjiku Njeri (2016) eKLR**, the Court while affirming these criteria held that:

***“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another..Vs... Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-***

***“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.”***

16. These conditions are cumulative and mandatory in nature. As such, should an applicant fail in establishing a single criterion, then stay of execution cannot not be granted. This position finds support in **Equity Bank Ltd –vs- Taiga Adams Company Ltd [2006] eKLR** it was held that: -

***“of all the four, not one or some, must be met before this court can grant an order of stay...”***

17. In our instant case therefore, the first limb of consideration is whether there was unreasonable delay in filing the application for stay of execution. In our present case, Judgment was delivered on the 18<sup>th</sup> December, 2019. In the said judgement, the court granted the applicants 30 days stay which lapsed on the 18<sup>th</sup> of January 2020. The first application for stay was filed on the 11<sup>th</sup> of October 2020 and subsequently withdrawn via a notice of withdrawal dated the 20<sup>th</sup> of November 2020. The applicants subsequent to the withdrawal notice dated the 20<sup>th</sup> of November 2020 filed the current application for stay on the 24<sup>th</sup> of November 2020.

18. Looking at the facts above, it is clear that the current application was filed more than 9 months after the lapse of the 30 day stay granted by court in its decision delivered on the 18<sup>th</sup> of December 2019. This period in my view constitutes inordinate delay since the applicants have not furnished sufficient reasons for this delay. On one hand, the applicants submitted that the Covid-19 pandemic had an impact on time while on the other hand they submitted that they had to await the ruling on tax which was delivered on the 11<sup>th</sup> of September 2020. I find the explanations insufficient.

19. This is because the maxim of equity *vigilantibus non dormientibus aequitas subvenit*, meaning equity aids the vigilant not the indolent is applicable. An appellant desirous of having his or her appeal heard would not want any delay in either prosecuting the appeal or in any way delaying any application that he or she knows very well may have an impact on his or her appeal. In the instant case, this court has to balance the competing interest between the applicant who has obtained a judgement from a competent court on his claim and the appellant as a result of the judgement has a right to seek redress and challenge the decision of the trial court. Applying the principles discussed in **Eastern Province Kenya Ltd v Rongai Workshop & Transporters Ltd & Another [2014] eKLR**, there is no doubt that the applicants are guilty of a major procedural default to adjudicate their appeal.

20. Secondly, whereas the pandemic has had a damning effect on all sectors of the country including the justice sector, the Judiciary put in place mitigating measures including the adoption of technology including e-filing systems which remained at the disposal of advocates. In any case, the pandemic began in March of 2020 whereas judgement had been issued in December of 2019.

21. Furthermore, I am guided by the decision of court in **Ruth Shikanda (Suing as Legal Repr. on behalf of the Estate of Agnes Ayori Ashiemi (DCD) v Sibed Transport Company Ltd [2020] eKLR**, where the learned judge declined a similar excuse that the Covid-19 pandemic affected the filing of cases and took judicial notice of the fact that court registries never closed while dismissing the application. The counsel ought to have utilized these channels if at all he was serious about having the application for stay heard and determined on time. I therefore see no correlation between the pandemic and the delay in filing the application for stay pending appeal.

22. There is need for parties to maintain target timeline and benchmarks which are in tandem with the constitution and enabling statute. It is hardly necessary to add that the delay in disposal of civil cases in our country is incompatible with the democratic ideals and the rule of law enshrined in our Constitution. Delays of any nature in the administration of justice tend to raise doubts in respect of the compliance with national values and principles of governors outlined under Article 10 of the Constitution.

23. Delays are of great concern to Kenyans hence during the promulgation of the constitution their voices were incorporated under Article 159 2(a) of the constitution that delay in justice is denying justice. Owing to the prolonged pendency of cases without sufficient good cause undermines the noble purpose of justice with the hallmark of the canons provided for in Section 1(a) of the Civil Procedure Act which rotates around efficiency, fairness and timely resolution of dispute. Surprisingly to put it mildly the Kenyan populace and society as a whole weigh heavily against the judiciary for not doing enough to end the delay of justice.

24. Certain societal issues that currently contribute to inefficiency in the administration of justice are the same threads that run through present case which displays the culture of complacency in adjudicating cases within a reasonable time. This case is about a pattern of legal maneuvers that the parties engage and in the aggregate delay justice for decades and many go to meet their maker without an outcome of their claim insight. The current status quo has put the integrity of the system at stake and threatens the public’s confidence in it.

25. Stay of execution or proceedings may appear to be an extreme measure but they are the means by which Kenyan courts have chosen to protect important constitutional right of appeal. There is however need to reconsider the delays which exceed the ceiling and the fairest possible trial within a reasonable time is permissible.

26. Sometimes the question arises as to the interpretation and usage of Order 42 Rule 6(1) of the Civil Procedure Code. There has been much

confusion how sliding scale approach on the traditional four factor test that the court must employ for purposes of determining whether stay relief is warranted. Taking the queue on the standard to be met by the applicant to establish substantial loss with a stronger showing of irreparable harm in many instances remains in the realm of discretion. I reiterate that a mere possibility of irreparable harm is insufficient to warrant a stay of execution. Looking at the balance of equities in particular to money decrees in accident claims equity must tip in favour of the claimant before a court can grant stay of execution of a valid judgment.

27. Courts have not uniformly adopted a presumption of irreparable harm in accident cases where a claimant in the context of an appeal has to wait for long for his/her fruits of the judgment. Notwithstanding the high threshold associated with obtaining the issuance of an injunction or stay of execution the balance of the hardships of personal injury claims ought to tip slightly in favour of denying the injunction or stay unless part of the awarded damages are released to the claimant. This is one rule appellants have used to remand cases in circumstances which occasions irreparable harm to the winning party before the trial court. The major harm is inordinate delay in prosecuting such appeals even those within the category of a fast track.

28. Consequently, it is my opinion that the reasons for delay are inexcusable and therefore inordinate.

29. The upshot therefore is that the application dated the 24<sup>th</sup> of November 2020 lacks merit and is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2022.**

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**R. NYAKUNDI**

**JUDGE**