



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 174 OF 2018

HARTEJ BUILDERS MANPREET SINGH BHABRA.....APPELLANT/APPLICANT

VERSUS

PATRICK (PADDY) O'DWYER.....RESPONDENT

RULING

1. Before me are two applications for determination. The first **Notice of Motion** Application is dated **24th February, 2020** and filed on an even date by the Appellant (hereinafter the Applicant). The Application is brought under **Sections 1A, 1B, 3A, 3B and Section 63**, all of the **Civil Procedure Act, Order 42 Rule 6** and **Order 51** of the **Civil Procedure Rules, 2010** and all other enabling provisions of the law. The Application seeks for the following orders:-

a. Spent;

b. THAT this Honourable Court be pleased to grant leave to the Appellant/Applicant to deposit with this court title deed number KILIFI/GERENYI/128 as security and/or condition of stay of the magistrate's judgment dated 10th July, 2017;

c. Spent;

d. THAT this Honorable Court be pleased to stay all proceedings and consequential orders thereof pending the hearing and determination of this appeal inter-partes;

e. THAT costs be provided for.

2. The **Motion** is supported by the grounds presented on its body and the **Affidavit of Manpreet Singh Bhabra**, the Appellant herein. He averred that he has been directed by the court to deposit a security for the execution of the decretal sum of Kenya Shillings Five Million One Hundred and Sixty One Thousand Nine hundred and sixty eight and fifty seven cents [KShs.5,161,968.57/=].

3. He averred that he has dire health issues which have been brought to the court's attention on various occasions, which reasons make him unable to raise the above set amount. However, he is willing and ready to surrender to the court title deed **No.Kilifi/Gerenyi/128** as security and/or condition of stay of the Magistrate's Court Judgment dated **10th July, 2017** in **MSA CMCC No.467 of 2015**.

4. The Applicant averred that the property mentioned herein belongs to one **Mr. Mujtaba Amirali Haji**, who is agreeable and willing to have the said title deposited in court as security for the performance of the decree. It was stated that the Title Deed is free from any encumbrances and is valued at approximately Kenya Shillings Seven Million (KShs.7,000,000/=).

5. According to the Applicant, he has already deposited a cash bail of One million Kenya Shillings [KShs.1,000,000/=] in **MSA CMCC No.467 of 2015** to secure his release from civil jail.

6. It was the Applicant's averment that unless the court allows the instant application and issues a stay of execution, he faces the risk of wasting away in the civil jail which will ultimately render the Appeal nugatory.

7. In response, the Respondent filed a **Replying Affidavit** sworn on the **29th April, 2020** by **Patrick (Paddy) O'dwyer**. He stated that the Appellant/Applicant's application is vexatious and an abuse of the court process as they have been given various stay orders by the subordinate and High Court.

8. It has been averred that the Applicant has flaunted all the conditions that have been set by court, an example being that in **2018**, the subordinate court issued orders that the Applicant deposits one million Kenya Shillings for an order on committal to civil jail, but the said amount has not been paid to date.

9. The Respondent averred that the actions of the Applicant are very deliberate in an attempt to ensure that he does not enjoy the fruits of the Judgment.

10. It was the Respondent's contention that they are not aware whether the original title of the said property exists as the owner has not appeared before the court to give a guarantee that the said property has been valued and it is sufficient to cover the decretal amount. Further, that the Applicant has not attached a current/immediate search of the said property and neither has he shown if it is free from encumbrances.

11. The Respondent has averred that the application herein is the Applicant's effort to delay justice and yet he is not willing to comply with any conditions that have earlier been set down by the courts.

12. The second **Notice of Motion** application is dated **12th May, 2021** and filed on an even date by the Applicant. The Application is brought under **Sections 1A, 1B, 3A, 3B and Section 63**, all of the **Civil Procedure Act, Order 42 Rule 6 and Order 51 of the Civil Procedure Rules, 2010** together with all other enabling provisions of the law. The Application seeks for the following orders:-

a. Spent;

b. Spent;

c. THAT this Honorable Court be pleased to stay hearing of the Notice to Show Cause against the Applicant in MSA CMCC No. 467 of 2015 and all consequential orders thereof pending the hearing and determination of this appeal inter-partes;

d. THAT costs be provided for.

13. The **Motion** is supported by the grounds presented on its body and the **Affidavit of Manpreet Singh Bhabra**, the Appellant herein. He has averred that there is present a Notice to Show Cause Application in **MSA CMCC No.467 of 2015** and he is apprehensive that should it be set down for hearing, it would be detrimental to the Appeal herein.

14. The Applicant has averred that he has previously been arrested over a hearing of **Notice to Show Cause** that was issued against him, wherein he was obligated by the court to pay a sum of Kenya Shillings One Million [Kshs.100,000/-] as cash bail to secure his freedom.

15. Mr. Bhabra, averred that payment of cash bail in a civil matter is unprecedented and the same was highly irregular. He contended that the application herein has been brought expeditiously as he believes if the Notice to Show Cause proceeds against him, he stands the risk of being vexed prematurely and without due consideration to the tenets of justice.

16. The appellant has also averred that he has had prevailing life threatening health issues which have exacerbated by the prevailing economic circumstances occasioned by the Corona Virus Pandemic.

17. The Applicant has acknowledged that there is present before this court an application for stay of proceedings of the said **MSA CMCC No.467 of 2015** which forms part of the record of the court.

18. The Applicant averred that if stay of execution is not granted he will suffer substantial loss and should the application be allowed, no prejudice will be occasioned on the Respondent.

19. In response, the Respondent filed a **Replying Affidavit** sworn on **24th May, 2021** by **Patrick (Paddy) O'dwyer** wherein he stated that the instant application for stay is the fourth before court in the Applicant's plot to curtail the Respondent's right to enjoy the fruits of the Judgment. It was the Respondent's case that on **23rd July, 2019**, Hon. P. J Otieno granted the Applicant 60 days stay of execution on the condition that he deposits the full decretal sum in an escrow account in the joint names of the Advocates herein, failure to which the Respondent was at liberty to execute.

20. He averred that the Applicant has applied for stay of execution before the Subordinate and High Court and granted orders on condition that the Applicant deposits the decretal amount in a joint account, which he has not complied with to date.

21. According to the Respondent, it has been over two years since the Appeal was filed and directions issued but the Applicant has not shown any intention to prosecute it despite the court's leniency.

22. The Respondent contended that he is owed **Kshs.6,559,477.91** which is growing by the minute due to the Applicant's frivolous applications. Given the Applicant's conduct, this Appeal can only proceed once the decretal amount is secured in a joint interest earning account in names of Advocates herein.

23. Mr. Paddy has averred that the Subordinate and High Court have been lenient and accommodative to the Applicant to the extent that he was granted bail in a Civil matter just to give him time to settle the decretal amount, a situation that he has abused and taken advantage of not to settle the decretal sum.

24. The Respondent has asked the court to put an end to the illegal, abusive, frivolous, vexatious and unlawful actions of the Applicant.

Directions of the Court

25. Directions were taken that the two applications be canvassed by way of written submissions and all parties indicated that they would be relying on the said written submissions. The Appellant/Applicant's submissions were filed on **22nd June, 2021** while those of the Respondent were filed on the **18th June, 2021**.

The Applicant's submissions

26. The Applicant submitted that for the court to issue to an order of stay of execution, one needs to fulfil the requirements as set under **Order 42 Rule 6 (2)** of the **Civil Procedure Rules**, being that *one must prove the substantial loss; the application was brought without undue delay and that they are ready and willing to provide such security as may be ordered by court*. Reliance was placed on the cases of **Antoine Ndiaye –vs- African Virtual University [2015] eKLR**.

27. According to the Applicant, the power to grant or refuse an application for stay is a discretionary one, which discretion should be exercised in such a way that does not prevent an Appeal. The Applicant submitted that stay of execution must be granted so that an Appeal is not rendered nugatory should the appeal court reverse the Judge's discretion and that a stay should not be denied on the grounds that there may be a better remedy available to the applicant at the end of the proceedings.

28. The Applicant did not submit on substantial loss but relied on the case of **James Wangalwa & Another –vs- Agnes Naliaka Cheseto [2012]eKLR**, wherein the court held that execution does not amount to substantial loss but substantial loss is defined to be that which has to be prevented by preserving status quo so as not to render the Appeal nugatory.

29. On the issue of security, it was submitted that the Applicant is willing to put on record a security by way of a **title deed No.Kilifi/ Gerenyi/128** as applied for in the application dated **24th February, 2020**. Further, that the Applicant paid **Kshs.1,000,000/=** at the subordinate court and the status of the said amount is unclear as it was represented as a "cash bail".

30. The Applicant has submitted that he has long standing health issues which have been brought to the attention of the court on several occasions and should a Notice to Show Cause succeed against him, he may as well waste away the remainder of his life in civil jail. For the said reason, an order for deposit of security is discretionary and it is upon the court to determine the same.

31. The Applicant urged the court to find his applications meritorious and to allow them as prayed with costs to the Appellant.

The Respondent's Submissions

32. The Respondent submitted that the Applicant has not fulfilled the requirements under **Order 42 Rule 6 (2)** of the **Civil Procedure Rules**. By only stating that there is a notice to show cause application coming up for hearing and that he paid Kshs.1,000,000/=, does not amount to substantial loss. It was submitted that the Respondent has not proved what loss that he will be occasioned if stay of execution is not granted. The court was referred to the cases of **James Wangalwa (supra)** and **Kiwanjani Hardware Ltd –vs- Daniel Ndaka Sebastian S.N. Ndaka, Machakos HCCA No.187 & 188 of 2006**, wherein the court stated that failure to prove substantial loss renders the application as one for dismissal.

33. On the question of security for costs, the Respondent submitted that the Applicant has enjoyed various stay of execution orders on condition that he furnishes security in the sum of the decretal amount, but has failed to meet the set condition and thus the application is ripe for dismissal as it has not met conditions imposed under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**.

34. The Respondent has submitted that if the court exercises its discretion and favour the Applicant's application for stay, that he be ordered to meet the condition set on security which is that the full decretal amount be deposited in an escrow account in joint names of the advocates for the parties as was previously ordered by the court on the **23rd July, 2019**. The court was referred to the case of **Gianfranco Manenthi & Another –vs- Africa Merchant Assurance Company Ltd [2019]eKLR**, where the court held that *'stay orders must not assist the litigant to delay execution, there should be no room for execution proceedings in case the Appellant loses the Appeal'*.

35. The Respondent has stated that there has been a four-year delay and that the Applicant has through prayers/orders that have been framed differently only to circumvent the legal penalty to settle the decretal sum.

36. It was submitted that the application herein is *res judicata* to an application filed before the subordinate court dated **6th September, 2018** wherein a **Ruling** was given on **19th June, 2019**. The Applicant was granted stay orders with the condition that he deposits security within 30 days. A further application was filed on the **23rd July, 2019** before Hon. Justice P. J. Otieno wherein the court granted the Applicant time to file their Appeal out of time and an order of stay of execution pending Appeal on the condition that the entire decretal amount be deposited into an escrow account in the joint names of the advocates for the parties, orders that have not been complied with.

37. The Respondent has urged the court to dismiss the applications herein for being scandalous, vexatious, frivolous and an abuse of the court process.

Analysis and determination

38. After perusing all the pleadings filed in this case and the written submissions by the parties herein, I find the following issues arise for determination: -

a. Whether the court can allow the Applicant to deposit a title deed as security for costs.

b. Whether stay of proceedings of MSA CMCC No. 467 of 2015 pending hearing and determination of the Appeal.

c. Whether the court can issue stay of execution orders of the Notice to show cause in MSA CMCC No. 467 of 2015 pending hearing and determination of the Appeal.

a. Whether the court can allow the Applicant to deposit a title deed as security for costs

39. In the Application dated 24th February, 2020, the Applicant has sought for Leave to deposit with this Court **Title Deed No.Kilifi/Gerenyi/128** as security and/or condition of stay.

40. The Respondent opposed the application and stated that the copy of title as presented is very vague as there is no proof of original title, proof of ownership done by way of a search and that there is no current valuation report that has been attached to show if the value of the land can cover the full decretal sum.

41. I have perused the said application and find that the said land does not belong to the Applicant but one **Mujtada Amirali Haji**. There is also no document duly executed by the owner to the effect that has been filed before this court that he agrees to deposit his title in court as security herein as required by **Order 42, Rule 6(2) (b)** of the Rules.

42. Further, I agree with the respondent that it would not be proper in the circumstances for the Applicant to be permitted to deposit a title document which title does not belong to him. It has also not been shown that there is a way of establishing whether the value of the subject property constitutes adequate security commensurate to the decretal amount.

43. The High Court in the case of **Stephen Njuguna –vs- John Wainaina Wanjiku [2020] eKLR** held: -

“...There is however no valuation report for the land, and as the respondent correctly argued, there is no way of telling the value of the land to enable the court determine whether to accept it as security or not. It is not enough to deposit a title deed as security. What is important is for the person proposing to deposit the title deed to show the court that if accepted the title deed is sufficient security for the performance of the decree. Accepting a title deed without ascertaining its value would not on its own suffice. It is the duty to the person offering that title deed to do all that is possible and satisfy the court that he has offered sufficient security for the due performance of the decree if called upon to do so....”

44. The prayer for leave to deposit with this court **title deed No.Kilifi/Gerenyi/128** as security and/or condition of stay therefore fails as there is no proof that it can be used by the Respondent to cover the decretal sum incase the Applicant loses the Appeal.

b. Whether stay of proceedings of MSA CMCC No.467 of 2015 pending hearing and determination of the Appeal

45. The decision on whether to grant or not to grant stay of proceedings is discretionary. This Court has powers to stay proceedings pending appeal and this jurisdiction is derived from **Order 42 Rule 6(1)** 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 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.

46. Stay of proceedings impinges on the right of access to justice, right to be heard without delay and overall, right to fair trial and the right to litigate which then renders the test for stay of proceeding high and stringent. In the case of **Re: Global Tours & Travel Ltd HCWC No.43 of 2000 Ringera, J** (as he then was) held that: -

“...As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...”

47. The main principles which guide the court in stay of proceedings application are thus, whether the Applicant has established that he/she has a prima facie arguable case; whether the application was filed expeditiously and whether the Applicant has established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought.

48. In the Application dated **24th February, 2020**, the Applicant has not demonstrated why he seeks for orders of stay of proceedings. He has not demonstrated that he has an arguable Appeal. The application herein has been filed four (4) years after the delivery of trial's court's judgment and no explanation has been demonstrated to explain the delay. Further, this court has been unable to establish sufficient cause in the interest of justice to grant the orders of stay of execution sought.

49. This court, therefore finds no sufficient reason has been demonstrated to warrant the grant of orders of stay of proceedings pending Appeal.

c. Whether the court can issue stay of execution orders of the Notice to show cause in MSA CMCC No. 467 of 2015 pending hearing and determination of the Appeal.

50. Stay of Execution is provided for under **Order 42 Rule 6(2)** of the **Civil Procedure Rules, 2010** which provides: -

(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.

51. The above Rule thus provides that before a court can grant an order of stay of execution pending hearing and determination of the Appeal, it must be satisfied that there is proof of substantial loss to be suffered by the Applicant; the application was made without unreasonable delay and that the Applicant is ready to provide such security as the court may impose.

52. I have looked at the Applicant's application and I find that there is no explanation that has been brought forth to support stay orders as required under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**. The Applicant has only told the court that the hearing of the Notice to show cause will be detrimental to the Appeal but has not shown what loss he will suffer if the Notice to show cause were to proceed in court. The instant application has been four years and thus the delay ought to have been explained.

53. On security for the due performance of the decree, the Applicant indicated that he was willing to deposit **title deed No. Kilifi/Gerenyi/128** as security and/or condition of stay of execution which is not possible as discussed in the above issue.

54. It is therefore clear that the Applicant has not fulfilled the conditions as set under **Order 42 Rule 6(2)** of the **Civil Procedure Rules** for this court to exercise its discretion and issue stay of execution orders pending Appeal.

55. It is important to note as raised by the Respondent that the Applicant has filed various applications for stay of execution. On **19th June, 2019**, the Applicant filed an application for stay of execution wherein Justice P. J. Otieno gave the orders on the **23rd July, 2019** that: -

i. The Appellant gets stay on deposit of full decretal sum into an escrow account in the joint names of advocates for the parties within 60 days from today.

ii. The Appellant files and serves a record of appeal as well as written submissions within 60 days from today.

iii. Upon service the Respondent files and serves submissions within 30 days after service for matter to be mentioned before the trial court on 28th October, 2019.

iv. Should the appellant fail to effect the deposit or aforesaid, the stay granted shall stand discharged and the Respondent shall be at liberty to execute in the manner initiated before the lower court.

v. Costs in the cause.

56. The above orders dated **23rd July, 2019** were clear that if the Applicant does not comply with them, the Respondent was at liberty to execute. Indeed as a matter of right, a Notice to Show Cause was issued as part of procedure and thus this court cannot stay the said Notice to aid the Applicant who has, and intends to continue defying the court orders.

57. Further, I agree with the submission by the Respondent that the instant application is an abuse of the court and a delaying tactic as the Applicant was accorded time to comply with the court orders dated **23rd July, 2019** but has failed to do so to date and has never sought an extension to ensure compliance. The court in the case of **Collin Bett –vs- Silas Kabisa [2016] eKLR** held: -

“...to file an application in the appellate court for stay of execution after having failed to comply with the terms of an order of stay granted upon a similar application for stay before the trial court is an abuse of the process of the court. This has the same effect on the process of the court as filling repeated applications seeking the same relief where such relief is denied in previous proceedings before the same or other court...”

58. In view of the above findings, the applications dated **24th February, 2020** and **12th May, 2021** lack merit and are hereby dismissed with

costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 17TH DAY OF FEBRUARY, 2022

D. O. CHEPKWONY

JUDGE

In the presence of:

No appearance for and by the Applicant

M/S Salma counsel for Respondent