



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 108 OF 2021

(Being an Appeal against the Judgement of the Honourable N.C.Adalo

Senior Resident Magistrate delivered on 21.9.2021 in Mariakani

SRMCC No.493 of 2017)

COAST RAHA LIMITED

BENARD GITAU KAMAU.....APPELLANTS/APPLICANTS

VERSUS

AMINA NYAMVULA KASUKA & COSMA CHANG'OKA MWAKUPHA(Suing as a *Legal*

Representatives of the Estate of MWAKUPHA KASUKA (Deceased).....RESPONDENTS

CORAM: Hon. Justice S. M. Githinji

GSLAW LLP Advocates for the Appellants/ Applicants

Otieno Otwere & Associates Advocates for the Respondent

R U L I N G

The Appellants herein filed a Notice of Motion Application dated 20th December, 2021 seeking the following orders: -

1. Spent

2. THAT pending the inter partes hearing of this application, the court be pleased to issue an order of stay of execution of the Judgment of N.C ADALO SRM in Mariakani SRM Civil Suit No. 493 of 2017; AMINA NYAMVULA KASUKA & COSMA CHANG'OKA MWAKUPHA (Suing as Legal Representatitves of the Estate of Mwakupha Kasuka Mwakupha (Deceased) vs Bernard Gitau Kamau & Another.

3. THAT the court be pleased to issue an order of stay of execution of the Judgment in Civil Suit No. 493 of 2017; AMINA NYAMVULA KASUKA & COSMA CHANG'OKA MWAKUPHA (Suing as Legal Representatives of the Estate of Mwakupha Kasuka Mwakupha (Deceased) vs Bernard Gitau Kamau & Another pending Appeal.

4. THAT costs of the application be provided for.

The Application is supported by the grounds on the face of the application and a supporting Affidavit sworn by **JOSEPH KALONZO KYENGO**. He avers that the case in the trial court initially proceeded ex parte and Judgment in default was entered against the Appellants and that an application was made and the ex parte Judgment set aside on merit to allow the appellant participate in the proceedings.

He asserted that when the matter came up for hearing on the 10th day of August, 2021, the magistrate decided to rely on the purported ex

parte proceedings of 27th August, 2019 in which the Appellant did not participate. He further asserted that on 21st September, 2021 and 3rd December, 2021, the trial court unprocedurally and illegally delivered Judgment against the Appellant for the sum of Kshs. 929,854/- plus costs and interests.

He deposed that the Respondent is set to execute against the Appellant's public Transport buses and has communicated, hence the urgency of the application. That the Judgment and proceedings violate the Constitutional principles of fair trial and yet this is one of the Constitutional Rights that cannot be limited. That it is in the interest of justice that the application be allowed as the appeal has a high chance of success.

The 1st Respondent filed a Replying Affidavit in response to the Application on the **13th day of January, 2022**. She stated in her Affidavit that the Appellants are misleading the court by alleging that the suit did not proceed on the **10th August, 2021** when in contrary all the parties were present and agreed that they rely on the proceedings of **20th April, 2021** and the advocate for the Appellants closed the Defence case. Further, at the conclusion of the proceedings of **10th day of August, 2021**, advocate for the Appellants filed written submissions on the **9th day of September, 2021**.

She deponed that it is unjust and undignified for the Appellants to accuse the trial magistrate of delivery of an unprocedural and illegal Judgment when they fully participated in the process. That in the magistrate's court, the Appellant filed an application to review the Judgment of which application was heard and dismissed.

ANALYSIS AND DETERMINATION

It is trite law and a principle of legal notoriety that a successful party or litigant must not be deprived or denied enjoyment of the fruits of his or her judgement at the instance of an unsuccessful party.

For a Court to order a Stay of Execution which amount to denying a successful party, even temporary the fruits of the decree of his or her judgment, the applicant must pass the hurdles of sufficient cause, substantial loss, appeal being rendered nugatory, and existence of compelling circumstances. (*See George Oraro V Kenya Television Network Nairobi Civil Case No. 151 of 1992*), *Damji Pragji Mandavia V Sara Lee Household and Body Care(K) Ltd CA No.345 of 2004*, *Githunguri V Jimba Credit Corporation Ltd 1980 KLR 838*.

The principles guiding the grant of stay of execution pending appeal are well settled. These principles are as expressly set out under order 42 Rule 6 of the Civil Procedure Rules. They include the following: -

- a. That the court must be satisfied that substantial loss may result to the applicant unless the order is made.**
- b. The application has been made without unreasonable delay.**
- c. That security as the court orders for due performance of such decree or order as may ultimately be binding on him has been given by the applicant. For these see the cases of *Vishran Ravji Halae v Thorntone & Turpin C. A. No 15 of 1990 (1990) KRL 365*.**

The approach to be adopted by the Court on an application for stay of execution is outlined in several decisions of the High Court and Court of Appeal, including the cases of *Reliance Bank Ltd v Nor Lake Investments Ltd [2002] 1EA 227*, *Githunguri v Jimba Credit Corporation Ltd {1988} KLR 838*, *Damji Pragji Mandavia v Sara Lee Household and Body Care Ltd CA No. 345 of 2004*, *National Bank of Kenya Ltd v Jivraj Rai Shi and Brothers Ltd Civil Application No. 153 of 2002*.

The grounds for a Stay of Execution is a matter of which the Court exercises it's discretionary power and must be guided by the well-established legal principles. In order to obtain stay pending an appeal against a successful party, the applicant must discharge the burden of proof on all the conditions set out in the provisions of law and authorities construing those provisions. That is the basis of which the Courts of equity are enjoined to consider the facts and law so as not to grant such a relief unless each of the grounds has been satisfied.

In applying the above principles, and having perused the record and corresponding Notice of Motion; I find that the applicant has not discharged the burden on the conditions precedent, based on the affidavit evidence, to warrant exercise of discretion in its favour under Order 42 Rule 6 of the Civil Procedure Rules. If I were to find otherwise, I do note that the Appellant in the Lower Court filed an application to review the Judgment delivered on the **21st day of September, 2021** of which prayer was declined by the Court. I agree with the Respondent that the Appellant having filed a review of the said Judgment lost his right to appeal on the issue.

In sum, after carefully interrogating the matter before me, and applying the principles on exercise of the discretion, I reach a finding that the ends of justice are better served by declining the Notice of Motion dated **20th December, 2021** with costs to the Respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 16TH DAY OF FEBRUARY, 2022

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S.M. GITHINJI

JUDGE

In the presence of: -

1. GSLAW LLP Advocates for the Appellants/ Applicants(absent)

2. Otieno Otwere & Associates Advocates for the Respondent