REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL NO. 004 OF 2022

CAR HOUSE LIMITED.....1ST APPELLANT/APPLICANT

CHARLES MUTHINI MWASYA.....2ND APPELLANT/APPLICANT

VERSUS

ERASTUS KAVITA MUSYOKA.....RESPONDENT

RULING

1. By a Notice of Motion dated 27th January, 2022, the Appellants/Applicants seek stay of execution of the judgment and/or decree issued by **Hon. Nelly K. Kenei (RM)** pending the hearing and determination of this the Appeal.

2. The application is supported by the supporting affidavit of the 2nd Appellant who is the insured of the suit motor vehicle registration number KCV 944S. According to the deponent, vide the judgment delivered on 16th December,2021, the Trial Magistrate found the Applicants 100% liable and awarded the Respondent general damages of Kshs. 250,000/- and special damages of Kshs. 3,960.00 with costs and interest.

3. Aggrieved by the said decision, the Applicants lodged this appeal which, based on legal advice, has high chances of success as the Respondent did not prove liability against the Applicants and hence did not deserve to be awarded any damages. It was the Applicants'' case that since the Respondent is likely to levy execution against the Applicants, that would render this the appeal nugatory and expose the Applicants to substantial loss and damage since the Respondent is unlikely to refund the decretal sum once paid over to him.

4. It was deposed that the Applicants' insurer, Directline Assurance Company Limited, is ready and willing to furnish the court with Bank Guarantee from DTB Bank as security. In their view, the application was made in good faith and would not occasion prejudice to the Respondent. The Applicants urge the court to grant the stay of execution orders.

5. In response to the application, the Respondent swore a replying affidavit on 7th February, 2022 in which he averred that the application is an abuse of the court's process in view of the fact that there is pending before the Trial Court, a similar application dated 27th January, 2022.

6. Based on legal advice, he averred that the appeal has no chances of success since the Respondent's evidence was not controverted as the Applicants closed their case without calling any witness; the Applicants failed to issue a 3rd Party Notice despite being granted leave to do so; and the award of damages of Kshs.250, 000 despite the Applicants proposal in their submissions that the Respondent be awarded Kshs.200, 000/- is a discretion of the Trial Court.

7. He proposed that should the Court be inclined to grant the stay sought it should do so on condition that the Applicants do release Kshs.200, 000/- to him and the balance be deposited in court as security. According to the Respondent, he is a person of means since he is a businessman at Wote Town and is in a position to refund the amount of Kshs.200, 000/- should be the appeal be determined in favour of the Applicants.

8. It was his case that the application lacks merit and should be dismissed with costs.

9. On behalf of the Applicants, it was submitted that the Memorandum of Appeal raises serious points of law and fact to warrant this court's intervention on appeal. According to the Applicants, the Applicant only needs to show that he has an arguable appeal and not to a requirement to show that the appeal has high chances of success. Reliance was placed on **Bake 'N' Bite (Nrb) Limited vs. Daniel Mutisya**

Mwalonzi [2015] eKLR where the court held that the applicant in seeking orders of stay pending appeal from the subordinate Court to the High Court is not required to prove that they have an arguable appeal, unlike if it was an application before the Court of Appeal seeking stay of execution of the decree of the High Court pending appeal to the Court of Appeal. The Applicants sought to rely on Order 42 Rule 6(2) of the ***Civil Procedure Rules***, on conditions to be satisfied by an applicant when granting stay of execution orders and Order 22 Rule 22(1) of the ***Civil Procedure Rules***, in respect of the court with jurisdiction to stay the execution of the decree.

10. Reliance was also sought on the case of **Tabro Transporters Ltd vs. Absalom Dova Lumbasi [2012] eKLR** which sets out the principle guiding stay of execution pending appeal while as regards the issue of substantial loss, it was submitted that the Applicants were ready and willing to issue security in the form of a banker's guarantee and that the Respondent's means were unknown hence is unlikely to refund the decretal sum in the event that the appeal is successful. Based on **Edward Kamau & Another vs. Hannah Mukui Gichuki & Another [2015] eKLR** where the Learned Judge cited **National Industrial Credit Bank Ltd vs. Aquinans Francis Wasike Court of Appeal Civil Application No. 238 of 2005** it was submitted that the Respondent is the only one who can specifically show that she has the means to repay the decretal sum if the appeal succeeds.

11. According to the Applicants the amount awarded is substantial and in the event that the Respondent is unable to refund the same and the appeal succeeds the said success would be rendered nugatory and the Applicants would be exposed to irreparable damage.

12. On behalf of the Respondent, it was submitted that the Applicant have not placed any evidence before court to prove they would suffer substantial loss if the stay orders are not granted. According to the Respondent, execution does not amount to substantial loss because the Respondent is a successful litigant entitled to the fruits of his legally obtained judgment. To the Respondent, it was not proved that if the decretal sum is paid, the Applicants would fold up their operations and find themselves in some financial embarrassment.

13. The Respondent submitted that he had shown in his replying affidavit that he is a person of means since he is a businessman at Wote Town. According to the Respondent the amount of Kshs. 200,000/- is not substantial as claimed by the Applicants. In the converse, the Respondent submitted that the Applicants have failed to place before the court by way of evidential means and any material to prove they stand to suffer substantial loss.

14. Regarding security, it was submitted that the court is not bound by the proposal to offer a Bank Guarantee by the Applicants but in the event stay is granted, the Applicant should be ordered to release Kshs. 200,000/- to the Respondent and deposit the balance in court.

15. According to the Respondent, the Applicants have no arguable appeal with high chances of success.

16. The Respondent asserted that the application before this court is an abuse of the court process since a similar application filed before the Trial Court is yet to be heard and determined, a fact that the Applicants failed to disclose hence their conduct amounts to forum shopping. According to the Respondent, the Applicants have not demonstrated why this court should invoke its discretionary powers in granting the orders sought and the Court was urged to dismiss the application with costs.

Determination

17. I have considered the application, affidavits in support and in opposition and the submissions filed herein as well as the authorities relied upon.

18. The Respondent contends that this application seeking orders for stay of execution of the Trial Court judgment is an abuse of the court process since the Applicant filed a similar application dated 27th January, 2022 before the Trial Court which is still pending. That there was a similar application pending before the Trial Court before the instant application was made has not been challenged by the Applicants hence that remains the factual position.

19. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the **Civil Procedure Rules** which provides as follows:

> **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.**

20. Order 42 rule 6(1) of the ***Civil Procedure Rules*** provides as follows:

> **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.**

21. These provisions have acquired judicial interpretation in a number of cases in our jurisdiction. In **Stanley Karanja Wainaina & Another vs. Ridon Anyangu Mutubwa [2016] eKLR,** it was held that:

"Counsel for the Respondent submitted on the provision of Order 42 Rule 6 (1) of the Civil Procedure Rules and argued that the Appellants had been granted a stay of execution by the trial court and in bringing the present application it was an abuse of the court process. In my view, Order 42 Rule 6(1) allows a party to file another application for stay of execution in the High Court whether the application for such stay shall have been granted or refused by the court appealed from. I appreciate the argument by the learned counsel and this court shares the same sentiment in that once an application has been dealt with by a court of competent jurisdiction and between the same parties, a similar application cannot be filed before another court as that would be an abuse of the court process or at best, *res judicata.* Unfortunately, that legal provision is part of our laws and until the same has been amended, we have no choice but to live with it as it is."

22. Similarly, in **Patrick Kalava Kulamba & Another vs. Philip Kamosu and Roda Ndanu Philip (Suing as the Legal Representative of the Estate of Jackline Ndinda Philip (Deceased) [2016] eKLR** it was held by **Meoli, J** that:

"12. For the purposes of this case, the operational words are as underlined above. Thus, whether an application for stay pending appeal has been allowed or rejected in the lower court, the High Court "shall be at liberty…to consider" an application for stay made to it and to make any order it deems fit. The High Court in that capacity exercises what can be termed "original jurisdiction". And from my reading of the rule, the jurisdiction is not dependent on whether or not a similar application had been made in the lower court, or the fate thereof…

[17. So long as an appeal from the substantive decision of the lower court has been lodged, an application under Order 42 Rule 6 (1) of the Civil Procedure Rules can be entertained afresh in the High Court. I believe that was part of the distinction that the Court of Appeal was making in the Githunguri Case concerning the court's original jurisdiction, vis-à-vis the appellate jurisdiction and the innovation behind Rule 5 (2) b (as it is now). The foregoing has a bearing on the interpretation of Order 42 Rule 6 (6) of the Civil Procedure Rules and in particular the highlighted phrased therein.

18. Similarly, the jurisdiction of the High Court in this case was invoked when the substantive appeal (itself a fresh pleading separate from the suit in the lower court) was filed. It is true that the application for stay of execution was allowed with conditions in the lower court. The wording in Order 42 Rule 6 (1) however does not preclude the Applicant from approaching this court as it has done.

19. I would venture to add that the wording of Order 42 Rule 6 (1) of the Civil Procedure Rules effectively grants the same jurisdiction to this court as an appellate court as Rule 5 (2) (b) does to the Court of Appeal: to entertain an application for stay whether or not the same has already been heard by the lower court and dismissed. The only salient difference is that in the case of the High Court the rule makes it clear that it matters not whether the earlier application for stay in the lower court has been allowed or rejected in the lower court. That is my reading of Order 42 Rule 6 (1).

20. It suffices, in my opinion, in this case, in view of the nature of the application before me, that there is an existing substantive appeal against the judgment of the lower court. To insist in this case that the Applicant must first file a separate appeal on the ruling of the lower court, apart from the judgment would in my view not only lead to confusing duplication of proceedings in respect of the same matter but also cause delay. . The provisions however must be applied under the guiding principles of Article 15 9 (2) d) of the Constitution.

21. In the circumstances of this case, I consider that driving the Applicant from the seat of justice when there exists a substantive appeal, and in disregard of the full import of Order 42 Rule (6) (1) would amount to raising a technicality, namely, the filing of an appeal on a supplemental matter that actually touches on the appeal where a substantive appeal already exists, above purpose and substance. There may arise in certain cases allegations of abuse of procedure but that must be established."

23. In arriving at its decision the Court relied on **Equity Bank Limited vs. West Link Mbo Limited [2013] eKLR,** where it was held by **Githinji, JA** that:

"[13] It is trite law that in dealing with (Rule 5 (2) (b) applications the court exercise discretion as a court of first instance and even where a similar application has been made in the High Court or other similar court under Rule 6 (1) of Order 42 of the Civil Procedure Rules and refused, the court in dealing with a fresh application still exercises original independent discretion as opposed to appellate jurisdiction (Githunguri –Versus- Jimba Credit Corporation Ltd. (No. 2) [1988] KLR 838."

24. In his judgment **Musinga, JA** observed on the same question that:

"The court is said to be exercising special independent original jurisdiction because on considering whether to grant or refuse an application for stay, it is not hearing an appeal from the High Court decision. It can grant orders of stay, irrespective of whether or not such an application had been made in the High Court. (See Stanley Munga Githunguri –Vs- Jimba Credit Corporation Ltd (Supra)."

25. **Kiage, JA** in his judgment quoted a passage from the judgment of the Court of Appeal in **Gurbux Singh Suiri & Anor. –vs- Royal Credit Ltd. Civil Application NAI 281 of 1995** expounding the court's reflection in its dictum in the **Githunguri** case as follows:-

"In ordinary circumstances the court has only appellate jurisdiction and in the absence of Rule 5 (2) (b) a party who has been refused a stay of execution or an injunction by the High Court would have been obliged to apply to the Court of Appeal to set aside the refusal and then, having done so, to grant the stay or injunction…But because of the existence of Rule 5 2 (b)

> **one does not have to apply to the court to first set aside the refusal by the High Court and then having set aside the High Court order, to grant one itself. That is clearly the sense in which the expression 'independent original jurisdiction' is to be understood and that was made abundantly clear in the Githunguri case, supra, by use of the expressions such as "we have to apply our minds *de novo* or it is not an appeal from the learned Judge's discretion to ours."**

26. It is therefore clear that under the said provision, whether the application for stay was granted or refused by the trial court, this court is at liberty to consider such application and to make such order thereon as it deems just. The question that this Court is being called upon to determine and which the authorities above do not deal with is whether a party who has filed an application before the Court whose decision is sought to be appealed from can abandon that application midstream and move to the appellate court to consider a similar application. In my view, that determination depends on the court's interpretation of the phrase ***"whether the application for such stay shall have been granted or refused by the court appealed from"***. In other words, for the appellate court to entertain the application in its original jurisdiction, the Applicant must show that either he had not made an application before the trial court or that he did make such an application and the same was granted with or without conditions or refused. In my respectful view, the Rules do not contemplate a situation where such an application is still pending and yet a similar application is made before the appellate court. This my view that the above provisions, while providing for an exception to the *res judicata* doctrine, does not open the window for parties to abuse the judicial process or the process of the court.

27. To adopt a procedure where a party files an application and abandons it midstream and moves an appellate court for the same relief without withdrawing the earlier application may not only lead to an embarrassment but may be considered as playing lottery with judicial process. Section 6 of the ***Civil Procedure Act*** provides that:

> **No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.**

28. The above section codifies the *sub judice* rule and that rule in my view applies to both suits and applications.

29. In my view the applicants ought to have held their horses and waited for their application before the trial court to be determined one way or the other before moving this Court. By acting in haste they have jumped the gun. Such conduct is not contemplated under the above provision and ought not to be tolerated. Accordingly, I find the instant application incompetent and it is hereby struck out with costs to the Respondent.

30. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 24TH DAY OF MARCH, 2022

G V ODUNGA

JUDGE

In the presence of:

Mrs Nyaata for the Respondent'

Ms Wanjiru for Ms Gathenya for the Applicant.

CA Susan