



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL APPEAL NO. E015 OF 2021

SHEIKH ALI IBRAHIM HASSAN.....APPELLANT

VERSUS

SHUEB ABDUALI.....1ST RESPONDENT

JELE HASSAN NOOR.....2ND RESPONDENT

ABDIWAHAB ABDULLAHI.....3RD RESPONDENT

ABDI FARAH HUSSEIN AKA MOHAMED

ABDUFARAH BULI.....4TH RESPONDENT

KHALIF OMAR BUNOW AKA HALIF BUNOW.....5TH RESPONDENT

RULING

1. Before court is an application dated 15th October, 2021 brought by way of a Notice of Motion pursuant to Sections 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules.

2. Prayer 1 and 2 of the same are spent. Pending are prayers 3-4 as follows;

“3 That the Honourable Court be pleased to unconditionally stay execution of the entire judgement and decree issued on 9th September, 2021 in Wajir Principal Magistrate Court Civil Case No. 21 of 2019, pending hearing and final determination of the substantive appeal herein.

4 That in the alternative to but without prejudice to (3) above, this Honourable Court be pleased to order stay of execution of the entire judgement and decree issued on 9th September, 2021, in Wajir Principal Magistrate Court Civil Case No. 21 of 2019 on which terms as the court deems fit and just.

5. Costs of the application be provided for.”

3. The application is predicated on grounds that the appeal was filed timeously, applicants are likely to execute thus rendering the appeal nugatory, the appeal is arguable and has high chance of success, the case against the appellant was not proved, the appellant is likely to suffer financial hardship and substantial loss. The above grounds were reiterated in the applicant’s supporting affidavit.

4. The application was opposed by way of a replying affidavit duly sworn by the 4th Respondent stating that the application is brought in bad faith and with the sole intention of denying the Respondents/ decree holders fruits of the judgement in their favour, the judgment is meritorious as the case against the applicant was proved, applicant has not established the substantial loss or any prejudice or hardship he is likely to suffer. He has equally failed to furnish security for due performance of their judgment.

5. The principles to be considered by the court when faced with an issue of stay pending appeal are contained in Order 42 Rules 6(1) and (2) of the Civil Procedure Rules as follows;

“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 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.”

6. The above principles have been expounded further in case law. Relevant to the application before court include the holdings in Victoria Construction vs BMM Civil Appeal No. 19 of 2015, Vishram Ravji Halai V Thornton Turpin Civil Application No. Nai 15 of 1990, Century Oil Trading Company Ltd V Kenya Shell Limited HCMCA No. 1561 of 2007 and Samvir Trustee Limited Vs Guardian Bank Limited HCC No. 795 of 1997 & Butt Vs Rent Restriction Tribunal (1979) KLA.

7. In the above authorities there is emphasize that Order 42 Rule 6 (1) and (2) of the Civil Procedure rules is to be read alongside Section 1A, 1B and 3A of the Civil Procedure Act to give effect to the overriding objectives. Further there is need to balance the competing interests of both partis; the applicant’s right of appeal, the need to ensure the appeal is not rendered nugatory and against the interest of the decree holder who has a judgment in his favour, so that the parties fight it out on a level playing field.

8. In Century oil trading company ltd vs Kenya shell (supra) the court went further to state that when money decree is involved the court should consider the financial status of the parties.

9. It is not lost to the court at the moment that it does not have details of the financial statues of any of the parties save that one party is a chairman of a mosque and others are members.

In Kenya’s economic situation 1.5 million to an individual and 6 million to another may be substantial by any means.

10. Bearing in mind the requirements of Section 42 Rule 6 of the Civil Procedure Rules, persuaded by the authorities cited above and the circumstances of this case, the court finds that the application was timeously filed and unless a stay is granted the applicant is likely to suffer substantial loss.

A stay is therefore granted subject to the payment of Kshs.1,500,000/= as security which sum will be placed in a sharia complaint account in the names of the counsel on record for the parties pending hearing and determination of the Appeal.

DELIVERED SIGNED AND DELIVERED AT GARISSA THIS 24^T MARCH, 2022.

.....

ALI-ARONI

JUDGE