



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BOMET

CIVIL APPEAL NO. E11 OF 2022

AMOKE OTIENO PASCALAPPELLANT

VERSUS

MELVIN ANYANGO OWUORRESPONDENT

RULING

1. This Ruling is in respect to the Notice of Motion Application dated 31st January 2022 which sought the following Orders:

i. Spent.

ii. Spent.

iii. THAT the Honourable Court be pleased to grant a stay of execution of the Judgment/Decree in **Sotik PMCC No. 162 of 2019** delivered on 14th January 2022 pending the hearing and determination of the appeal in **BOMET HIGH COURT CIVIL APPEAL NO. E11 OF 2022**.

iv. THAT upon the grant of prayer No. 3 above, this Honourable Court be pleased to order that the Applicant do provide sufficient security in the form of a suitable Bank Guarantee from a reputable financial institution to secure the Judgment in **Sotik PMCC No. 162 of 2019**.

2. The Application was brought under Sections 3, 3A of the Civil Procedure Act, Order 42 Rule 6, Order 50 Rule 5, Order 51 Rules 1 and 3, Order 22 Rule 22 of the Civil Procedure Rules. The Application was based on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Amoke Otieno Pascal on 31st January 2022.

The Applicant's Case and Submissions

3. It was the Applicant's case that Judgment in **Sotik PMCC No. 162 of 2019** was delivered on 14th January 2022 where the Applicant was ordered to pay Kshs 1,327,500. The Applicant was dissatisfied with the Judgment and decided to appeal by filing A Memorandum of Appeal on 28th January 2022 where he sought to set aside the aforementioned Judgment. It was his further case that the appeal herein had a high chance of success.

4. The Applicant stated that there was an impending threat of execution by the Respondent.

5. It was the Applicant's case that the Decree was for a substantial amount of Kshs 1,327,500. That if it were to be paid to the Respondent and the Appeal was successful, the Applicant would not be able to recover the same from the Respondent. It was his further case that he would suffer substantial loss if the orders sought were not granted and that the appeal would be rendered nugatory.

6. The Applicant stated that the application had been filed timeously. He further stated that the Respondent would not be prejudiced in any way if the orders sought were granted.

7. It was the Applicant's case that he was ready, willing and able to furnish such reasonable security and he was willing to do that by providing a Bank Guarantee for the whole decretal sum.

8. The Applicant submitted that the Respondent had not demonstrated that she could refund the decretal sum, if required. He urged the court to allow him provide a Bank Guarantee as security. He further submitted that should the court disallow the Bank Guarantee, then it should

direct that the entire amount be deposited in court. He relied on the case of **Shanzu Beach Resort VS Crown Marble and Quartz (2020) eKLR**.

9. The Applicant submitted that the burden of proving whether the Respondent could satisfy the decretal sum shifted to her once the Applicant stated that he would not be able to recover the substantial amount from her. He relied on the case of **Kenya Orient Insurance Co. Ltd VS Paul Mathenge Gichuki & Another (2014) eKLR** to support this submission.

10. The Applicant submitted that he had a meritorious and arguable appeal which had a high chance of success and if the orders sought were not granted, he was apprehensive that the Respondent would proceed with execution and as a result, he would suffer substantial loss.

The Respondent's Case

11. The Respondent filed a Replying Affidavit dated 7th February 2022 where she stated that the application did not meet the statutory and time tested conditions for a grant of stay of execution. That the Applicant failed to meet the threshold under Order 42 Rule 6 of the Civil Procedure Rules.

12. It was the Respondent's case that the Applicant had not demonstrated what substantial loss he would suffer if the stay was not granted. That the purported and unattested Bank Guarantee of a stranger could not be good security.

13. The Respondent averred that the application was brought in bad faith and was intended to delay satisfaction of the Decree. She further stated that the appeal was also meant to frustrate and delay her from realizing the fruits of her litigation.

14. It was the Respondent's case that she was a person of means and was able to refund any amount that ought not be paid to her under the Decree. She further stated that this being a money Decree, it could not be rendered nugatory.

The Respondent's Submissions

15. The Respondent submitted that lodging an appeal in the Court of Appeal did not grant an automatic guarantee for stay of execution. That for stay of execution to succeed, the applicant ought to demonstrate that the intended appeal was arguable and would be rendered nugatory if the stay was not granted.

16. It was the Respondent's submission that for stay to be granted, the Applicant had to meet the conditions set out in Order 42 Rule 6 (2) of the Civil Procedure Rules. She relied on the case of **Anloine Ndiaye VS African Virtual University (2015) eKLR** to support this submission. It was her further submission that the Applicant had failed to meet the requirements under Order 42 Rule 6 of the Civil Procedure Rules.

17. The Respondent submitted that the process of execution did not amount to substantial loss. She further submitted that execution was a lawful process and that the Applicant had to show that he would be irreparably affected. She relied on the cases of **Tamey Wangalwa & Another VS Agnes Naliaka Cheseto O (2012) eKLR** and **RWW VS EKW (2019) eKLR** to support this submission.

18. The Respondent further submitted that she objected to the use of a Bank Guarantee as a mode of security since it only covered 0.1% to 0.5 % of the amount claimed and further that they only lasted for one year.

19. I have read through and considered the Notice of Motion Application dated 31st January 2022, the Replying Affidavit dated 7th February 2022, the Applicant's Written Submissions dated 12th February 2022 and the Respondent's Written Submissions dated 2nd March 2022. The one issue for my determination is Whether the Applicant has satisfied the requirements for the grant of the Order of Stay of Execution.

20. The principles that relate to Stay of Execution Orders are well settled. Order 42 Rule 6 of the Civil Procedure Rules stipulates: -

“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 orders 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”.

21. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant should satisfy the court that:

i. Substantial loss may result to him unless the order is made;

ii. That the Application has been made without unreasonable delay; and

iii. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

22. Regarding the issue of substantial loss, the Court of Appeal in the case of Kenya Shell Ltd V Kibiru & Another (1986) KLR 410, held that:

“Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay”.

23. The Applicant contended that they would suffer substantial loss because the Respondent would not be able to refund them the Decretal Sum of Kshs 1,327,500 in the event that the Appeal succeeded. In the case of National Industrial Credit Bank Ltd V Aquinas Francis Wasike and Another (2006) eKLR the Court of Appeal stated that:

“This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such Applicant to know in detail the resources owned by a Respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge”.

24. The above principle was further stated in Abn Amro Bank Vs Lemond Foods Limited Civil Application No.15 Of 2002 where the Court Appeal held that:

“The legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal was to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has – such as land cash in bank and so on.”

25. The Respondent in her Replying Affidavit sworn on 7th February 2022 stated that she was a lady of means and would be able to refund the amount paid to her under the Decree. This was an empty averment not backed by any evidence. She failed to discharge the evidential burden of proving that she could repay the Decretal sum.

26. On the criteria of substantial loss, the Applicant did not adduce any evidence or set out factual circumstances to demonstrate that he would suffer substantial loss if the appeal succeeded. He only made a generalized statement that it would suffer substantial loss. Such a statement does not persuade this Court that any actual loss would be suffered so as to justify grant of the orders sought. This being a money decree, the same is recoverable.

27. On whether or not the application was brought timeously that I observe that this Application was filed on 3rd February 2022 whereas the Judgment in the trial court was delivered on 14th February 2022. The Applicant has also attached a copy of the Memorandum of Appeal marked as “P.O.A” which indicated that the Appeal was filed on 28th January 2022. It is my finding that the two-week difference represents a reasonable timeline within which this Application was filed. It was filed timeously.

28. Regarding security for the performance of the Decree, Gikonyo J in the case of Arun C Sharma Vs. Ashana Raikundalia T/A Raikundalia & Co. Advocates & 2 Others (2014) eKLR held that: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.

Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

29. The Applicant has attached a Bank Guarantee marked “P.O.A 2” from Family Bank. The nature of the Bank Guarantee is that it will be used to provide security for awards and/or costs awarded in various court cases or claims against Directline Assurance Company Limited. The Respondent has rejected the use of the Bank Guarantee stating that the Guarantee was unattested and that it could not be a good security.

30. Other than the Applicant stating that he would get a Bank Guarantee from a reputable financial position, the Applicant has failed to establish or explain his relationship with Directline Assurance. The parties to this Application are Amoke Otieno Pascal and Melvin Anyango Owuor. It is not for this court to speculate the relationship between the aforementioned parties and Directline Assurance Company Limited.

31. It is my finding that the Bank Guarantee as presented by the Applicant is insufficient to be considered as security for the due performance of the Decree.

32. It is salient to note that the power of the court in deciding whether or not to grant a stay of execution is discretionary. In the case of Butt

V Rent Restriction Tribunal (1982) KLR 417 the Court of Appeal held that

- “1. 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.
2. 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.
3. 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.
4. The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

33. I am persuaded by the holding of in the case of Samvir Trustee Limited Vs Guardian Bank Limited (Ur), Where Warsame J (as he then was), aptly stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion”.

34. In the end therefore, I have found that the Applicant has neither demonstrated substantial loss nor provided sufficient security. I shall however exercise my discretion to balance the rights of the parties, to grant stay of execution on the following conditions: -

- i. The Applicant shall release 30% of the decretal sum to the Respondent and provide a Bank Guarantee from a reputable Bank for the balance of the decretal sum within 30 days.
- ii. The Appeal shall be filed and steps taken to have the same admitted within 45 days of this ruling.

RULING VIRTUALLY DELIVERED, DATED AND SIGNED AT BOMET THIS 28TH DAY OF APRIL,2022

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R. LAGAT-KORIR

JUDGE

Ruling delivered virtually in the presence of Dennis Manono Nyatundo for the Respondent, and Kiprotich (Court Assistant)

Ruling emailed to the parties at: -

info@kglaw.co.ke for the Respondent

nyatundod@gmail.com for the Plaintiff