



REPUBLIC OF KENYA



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**Wambugu v Bwonya (Civil Appeal E018 of 2021)
[2022] KEHC 17062 (KLR) (22 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 17062 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E018 OF 2021**

MN MWANGI, J

APRIL 22, 2022

BETWEEN

LARRY MAINA WAMBUGU APPELLANT

AND

RICHARD IBRAHIM BWONYA RESPONDENT

RULING

1. The application before me is a Notice of Motion dated February 22, 2021 brought under the provisions of Order 42 Rules 6 & 9, Order 51 Rules 1 & 4, Order 22 Rule 22 of the Civil Procedure Rules, Sections 1A, 1B, 3, 3A, & 63(e) of the Civil Procedure Act, Article 159 of the Constitution of Kenya, and all enabling provisions of the law. The appellant seeks the following orders-
 - i. Spent;
 - ii. Spent;
 - iii. That there be a stay a stay of execution of the exparte Judgment of August 10, 2020 and ruling of February 5, 2021 in Mombasa Civil Suit No 693 of 2020, and all orders therefrom, pending the hearing and final determination of the appeal; and
 - iv. That the costs be in the cause.
2. The application is supported by an affidavit sworn on February 22, 2021 by Larry Maina Wambugu, the appellant herein. In opposition thereto, Richard Ibrahim Bwonya, the respondent herein filed a replying affidavit sworn on May 4, 2021.
3. The application was canvassed by way of written submissions. The appellant's submissions were filed on July 15, 2021 by the law firm of Omondi, Omeri & Mwasaru Advocates, while the respondent's submissions were filed on July 23, 2021 by the law firm of IRB Mbuya & Company Advocates.



4. In advancing the appellant's arguments, his Counsel relied on the case of *Lucy Bosire v Kehancha Div. Land Dispute Tribunal & 2 others [2013] eKLR*, where the Court held that it must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made, a party should suffer the penalty of not having his case determined on its merits.
5. In citing the case of *Msagha v Chief Justice & 7 others [2006] 2 KLR 553*, Counsel submitted that the appellant's supporting affidavit dated February 22, 2021 clearly showed that submissions were filed online. Mr Omeri relied on Order 42 Rule 6(1) and (2) of the Civil Procedure Rules which provides the principles that guide a Court when deciding on an application for stay of execution pending appeal.
6. He also relied on the case of *Butt v Rent Restriction Tribunal [1979] eKLR*, where the Court in dealing with an application for stay of execution held that the power of the Court to grant or refuse an application for stay of execution is a discretionary one and the discretion should be exercised in such a way as not to prevent an appeal. He further stated that in the above case, the Court also held that the general principle in granting or refusing a stay of execution is if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the Court hearing the appeal reverse the Judge's discretion.
7. It was submitted by Counsel that the purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his right of appeal are safeguarded. He stated that the applicant should demonstrate that there is need to preserve the subject matter since failure to do so would render the appeal nugatory and in doing so, the Court should ensure that no party suffers prejudice that cannot be compensated by way of costs. Mr Omeri submitted that the appellant had demonstrated sufficient cause by stating that the ruling by the Trial Magistrate was delivered without his submissions being considered.
8. He placed reliance on the case of *Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR*, where the Court held that in an application involving a money decree, a stay of execution pending appeal may be granted so as to alleviate any undue hardship the applicant would suffer if stay was refused. He stated that the lower Court's ruling was delivered on February 5, 2021 whereas the application herein was filed on March 2, 2021 without inordinate delay. Mr Omeri submitted that the appellant was ready and willing to avail such reasonable security as the Court may order for the due performance of such decree or order as may ultimately be binding on him.
9. Mr Mbuya, learned Counsel for the respondent relied on the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 and submitted that the conditions enumerated thereunder ought to be met before the Court can grant the appellant stay of execution pending appeal. He contended that in this instance, the appellant had not met the said conditions.
10. He further submitted that the appellant had not demonstrated to this Court the loss he would suffer should the decretal sum be released to the respondent since the debt had been admitted. He added that granting stay of execution would mean that the status quo should remain as it were before the Judgment which would amount to denying a successful litigant of the fruits of his Judgment.
11. Mr Mbuya referred to the case of *Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR* where the Court relied on the case of *James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR*, where it was held that the fact that the process of execution had been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss, and the applicant must establish other factors which show that the execution would create a state of affairs that would irreparably affect or negate the very essential core of the applicant as the successful party in the appeal.



12. It was submitted by Mr Mbuya that security must be provided for the due performance of such decree or order as may ultimately be binding on him and must have been given by the appellant. He stated that in this instance, the appellant had not done so and as such, he was not entitled to orders of stay of execution.

Analysis And Determination.

13. I have considered the application filed herein, the affidavit filed in support thereof, the replying affidavit by the respondent and the written submissions by Counsel for parties. The issue that arises for determination is whether the appellant herein has satisfied the conditions set down under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010, to warrant being granted an order for stay of execution pending appeal.
14. In the affidavit filed by the appellant, he deposed that an ex parte Judgment against the appellant was entered on August 10, 2020 and thereafter, the appellant filed a Notice of Motion application dated August 13, 2020 seeking to set aside the ex parte Judgment and all consequential orders arising therefrom. He averred that the said application was canvassed by way of written submissions. On September 24, 2020, his Advocates on record filed their submissions dated September 21, 2020 online via mombasacmscivil@gmail.com. Thereafter, the said submissions were served upon Counsel for the respondent on September 24, 2020, through their stated email address info@mbuya-law.co.ke.
15. It was stated by the appellant that on November 24, 2020 both parties confirmed to the Trial Magistrate that they had filed their respective submissions. A ruling was delivered on February 5, 2021, where the Trial Court dismissed the applicant's application dated August 13, 2020 and held that the appellant had failed to file written submissions in support of his case. The appellant contended that he was condemned unheard as he was never afforded the opportunity to defend himself and should execution proceed, he stands to suffer substantial, irreparable loss and damage, whereas no prejudice whatsoever will be suffered by the respondent if stay of execution is granted. He averred that the appeal filed herein is an arguable one and has very high chances of success and should the respondent execute the decree, the said appeal shall be rendered nugatory.
16. The respondent in his replying affidavit deposed that this appeal emanates from a contractual obligation that the appellant duly acknowledged in the primary suit and further admitted to owing monies which he was liable and ready to pay. He averred that the application herein has been made in bad faith with intent to derail the cause of justice, the respondent having tried to have the appellant settle the debt of Kshs 1,310,000/= that he owes for over a period of five years. He further averred that he stands to be greatly prejudiced in the event the application herein is allowed.
17. It was stated by the respondent that should this Court exercise its discretion to allow the application, then the Court should make a conditional order that the decretal sum of Kshs 1,310,000/= be deposited in a joint interest earning account in the names of the parties' Advocates pending the hearing and determination of the appellant's appeal.
18. The principles for granting stay of execution pending appeal are well settled under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 which provide as hereunder-

' 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.'

19. In the case of *Feissal Amin Jan Mohammed t/a Dunvia Fowarders vs Shami Trading Co Ltd [2014] eKLR*, the Court when dealing with an application for stay of execution pending appeal stated as follows-

' It is trite law therefore that a stay of execution is generally granted if the applicant has successfully demonstrated that a substantial loss may result to him unless the order is made; that the application was made without unreasonable delay and that the applicant has offered proper security'.

20. This Court has an obligation to safeguard and preserve the subject matter of the appeal herein. To this end I am guided by the decision in *Siegfried Busch vs MCKSK [2013] eKLR*, where the Court held that: -

' A superior court to which an application has been made must recognize and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment.'

21. On the the issue of whether the appeal is arguable, I have perused the Memorandum of Appeal and it is my considered view that the same raises several issues that deserve attention and determination by this Court. For instance, the Trial Magistrate in his ruling noted that only the respondent filed his submissions which would mean that the appellant's submissions were not considered. One of the grounds of appeal raised by the appellant is that the Trial Magistrate erred in determining the matter without considering his submissions together with authorities despite the same having been duly filed on September 24, 2020.

22. There is also the issue that the Trial Magistrate erred by arriving at the decision the appellant had admitted that he owed the respondent some monies, an issue that was to be determined during the substantive trial of the matter. It is noted that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court and one which is not frivolous. Accordingly, from the material before me, I am satisfied that the appellant has an arguable appeal.

23. This Court finds that by virtue of dismissing the application to set aside the exparte Judgment, the appellant was liable to pay the decretal sum. The appellant contended that should execution proceed, he stands to suffer substantial, irreparable loss and damage. In his submissions, the appellant submitted that he had demonstrated sufficient cause by stating that the Trial Magistrate's ruling was delivered without his submissions being considered. The respondent on the other hand submitted that the appellant has not demonstrated what loss he would suffer should the decretal sum be released to him. The Court in *James Wangalwa & another vs Agnes Naliaka Cheseto [2012] eKLR* explained what amounts to substantial loss as hereunder-

' No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss.

The Applicant must establish other factors, which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.'



24. It is noteworthy that the decree before the Trial Court is a money decree hence it is for the appellant to prove the respondent's inability to refund the decretal sum in the event the appeal is successful by putting forth his current financial position and how the same will be affected if stay of execution is not granted. Once the appellant alludes to the respondent's inability to refund the decretal sum, the burden of proof shifts and the respondent has to demonstrate to this Court his financial capacity and/or his ability to refund the appellant the money in the event that he will be successful in his pending appeal.
25. In *Machira t/a Machira & Co Advocates vs East Africa Standard (No 2) [2002] KLR 63*, the Court held that-
- ' In this kind of applications for stay it is not enough for the applicant to merely state that substantial loss will result. He must prove specific debate and particulars. where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay.'
26. On the basis of the above, this Court finds that the appellant has established that substantial loss will occur unless stay of execution is made. The appellant's affidavit seems to rely on the success of arguing the grounds of appeal to the extent of even arguing the said grounds of appeal. The issue of substantial loss is the cornerstone of this Court's jurisdiction to grant stay of execution pending appeal.
27. This Court finds that the present application has been brought without unreasonable delay since the Trial Court's ruling was delivered on February 5, 2021 while the application herein was filed on March 2, 2021 about 24 days later.
28. The appellant submitted that he is ready and willing to offer security and to abide by any terms this Court will issue. Similarly, the respondent submitted that should this Court exercise its discretion to allow the application, then the Court should make a conditional order that the decretal sum of Kshs 1,310,000/= be deposited in a joint interest earning account in the names of the parties' Advocates. In the case of *Focin Motorcycle Co Limited vs Ann Wambui Wangui & another [2018] eKLR*, it was stated that-
- ' Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security.'
29. It is my view that the appellant is alive to the fact that even where stay of execution is granted it must be in the form of a security for the due performance of such decree or order as may ultimately be binding on the appellant. In the circumstances, when considering whether to grant the orders sought or not, this Court has to ensure that the appellant's business is not seriously affected while at the same time the respondent is also assured that his money will be there for him should the intended appeal not succeed.
30. The upshot is that the application dated February 22, 2021 is merited and the same is allowed in the following terms: -
- i. That there shall be stay of execution of the exparte Judgment of August 10, 2020 and ruling of February 5, 2021 in Mombasa Civil Suit No 693 of 2020, and all orders therefrom, pending the hearing and determination of the appeal herein;



ii. That the appellant shall deposit Kshs 1,310,000/= in a joint interest earning bank account in the names of the Advocates of the parties herein within 30 days from the date of this ruling. In default the application shall be deemed to have been dismissed and the respondent shall be at liberty to execute.

iii. That the costs of this application will abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 22ND DAY OF APRIL, 2022.

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued

by his Lordship, the then Chief Justice on the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Mwanzia for the respondent

No appearance for the appellant/applicant

Mr. Oliver Musundi – Court Assistant.

