



REPUBLIC OF KENYA



KENYA LAW
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Masinde & another v Robson Harris & Co. Advocates & another (Civil Case 17 of 2017) [2022] KEHC 15555 (KLR) (25 October 2022) (Ruling)

Neutral citation: [2022] KEHC 15555 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL CASE 17 OF 2017
SM GITHINJI, J
OCTOBER 25, 2022**

BETWEEN

CONRAD MASINDE 1ST PLAINTIFF

ALPHONCE MWAMBO SANGA 2ND PLAINTIFF

AND

ROBSON HARRIS & CO. ADVOCATES 1ST DEFENDANT

SAMMY NYAMAWI RUWA 2ND DEFENDANT

RULING

1. Before Court for determination is the 2nd Defendant/applicant's Notice of Motion dated May 25, 2022. The orders sought are as follows:
 1. Spent.
 2. Spent.
 3. That this Honourable Court be pleased to grant an order of stay of execution in respect of the judgment by Honourable Justice R Nyakundi dated the June 9, 2021 delivered on the same date and all consequential orders emanating therefrom pending the hearing and determination of the intended appeal.
 4. That costs of the Application abide by the outcome of the Appeal.
2. In support of the application are the grounds on its face and the affidavit of Sammy Nyamawi Ruwa sworn on May 25, 2022 who deposed that following the judgment of this court delivered on June 9, 2021, he was ordered to honor a professional undertaking failure to which the Plaintiffs be at liberty to execute the impugned judgment. Subsequently, he filed an appeal against the said judgment. He added that the Plaintiffs took out warrants of attachment to execute Kshs 17, 107,870/- without first



assessing costs. As a result, his tools of trade were proclaimed. He expressed his willingness to deposit Kshs 3,000,000/- being the outstanding amount to act as security.

3. In response to the application, the Respondent filed grounds of opposition dated May 31, 2022 contesting that the application was an afterthought, superfluous, vexatious and should be dismissed.

Parties canvassed the application by way of written submissions which the Applicant and 1st Plaintiff/ Respondent filed.

Applicant's Submissions

4. The Applicant submitted that the Respondents failed to adhere to the procedure for execution provided under section 94 of the *Civil Procedure Act*, and that there was no leave obtained to execute the decree before taxation. As a result, the execution should therefore be nullified. He relied on the cases of *Republic v Attorney General & 2 others; Patrick Ochwa, Samuel Ouma & Job Weloba t/a Cootow & Associates* [ex parte [Judicial Review 222 of 2017] [2021] KEHC 144 KLR; and *Commercial Bank of Africa v Lalji Karsan Rabadia & 2 others* [2012] eKLR.
5. The Applicant further submitted that the decretal amount being highly disputed, he stands to suffer substantial loss if the attached tools of trade are auctioned. He relied on the case of *Lagoon Development Limited v Prime Aluminum Casements Limited* [2020] eKLR.

Further relying on the case of *Tropicana Hotels Limited v SBM Bank Kenya Limited {formerly known as Fidelity Commercial Bank Ltd}* [2020] eKLR, the Applicant argued that any issue with the appeal as filed should be tabled before the court of appeal and not this court.

1st Plaintiff/Respondent's Submissions

6. The 1st Plaintiff/Respondent submitted that the Applicant was guilty of laches for failure to file the record of appeal within the statutory period of 60 days and that no application for enlargement of time has been filed.

It was the 1st Plaintiff/Respondent's submission that the legal basis for grant of stay pending appeal is anchored under Order 42 rule 6 of the *Civil Procedure Rules* as follows:

Substantial loss may result unless the order is made. The application has been made without unreasonable delay, and such security as the court orders for the due performance of the decree has been given.

7. To the 1st Plaintiff/Respondent, the Applicant has failed to meet the above three conditions.

Further citing the case of *Benson Luswety Wanyonyi v Kenya Power & Lighting Company Limited & Attorney General* [2016] eKLR, the 1st Plaintiff Respondent submitted that the Applicant is guilty of laches for filing the present application one year after judgment was delivered with no plausible explanation.

Analysis and Determination

8. There is only one issue for determination, and that is whether the order of stay of execution should be granted.

Grant for stay of execution pending appeal is provided for under Order 42 Rule 6 of the *Civil Procedure Rules*, which states 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.
9. It follows therefore that an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
10. In *Butt v Rent Restriction Tribunal [1979]*, the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, 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 the appeal court reverse the judge’s discretion. Thirdly, 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. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

It must not also be lost that a successful party is *prima facie* entitled to the fruits of his judgment. I am persuaded by Warsame J (as he then was) in *Samvir Trustee Limited v Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997 where he expressed thus:

“...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 judgment.”

11. As to what substantial loss is, the court in *James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR*, observed that:

“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. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

12. On the fulfillment of this condition, the Applicant did not set out in his affidavit in support what substantial loss he will suffer if stay is not granted, beyond stating that its appeal would be rendered nugatory and that his tools of trade will be attached or auctioned.

The requirement is for an applicant to show the specific loss that he or she is going to suffer in this regard, which was not done by the Applicant. In *Antoine Ndiaye v African Virtual University [2015] e KLR* Gikonyo J stated as regards this condition that the Applicant must show he will be totally ruined in relation to the Appeal if he pays over the decretal sum to the Respondent.

13. On the fulfilment of the second condition on time, the judgment was delivered on June 9, 2021; the notice of appeal filed on June 21, 2021 and the present application on May 26, 2022, approximately one year after judgment was delivered. In my considered view, the application was not brought timeously and there was indeed no explanation given for the delay.

Given the foregoing, I need not consider the final condition. The upshot is that the 2nd Defendant/Applicant’s Notice of Motion dated May 25, 2022 is in want of merit and is hereby dismissed with costs to the Respondents.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 25TH DAY OF OCTOBER, 2022.

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S M GITHINJI

JUDGE

In the absence of; -

Gicharu Kimani & Associates for the 1st Applicant

Richard O & Co Advocates for the 2nd Applicant

Robson Harris & Co Advocates for the 1st Respondent

S Ruwa & Co Advocates for the 2nd Respondent

