



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ali v Jitegemee Sacco Society Limited (Civil Appeal 202 of 2021)
[2022] KEHC 17058 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 17058 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 202 OF 2021
MN MWANGI, J
OCTOBER 21, 2022**

BETWEEN

MOHAMED KIBWANA ALI APPELLANT

AND

JITEGEMEE SACCO SOCIETY LIMITED RESPONDENT

RULING

1. The appellant filed a Notice of Motion dated 9th November, 2021 brought under the provisions of Order 42 Rule 6(1) & (2) of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws 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 of execution of the decree of the Chairperson Honourable Kimemia of the Co-operative Tribunal delivered on 7th October, 2021 in Tribunal Case No. 432 of 2018 pending the hearing and determination of the appeal herein;
 - iv. That the costs of the application be borne by the respondent; and
 - v. Any other relief deemed just and fair to grant.
2. The application is anchored on an affidavit sworn on 9th November, 2021 by Mohamed Kibwana, the appellant herein. In opposition thereto, the respondent on 25th November, 2021 filed a replying affidavit sworn on 23rd November, 2021 by Dola Mbale, the current Vice-Chairperson of the respondent herein.



3. The application was canvassed by way of written submissions. The appellant's submissions were filed on 10th May, 2022 by the law firm of Khatib & Company Advocates, whereas the respondent's submissions were filed on 9th May, 2022 by the law firm of Chamwanda & Company Advocates.
4. Mr. Khatib, learned Counsel for the appellant relied on the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 and the case of *James Wangalwa v Agnes Naliaka* [2012] eKLR as cited in *Michael Mitheu v Abraham Kirondo Musa* [2021] eKLR. He submitted that the appellant upon becoming a member of the respondent processed a loan from the respondent which was advanced through his salary account and he has been repaying the said loan through his salary account by way of deductions and other cash payments.
5. He further submitted that in April, 2009, the Ministry of Co-operatives investigated the case and prepared a report indicating that the outstanding amount was Kshs. 3,462,276.00. He indicated that the appellant repaid the said amount through his salary account deductions since the year 2014 and by the year 2021 when the case was being instituted, the appellant had cleared the outstanding amount as declared in the report by the Ministry.
6. It was submitted by Mr. Khatib that since the appellant is an employee of Mombasa County, he is a man of means who is able to satisfy the judgment in the event the appeal herein fails. He cited Article 50 of *the Constitution* of Kenya and contended that to order the appellant to satisfy the Chairman's award before the appeal herein is determined will render the appeal nugatory and it will also be a hindrance to the appellant's right to a fair hearing. Mr. Khatib stated that the application herein has been made without any undue delay since it follows the oral application for stay of execution which was made in Court.
7. Mr. Chamwanda, learned Counsel for the respondent relied on the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules and the case of *Halai & another v Thornton & Turpin (1963) Ltd* [1990] eKLR, where the Court of Appeal highlighted the conditions for granting stay of execution pending appeal. He submitted that the appellant has failed to demonstrate the substantial loss he is likely to suffer if the Court declines to grant an order for stay of execution. He relied on the case of *Edwin Kipng'eno Rono v Kenyatta Matibabu Sacco Society Ltd & another* [2021] eKLR. He submitted that the application herein is premature since no execution has ensued.
8. Mr. Chamwanda stated that the appellant had not made any attempt to furnish security for the decretal sum. He contended that in the very unlikely event that the Court allows the application herein, then the same should be conditional and the appellant should be ordered to pay half of the decretal sum to the respondent and deposit the balance of the decretal sum in a joint interest earning account of the Advocates on record within 30 days.
9. He submitted that judgment by the Co-operative Tribunal was delivered on 7th October, 2021 and on the same day, the appellant was granted stay of execution which lapsed on 7th November, 2021. He indicated that the application herein was filed on 15th November, 2021 and that the appellant had not given any reasonable explanation for the inordinate delay in making the instant application. He submitted that the judgment herein relates to a money decree that involves the respondent's members' money that was utilized by the appellant, thus the respondent being the decree holder has a right to be paid its money.
10. Mr. Chamwanda asserted that the appellant defaulted in his loan repayments which prompted the respondent to take out enforcement measures to protect its members' funds as the said loan was not secured or guaranteed. He contended that the appeal herein is only meant to delay the realization of the respondent's members' funds advanced to the appellant.



Analysis and Determination.

11. I have considered the application filed herein, the affidavit in support thereof, the replying affidavit by the respondent and the written submissions by Counsel for the parties. The issue that arises for determination is whether the appellant has satisfied the conditions set down to warrant grant of an order for stay of execution pending appeal.
12. In the affidavit filed by the appellant, he deposed that on 7th October, 2021, the Chairman of the Co-operative Tribunal delivered a ruling in favour of the respondent in Case No. 432 of 2018 for payment of Kshs. 6,912,697.00. That being aggrieved by the said decision, the appellant preferred the appeal herein vide a Memorandum of Appeal dated 27th October, 2021.
13. The appellant further deposed that the Chairman of the Tribunal did not issue any stay of execution and on 2nd November, 2021, and the respondent commenced the process of execution by issuing a decree and certificate of costs with a demand letter. The appellant averred that the decree involves a huge sum of money, hence repayment of the said money in the event the appeal herein is successful shall require several suits to be filed thus rendering the appeal nugatory.
14. The respondent in its replying affidavit deposed that the application herein is vexatious and an abuse of the Court process as the appellant seeks to avoid giving security for the due performance of the decree by presenting pay slips that do not show his entire source of income. The respondent averred that in the very unlikely event that the Court allows the application herein, then the same should be conditional and the appellant should be ordered to pay half of the decretal sum and deposit the balance of the decretal sum in a joint interest earning account of the Advocates on record within 30 days.
15. The principles that govern the grant of an order for stay of execution pending appeal are provided for under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 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.”
16. The Court’s power to grant an order for stay of execution is discretionary and the said discretion ought to be exercised judiciously. In *Vishram Ravji Halai v Thornton & Turpin* [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 42 Rule 6 of the Civil Procedure Rules, 2010 is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further, the application must be made without unreasonable delay.
17. In dealing with applications for stay of execution, Courts have a duty to balance the interests of the parties taking into account the fact that an appellant has an undoubted right of appeal, whereas the respondent has a decree which he should not be obstructed from executing unless there is a good reason.
18. It is evident from the decree and certificate of costs dated 1st November, 2021 annexed to the appellant’s supporting affidavit as annexure MK1 that the Chairperson of the Cooperative Tribunal awarded the respondent Kshs. 6,912,697.00 in special damages, costs of the suit and interest at commercial rates of



20% per annum, from 2006 to the date of delivery of the Tribunal's judgment. This Court finds that Kshs. 6,912,697/= is a large amount of money. It was submitted by the appellant that to order him to satisfy the Chairman's award before the appeal herein is determined will render the appeal nugatory and it will also be a hindrance to his right to a fair hearing

19. The appellant averred that the respondent commenced the process of execution by issuing a decree and certificate of costs with a demand letter and since the decree involves a huge sum of money, repayment of the said money in the event the appeal herein is successful, shall require several suits to be filed thus rendering the appeal nugatory. In *Kenya Hotel Properties Limited v Willesden Investments Limited* [2007] eKLR, the Court of Appeal stated that-

“Courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the Court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant.”

20. In the present case, the appellant did not state that he shall suffer substantial loss in the event the application herein is not allowed. In addition, the appellant did not put forth his current financial position and explain how the same would be affected if stay of execution is not granted. He did not allege that he might not be able to recover the decretal sum if the same is paid to the respondent since its financial position is unknown. All that the appellant averred was that he is a man of means who is able to satisfy the judgment in the event the appeal fails, and that recovery of the said money from the respondent if the appeal was successful, would require several suits to be filed. He however did not file an affidavit of means or attach any documents to demonstrate that he is a man of means.
21. The respondent on the other hand, did not demonstrate its financial capacity to this Court by providing financial statements to demonstrate its ability to refund the appellant his money in the event that he was successful in his appeal. I however take judicial notice of the fact that the financial status of the respondent is in the public domain as it is a Sacco Society Limited with the financial capacity to advance loans to its members such as the one advanced to the appellant.
22. It is my finding that the appellant has not satisfied this Court to the required standard that he is likely to suffer substantial loss in the event that stay of execution is not granted.
23. On the issue of whether the application herein has been made without unreasonable delay, the appellant submitted that the application was made without undue delay since it was filed following the oral application for stay of execution which was made in Court. The respondent on the other hand submitted that the Cooperative Tribunal granted the appellant stay of execution that lapsed on 7th November, 2021, whereas the application herein was filed on 15th November, 2021.
24. The judgment by the Cooperative Tribunal was delivered on 7th October, 2021 whereas the application herein was filed on 15th November, 2021, approximately eight (8) days from the date of expiry of the interim orders that had been granted for stay of execution. The appellant has offered no explanation for the delay. Accordingly, this Court finds that there was been unreasonable delay in filing the instant application. In *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] eKLR, the Court held as follows -

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay being dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of *Christopher Kendagor v Christopher*



Kipkorir, Eldoret ELC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.”

25. It is worth noting that the appellant has not offered any security to guarantee the due performance of such decree or order as may ultimately be binding on him. In *Arun C.Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, the Court stated as follows-

“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.”

26. Having given due consideration to the application, it is evident that the appellant has not satisfied any of the conditions set down to warrant the grant of an order for stay of execution.
27. The upshot is that the application dated 9th November, 2021 is devoid of merit and the same is dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 21ST DAY OF OCTOBER, 2022.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

No appearance for the appellant

No appearance for the respondent

Mr. Oliver Musundi – Court Assistant.

