REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL SUIT NO 20 OF 2016

NUR MUSLIM SOCIETY THRO,

THE CHAIRMAN MOHAMED ABDISHEIKH

THE SECRETARY ALI OMAR SAID and

THE TREASURER, ABDALLA MOHAMED ABDISHEIKH.....PLAINTIFF

VERSUS

ALI ABDALLA DUHMY (FORMER CHAIRMAN).....1ST DEFENDANTS

MOHAMED HEMED ATHAMAN (FORMER TREASURER).....2ND DEFENDANT

NASSIR KHAMIS (FORMER SECRETARY).....3RD DEFENDANT

Coram: Hon. Justice R. Nyakundi

Ms Muranje for the Plaintiff

Ms Gicharu Kimani for the Defendants

RULING

The applicant has made an application dated 17.11.20 and filed in court on the same day by way of notice of motion expressed to be brought under Order 22 Rule 22 (i) of the Civil Procedure Rules and Section 3A of the Act seeking the following orders:

(i) That there be temporary stay of execution of the orders issued on 11.11.2019

(ii) On costs pending the hearing and determination of the intended appeal.

The notice of motion is supported by affidavit of the applicant Abdala Mohamed Abdi Sheikh and copies of the ruling is exhibited to the affidavit.

The respondent in reply filed grounds of opposition dated 1.12.2020 in which he asserts that the applicants are guilty of laches and inordinate delay. In addition, the respondent states that the applicants have been aware of the order of the court, on dismissal of such and thereby do not deserve the discretion on the orders of stay of execution.

Determination

Having considered the affidavit evidence, the record and grounds of opposition, the issue for the court to determine is whether or not stay of execution pending an appeal it is capable of being granted as premised in the motion.

The Law

(1) The application primarily rests on order 42 Rule 6 (i) (2) of the Civil Procedure Rules which provides inter alia that: -

"An appeal shall not operate as a stay of execution or of 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 a decree or order…."

(a) No order for stay of execution shall be made under sub rules centers. The court is satisfied that substantial laws 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 bending on him has been given by the applicant.

The courts have, in several decisions, addressed their minds to what constitutes discretion to grant or deny stay of execution pending an appeal. In **Chris Muunga Bichage v Richard Tongi & 2 others 2013** in which it held that; -

"The Law as regards applications for stay of execution or stay of proceedings or injunctions are well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are, First, that his appeal or intended appeal is arguable, that is to say it is not frivolous"

Secondly, that if the application is not granted, the success of the appeal where it to succeed would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated". In the **Port Reiz Maternity v James Karanga Kabia CA No. 3 of 1997**. The court also stated that;-

"The right of appeal must be balance against weighty right that of the plaintiff or defendant to enjoy the fruits of the judgment delivered in his favor. There must be a just course for depriving the plaintiff that right".

In one of the leading cases on substantial loss in **James Wangalwa & Another v Agness Naliaka Cheseto (2012(EKLR** it was 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 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 have to be presented by preserving the status quo because such loss would render the appeal nugatory"

Turning to this grounds, the affidavit invokes the process of taxation which was scheduled for hearing and determination. That if a stay of execution is not granted the appeal if successful would be rendered nugatory.

Secondly, the appeal has high chances of success and therefore to proceed and tax the bill of costs will expose the applicants to execution thereby and consequently suffer substantial and irremediable loss and damage. However, in my view, somewhat perplexing the affidavit evidence fails to discharge the burden of proof that the taxation and subsequent bill of costs would cause irreparable and substantial loss to the applicants. It also goes almost without saying that the applicants having a good chance of success, in his or her appeal and for that reason alone would not be sufficient cause to satisfy the criteria for the court to exercise discretion in the matter. By way of illustration, the affidavit in support merely avers that to the best of his information and belief he has good chances of success in his appeal and that he would suffer substantial loss to me is inadequate to satisfy the test in **Wangalwa case (supra) and M.M. Butt v Rent Restriction Tribunal CA No. 6 of 1979**.

For purposes of this ground on substantial loss, there is need to prove that the decree holder would not be able to pay back the taxed costs if the appeal succeeds. Arising from the above precedents it's my view that the appeal is not stated to be rendered nugatory by virtue of the taxing master proceedings to tax the bill of costs. In passing the threshold an affidavit evidence in support of stay of execution has to contain credible and cogent material that can serve as a basis for the exercise of discretion.

In this case the relevant facts underlying the claim are not in dispute as it's evident in **HC No. 26 of 2016 and HCC No. 144 of 2012**. The governing principles of law on res judicata under Section 7 of the Civil Procedure Act are well settled and not questioned by the parties, save that they raise a rider on audit of accounts. In exercising that authority vested in the proper institutions by itself is not a ground to manifest that the appeal is arguable and that if successful it will be rendered nugatory unless there is a stay of execution.

The other feature emerging from the respective materials filed by the parties is in the inordinate delay to file an application for stay of execution. In the cases of **Rosselte Kizito v Administrator General (1993) 5 KALR and Allem v SCR Alfred MCAlphine & Sons (1968) 1 ALL ER 543** stated inter alia that:-

"conducting litigation in a manner manifesting an intention not to bring them to a expeditious conclusions is a subversion of the process of the court and will constitute an abuse not justifying stay".

In the instant case it is clear that the impugned ruling is stated to have been delivered on 11.1.2019

The applicant moved the court on 17.11.2020 alleging that he was not aware of the delivery of the ruling while the court has no affidavit in

answer to that averment by Mr. Muranje Learned Counsel previously on record. I wish to emphasize that I take notice on the standard practice on delivery of judgment/rulings and subsequent issuance of a copy thereof to the parties through their respective emails deposited with the court. If on the other hand Learned Counsel Mr. Muranje previously on record for the applicant was not served with the due date of the ruling or a copy therein electronically dispatched to his respective email nothing could have been easier than to have his affidavit in support of that allegation. All in all, on the issue of the delay in filing the application, and supporting reasons do not merit the courts exercise of discretion.

The difference of one year is too much to ask of the court to proceed to grant stay of execution on the strength of principles in **Salat v IEBC (2014 eklr (sck)**. In this case the competing factors that tilt against grant of stay of execution are expounded in the comparative case of **Hammord Suddand Solicitors v Agrichem International Holdings (2001) EWCA Civil 1915,** in which the court posed the following questions:

> **(a) If stay is granted and the appeal fails which are the risks that the respondent will be unable to enforce the judgment**
>
> **(b) If a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being unable to recover the subject matter of executing.** In a money judgment that has been paid due to the respondent.

Taken in isolation the subject matter of the bill of cost might perhaps, be regarded as one to which not too much weight should be accorded to the applicant for present purpose as a substantial loss to apply for stay of execution.

For these reasons and in the circumstances of this cases, it is not open to the court to grant stay of execution pending an appeal. The motion is denied with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF JANUARY, 2021

.....

R. NYAKUNDI

JUDGE

This Ruling has been dispatched electronically to the respective emails of the advocates in the matter.

(info@gklaw.or and mutisyaadvocates@gmail.com)

In the precense of:

Ms Gicharu Kimani for the Defendants