



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 144 OF 2017

CANON ASSURANCE CO LTD.....APPLICANT

VERSUS

PETER MULEI SAMMY.....RESPONDENT

RULING

1. The Applicant vide application dated 1.10.2020 is seeking for the following orders;

a) Spent

b) Spent

c) That the Honorable court be pleased to issue orders of stay of execution of the decree/judgement by the Honorable court made on 29th July, 2020 as against the applicant pending the hearing and determination of the appeal.

d) Spent

e) That the costs of this application be provided for.

2. The application is supported by the affidavit of Martha Mutoro deponed on 1.10.2020. The application is brought under sections 1A, 1B and 3A of the Civil Procedure Act and Order 22 Rule 22, 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules.

3. The grounds upon which the application is premised are contained in the face of the notice of motion as well as the supporting affidavit and are:

a) That the applicant was aggrieved by the judgement of this court that was delivered on 29.7.2020 and has lodged an appeal challenging the same.

b) That If execution is not stayed, the applicant will suffer substantial and irreparable loss

c) That the respondent filed an application seeking for release of the security that was deposited and yet the applicant intends to use the same as security for the appeal.

d) That the intended appeal has a high probability of success.

4. Copies of the notice of appeal and the respondent's application to release the security were annexed to the affidavit.

5. There is no indication of any response to the application.

6. The applications was canvassed by way of oral submissions. Learned counsel for the applicant urged this court to grant the prayer sought.

7. Counsel for the respondent submitted that the appeal that was the subject of the mentioned security had already been spent and therefore the applicant could not rely on an appeal that is no longer before this court.

8. I have considered the application and find the issue for determination is whether the application has merit. The application is hinged *inter alia* on Order 42 Rule 6 of the Civil Procedure Rules that provides for stay of execution pending appeal. The conditions to be met by an Applicant in order to be entitled to an order for stay are laid out in that Rule in the following terms:

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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.

9. I have seen the memorandum of Appeal and agree that the appeal is arguable. I have had due regard to section 2 of the Civil Procedure Act Cap 21 of the laws of Kenya which in the definition of a “decree” means *the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—*

(a) any adjudication from which an appeal lies as an appeal from an order; or

(b) any order of dismissal for default:

Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;

Explanation. — A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

10. In the same section, decree holder, alludes to an order that “is capable of execution.” In that section, a decree holder is defined as “any person in whose favour a decree has been passed or an order capable of execution has been made...” It therefore obtains that there are orders that are capable of execution while others are not.

11. The court has no jurisdiction to stay any action unless there is a positive order of court for something to be done or enforced. The court has no power to stay a negative order of dismissal as was found by the Court of Appeal in the case of **Oliver Collins Wanyama v Engineers Board of Kenya [2019] eKLR** where it observed that “An order of stay is not available to the applicant if his application for judicial review having been dismissed, giving rise to a negative order that is incapable of being stayed”

12. In **Milcah Jeruto vs Fina Bank Ltd [2013] eKLR** the court held that an order for stay cannot be granted where a negative order had been issued. Under section 2 of the Civil Procedure Act, the definition of a decree holder alludes to an order that was capable of being executed in any of the methods stipulated under section 38 of the Civil Procedure Act. Courts have held that a negative order can only be set aside by the appellate court. See **Catherine Njeri Maranga v Serah Chege & another [2017] eKLR**, **Electro Watts Limited v Alios Finance Kenya Limited [2018] eKLR**, **Nairobi Metropolitan Psv Saccos Union Limited & 25 Others v County of Nairobi Government & 3 Others [2014] eKLR**, **George Ole Sangui & 12 Others v Kedong Ranch Limited [2015] eKLR**.

13. Section 38 of the Civil Procedure Act provides for the various modes of execution in the following words:

(a) “by delivery of any property specifically decreed,

(b) by attachment and sale, or by sale without attachment, of any property,

(c) by attachment of debts,

(d) by arrest and detention in prison of any person,

(e) by appointing a receiver,

(f) in such manner as the nature of the relief granted may require.”

14. The section envisages an order which is not yet implemented or executed and which is capable of execution. For the order or decree to be satisfied, the judgment creditor or an officer of the court such as a bailiff must force or compel the judgment debtor or 3rd party such as the

Garnishee using any of the modes provided for under section 38 of the Civil Procedure Act to implement the order or decree.

15. In the case of **Western College of Arts And Applied Sciences v Oranga & Others [1976] KLR 63** the Court of Appeal whilst considering whether an order of stay can be granted in respect of a negative order stated:-

“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....”

The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.”

15. In the premises there is no order of this court that is capable of execution and thus prayer No.3 for stay of execution cannot be allowed to stand.

16. In this regard I find refusal to grant a stay of execution would not prejudice the rights of the applicant to be heard on appeal. This is because the Court of Appeal has been granted powers to issue the appropriate orders under Rule 5 of the Court of Appeal Rules and thus the applicant is not precluded from approaching the Court of Appeal and seek the requisite orders. Rule 5 of the Court of Appeal Rules provides in material part that:

“5. (1) No sentence of death shall be carried out until the time for giving notice of appeal has been given, until the appeal has been determined.

(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may —

(a) in any criminal proceedings, where notice of appeal has been given in accordance with rule 59, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal;

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.

17. The Applicant has also sought for an order for stay of proceedings of the Respondent’s application dated 30.7.2020 as against the Applicant pending the hearing and determination of the application. I find such a prayer to amount to muzzling the respondent from prosecuting his application dated 30.7.2020. In any event the applicant is at liberty to challenge the said application by filing a response thereto and hence there is no prejudice suffered by the applicant. I am not satisfied that the applicant has given sufficient reasons to warrant the grant of such an order.

18. In the result, it is my finding that the Applicant’s application dated 1.10.2020 lacks merit. The same is dismissed with costs.

It is so ordered.

Dated and delivered at Machakos this 25th day of January, 2021.

D. K. Kemei

Judge