



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 55 OF 2020

DAVID NJAGI.....APPELLANT/APPLICANT

-VERSUS-

ELIZABETH MUSAU.....1ST RESPONDENT

JOHN MUSAU NZIVO.....2ND RESPONDENT

(Appeal from the Judgment of Honourable Magistrate Gilbert O. Shikwe SRM delivered on 15th July 2021 in SRMCC No.8 of 2016 at Kithimani Law Courts)

RULING

1. The Appellant/Applicant herein has filed a Notice of Motion dated 16th October 2020 seeking in the main an order of stay of execution of the judgement and decree in **Kithimani PMCC No.8 of 2016** pending the final determination of the appeal.
2. The application is supported by grounds set out therein and the affidavit of the appellant sworn on even date. The gravamen of the applicant's case inter alia, is that he is dissatisfied by the judgement of the trial court delivered on 15. 7. 2020 in which he has already lodged his memorandum of appeal where he has raised seven grounds of appeal. It is also his case that there is a threat of execution of the said judgement which will occasion him to suffer irreparable harm and that the appeal might be rendered nugatory.
3. The application was strenuously opposed by the respondents. Vide a replying affidavit of the 1st respondent Elizabeth Musau sworn on 4.11.2020 it was averred that upon the dismissal of the appellant's suit, the costs thereof if paid will not cause any prejudice to the appellant as they are in a position to refund the same if paid by the appellant on success of the appeal. It was also averred that the appellant has not shown evidence of substantial loss if stay is not granted and has also not given security for costs. The respondents sought for the dismissal of the application with costs.
4. Parties agreed to canvass the application by way of written submissions. Both submissions are dated 25.1.2021. I have duly considered the said submissions and find that the only issue for determination is whether the appellant has satisfied the conditions imposed by Order 42 Rule 6(2) of the Civil Procedure Rules regarding the issue of stay pending appeal.
5. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [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 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely:-

- a). *establishment of a sufficient cause.*
- b). *satisfaction of substantial loss and.*
- c). *furnishing of security.*
- d). *Further the application must be made without unreasonable delay.”*

6. On substantial loss, Mativo- J In **Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR**, relied on the case of **Equity Bank Ltd vs Taiga Adams Company Ltd, [2006] eKLR** to explain the onus upon the Applicant where the court stated as follows: -

“.....The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out—in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the appellant.”

7. It is noted that the Applicant has not pleaded in the stay of execution application that the Respondents would not be in a position to refund the decretal sum in the event the appeal succeeds. The fact that a decree is attached does not satisfy the ground that substantial loss will be suffered. It is incumbent upon the Applicant to establish to the court the substantial loss to be suffered in the event of refusal of the order for stay. He has not convinced the court that the payment of the costs awarded by the trial court will cause him any substantial loss. In any event, the respondents have asserted that they are persons of means and will refund the monies in the event of success of the appeal. The appellant has not challenged this averment by way of a further affidavit thereon. I find that this condition has not been met by the appellant.

8. On the issue of whether the application has been filed timeously, I agree with the decision in the case of **Geoffery Muriungi & another vs John Rukunga M’imonyo suing as Legal representative of the estate of Kinoti Simon Rukunga (Deceased) [2016] eKLR** where the court held as follows with respect to the timeous filing of an application: -

“This ground is normally easy to determine and is usually straight forward. Although there is no exact measure as to what amounts to unreasonable delay, it will not be difficult to discern inordinate delay when it occurs. It must be such delay that goes beyond acceptable limits given the nature of the act to be performed.”

9. It is noted that the Judgement was delivered on 15th July 2020 and the stay application was filed on 21st October 2020 three months later. I find the delay of three months not so unreasonable due to the fact that the appellant might have been pursuing court proceedings before deciding to pursue an appeal. I will excuse the same.

10. On the issue of furnishing security, it is noted that the Applicant has not shown any willingness in the pleadings to furnish any security for the performance of decree but has chosen to focus on the appeal being rendered nugatory if stay is not granted. In **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...”

11. In my view, I find the Applicant has not satisfied this condition as he has not said anything regarding the furnishing of security for the due performance of the decree which might be binding upon him. The applicant was under obligation to say something on the same as assign that he is ready to offer something to cushion the respondents as the appeal is tackled. As this was lacking, I find that the applicant has not satisfied the above condition so as to merit an order of stay pending appeal.

12. Going by the above observations, it is my finding that the Applicant has not satisfied the conditions under Order 42 of the Civil Procedure Rules. The Applicant has relied on the case of **John Gachanja [2016] eKLR** to ask the court to invoke the overriding objective but noting that the appeal emanates from the suit that had been dismissed for lack of proof in favour of the Respondents, there are no fruits pursued by the appellant save only on the right of appeal. I note that the Respondents costs of Kshs. 64,675 assessed by the court is not huge. The respondents have confirmed that they are willing to refund the monies if ordered to do so in the event of success of the appeal. As the appellant has not dislodged the fact that the respondents are not persons of straw, this court must agree with the respondents claim that they have the means with which to refund the monies to the appellant in the event of success of the appeal.

13. In the final analysis, the order that commends itself is that the Appellant's application dated 16.10.2020 lacks merit. The same is dismissed with costs.

It is so ordered.

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

D. K. Kemei

Judge