



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 91 OF 2019

JUMAA MWARUA KAPHUTSU.....APPELLANT/RESPONDENT

VERSUS

PALLET LOGISTICS LIMITEDRESPONDENT/APPLICANT

Coram: Hon. Justice R. Nyakundi

Wachenje Mariga advocates for the Appellant/Respondent

Okello Kinyanjui advocates for the Respondent/Applicant

RULING

This is the respondent's application for an order staying proceedings of the Judgment delivered on 1.10.2020 in favour of the appellant herein. It is expressed to be brought pursuant to Article 159 of the Constitution, Order 42 Rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application for stay is supported by an affidavit sworn by **Lydia Wairimu** and the relevant parts thereof provides as follows:

(a). That in the Court remitting the file back to the trial Court to assess damages, it would be like setting an appeal of its own Judgment.

(b). That it is only fair that stay of execution of the aforesaid proceedings to grant an opportunity for the respondent to challenge the Judgment on appeal.

The appellant is opposed to the application for stay and a replying affidavit was filed to that effect sworn by **David Wachenje**. The affidavit more or less touched on the history of the matter and the averments that the matter has not ripened for stay of execution to apply. Submissions by the respondent/applicant counsel **Mr. Kinyanjui** in respect of Order 42 Rule 6 of the Civil Procedure Act, was to the effect that the Court has power to grant the relief on stay of execution so long as the applicant has met the threshold.

The conditions he outlined were that the application has been filed without undue delay, the applicant would suffer substantial loss, the appeal has chances of success and the applicant is willing to deposit any such security as would be demanded by the Court.

In buttressing the arguments and submissions in support of the application, Learned counsel cited and relied on the following authorities: **Butt v Rent Restriction Tribunal (1979) eKLR, Focin Motorcycle Co. Limited v Ann Wambui Wangui & another (2018) eKLR, Kenya Commercial Bank Ltd v Suncity Properties Limited & Others (2012) eKLR, Kenya Shell Limited v Kibiru (1986) KLR 410, Platt, AG, JA, Adipo v Teachers Service Commission, Nduhiu Gitahi & Another v Anna Wambui Warungogo (1988) 2 KAR**

In trying to get a full appreciation of the arguments by the Learned counsel regarding the subject matter of appeal, it is useful recapitulate the issues at stake.

The respondent had been sued initially before the lower Court by the appellant seeking damages resulting out of an accident which occurred on or about 2.4.2016 at Kokotoni area. The Learned trial Magistrate dismissed the claim prompting the appellant to file an appeal to this Court. Following the consideration of an appeal on the merits, it was demonstrated that the lower Court had misdirected itself in the findings arrived at in dismissing the claim on both liability and general damages. It is the believe of the respondent that the circumstances obtaining the case being remitted back to the trial Court were insufficient and therefore necessary in granting the order for stay of execution pending an appeal.

Counsel for the appellants submitted that the respondent has not shown or proven any special circumstances warranting a grant of a stay of execution. That the respondent has not shown how it would suffer prejudice, should the trial Court proceed to determine the case pursuant to an order of the High Court.

The applicant in opposing the application stressed that the respondent's appeal success likelihood is minimal.

Determination

I have carefully appraised all the affidavits as premised in the respective parties' responses to the notice of motion, including the skeletal arguments relied upon by the respective counsels. The legal principles which guide the Court when exercising discretion in applications of this nature for stay of execution of Judgment pending appeal are very clear as set out under Order 42 Rule 6 of the Civil Procedure Rules. It is trite that the Court in considering the application does not necessarily make orders that would deprive a successful party to a litigation of the fruits of his or her litigation. (See **George Oraro v Kenya Television Network Nairobi High Court Civil Case No. 151 of 1992, F. K. Kiongo v VPN Mukubwa & another Nairobi Civil Application No. 63 of 1988**).

The fact of the matter is that by the mere action of a party exercising his or her right to appeal to higher Court is no ground for that Judgment appealed against to be stayed as of necessity. In the case of **Stephen Wanjohi v Central Glass Industries Ltd Nbi HCCC No. 6726 of 1991** the Court emphasized that:

“For the Court to grant stay of execution there must be:

(a). Sufficient cause.

(b). Substantial loss.

(c). No unreasonable delay and security offered for due performance of the decree.

As a consequence of these principles evidence of facts must be presented by the burden bearer to the Court in order for it to assess the situation so as to exercise discretion in favour of the applicant.

Further, a Court has the discretion to order for stay of execution pending an appeal when it is satisfied that the applicant will suffer substantial loss which could not be compensated in damages (See **Kenya Shell Ltd v Kibiru (1986) KLR, Prilscot Company Ltd v Monica Heho (2015) eKLR, Daniel Chebutul Rotich & 2 others v Emirates Airlines Civil Case No. 368 of 2001**).

In the present case, the respondent has fulfilled and met conditions on undue delay, that he moved the Court timeously. On substantial loss, hitherto, the respondent has not demonstrated that for reasons of this Court Judgment being executed by the lower Court it could suffer substantial loss not remedied by way of damages.

All that the respondent has done is to aver, that the referral of the case to be retried by the lower Court is equivalent to asking the same Court to sit on appeal of its own decision. Obviously these are relevant facts in so far the view point of the respondent position is concerned but is not of a nature to satisfy substantial loss. It will also be noted that the respondent's contention is to the effect that the intended appeal has high prospect of success. (See **Central Bank of Kenya Deposit Protection Fraud Board v Uhuru Highway Development Ltd Nairobi Civil Application No. 95 of 1991**). The Court observed that:

“it would be wrong for the Court of Appeal, on an application for stay of execution pending appeal to say anything that indicates a concluded view as to the merits of action, on fact or Law, because the Ruling is the subject matter of the appeal and will have to be heard and dealt with thereafter. However, it is the applicant to prove that the appeal will be rendered nugatory unless stay of execution is granted.”

On my part, I will not fall into such temptation because it is not the duty of the Court to pretend to defraud its own Judgment. The obvious duty is for the applicant to satisfy the Court that the appeal or intended appeal is an arguable one and is not frivolous appeal or baseless.

Nevertheless, in the instant case, the applicant has heavily relied on the record of the proceedings and the impugned Judgment that has been exhibited to as part of the annexures thereto. Having read thoroughly the affidavits in support of the application, the substantial questions of Law to be adjudicated upon by the appellate Court are unclear. It has been stated again and again that the usual course to persuade the Court to stay proceedings or execution of a Judgment is only for the applicant to demonstrate that the on-going proceedings would cause irreparable injury to the applicant. The mere dissatisfaction or grievance against the impugned Judgment is not sufficient for the Court to exercise discretion to deprive a successful litigant benefit of the decree.

Given the above facts, circumstances as disposed to by the applicant, I do not see how the application meets the conditions precedent on substantial loss, sufficient cause and irreparable harm not compensable by way of damages or that the appeal would be rendered nugatory in which a stay of execution can be granted. The upshot of it all, the application is accordingly dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF MARCH, 2021

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R. NYAKUNDI

JUDGE

NB: This Ruling has been emailed to the advocates pursuant to the causelist of 26.2.2021.

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