



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 27 OF 2020

PALS WAGENAARAPPELLANT

VERSUS

SAMUEL ADADA ONDIEK..... 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

RULING

The application dated 23rd September 2020 is for stay of execution pending the hearing of the appeal.

1. The Appellant, **PALS WAGENAAR**, was the 1st Defendant in the case before the trial Court.
2. On 14th May 2020 the trial court delivered its Judgment in favour of the Plaintiff, **SAMUEL ADADA ONDIEK**, awarding to him the sum of Kshs 2.5 Million.
3. Being dissatisfied with the said Judgment, the 1st Defendant decided to lodge an appeal to the High Court. The said 1st Defendant also brought the application for stay of execution.
4. The application was first placed before the court on 23rd September 2020. After giving due consideration to the Certificate of Urgency, the Court granted a temporary order for the maintenance of the status quo.
5. The application was next before the court on 30th September 2020. On that date, all the 3 parties were represented in Court. The 1st Respondent had already filed his Grounds of Opposition. However, the 2nd Respondent, **THE ATTORNEY GENERAL**, was allowed 21 days more, within which to file and serve a Replying Affidavit.
6. In the meantime, an order for stay of execution was granted.
7. On 2nd December 2020, the 2nd Respondent informed the Court that he would not be opposing the application.
8. Thereafter, the Appellant and the 1st Respondent filed written submissions.
9. It was the Applicant's submission that if the court allowed the 1st Respondent to execute the Decree before the appeal was heard and determined, such execution would destroy the substratum of the application and would render the appeal nugatory.
10. It is well settled that the court would need to be satisfied that the intended appeal would be rendered nugatory if no stay of execution was ordered, before it can order that execution be stayed.
11. As the Applicant pointed out, the purpose of an order for stay of execution is to preserve the subject matter of the appeal, so that the appeal would not be rendered nugatory.
12. Pursuant to **Order 42 Rule 6** of the **Civil Procedure Rules**, the appeal filed to challenge a judgment or an order, shall not, of itself, operate as an order for stay of execution.

13. The person seeking stay of execution must satisfy the court that there was sufficient cause to warrant a stay of execution.

14. Pursuant to **Order 42 Rule 6 (2)** of the **Civil Procedure Rules**;

“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 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.”

Substantial Loss

15. The Applicant described the Respondent as a man of straw, who was thus incapable of effecting a refund of the decretal amount in case the appeal succeeded after the decretal sum had been paid to him.

16. The anticipated failure to refund is what the Applicant says would cause him to suffer great irreparable loss and damage.

17. But the Respondent submitted that the Applicant failed to demonstrate the substantial loss that he would suffer if execution was not stayed.

18. The law places on the party who has made an assertion, the onus to prove his said assertion by providing the requisite evidence.

19. Secondly, when a party would fail, if he did not adduce evidence to meet the requirements of the case he was advancing, the onus is upon that party to lead evidence so as to satisfy the court.

20. Therefore, when the Applicant asserted that the Respondent was a man of straw, it was expected that the Applicant would tender evidence to prove that assertion.

21. No such evidence was made available by the Applicant.

22. However, the law does appreciate that there are matters of fact, about which a particular party would be best placed to provide evidence.

23. As an example, if the Respondent is the proprietor of a property or properties, those facts would be within his knowledge, better than that of the Applicant.

24. Therefore, I hold the view that the Respondent was in a better position to demonstrate to the court that he was a person of means, contrary to the opinion expressed by the Applicant. But the Respondent is not under an obligation to tender evidence to prove facts about which the Applicant has not provided evidence.

25. In the absence of material upon which I could determine whether or not the Respondent was a man of straw, I find that the Applicant did not discharge the onus of proof.

26. But I will nonetheless bear in mind the fact that the Respondent had the opportunity to demonstrate to the court that he was not a man of straw; but he made a choice not to provide any such evidence.

Security

27. The Judgment against which the Applicant intends to appeal held the two Defendants Jointly and Severally liable for the sum of Kshs 2,000,000/=.

28. In the circumstances, the Applicant offered to provide security in the sum of Kshs 500,000/=, because the Judgment is against 2 Defendants.

29. According to the Applicant, if he provides security of that sum, that would secure the interests of both parties “*without bias.*”

30. In my understanding of the law, when two or more parties are held liable to the Plaintiff, the said Plaintiff would be entitled to execute the Decree against any one of the Judgment-Debtors, unless the Court had specifically limited the scope of liability attaching to each of the Judgment-Debtors.

31. A very good example is to be found in this very case, wherein the trial court ordered the 2nd Respondent to pay Kshs 500,000/=. In respect to the Punitive Damages of Kshs 500,000/=: it is only the 2nd Respondent who is liable.

32. But in respect to the General Damages of Kshs 2,000,000/= each of the Defendants is liable for the full amount, provided that the total sum recoverable does not exceed that sum.

33. Neither of the Defendants can be deemed to have satisfied the Decree, (in respect to the General Damages) by paying Kshs 1,000,000/=, unless the other Defendant will have paid the other Kshs 1,000,000/=.

34. As the requirement for security is that the Applicant should secure the due performance of the Decree, the amount to be secured by the Applicant is Kshs 2,000,000/=.

Delay

35. Although the Respondent submitted that there was a delay, I find that whilst there was an order for stay of execution, which had been granted by the trial court, the Applicant did not require another order for stay of execution.

36. The application before this court was brought when it was imminent that the orders for stay of execution, that were issued by the trial court were due to lapse by effluxion of time.

37. I hold the considered view that there was no unreasonable delay in bringing the current application.

Conclusion

38. The financial capacity of the Respondent is unknown. And although it was not proved that he was a man of straw, I find that a person who shields facts about himself may be deemed to be aware that such facts might be adverse to him, if he disclosed the same.

39. It therefore follows that it is probable that the Respondent may be unable to refund the decretal amount if the intended appeal against him were ultimately successful.

40. In the circumstances, I do grant an order for stay of execution pending the determination of the intended appeal. However, the stay shall be conditional upon the Applicant either depositing the sum of Kshs 2,000,000/= in a joint account, to be held by the two Law Firms representing the Appellant and the 1st Respondent; **OR** the Applicant shall provide a Bank Guarantee for Kshs 2,000,000/=.

41. The security should be secured and be filed, if it is a Bank Guarantee, within the next 30 days.

42. The costs of the application shall be in the cause, in the substantive appeal; so that the successful party shall also get the costs of the said application.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 17TH DAY OF MARCH 2021

FRED A. OCHIENG

JUDGE