



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL APPEAL NO. 15 OF 2015

JACKSON KAIO KIVUVA.....APELLANT/APPLICANT

VERSUS

PENINAH WANJIRU MUCHENE.....RESPONDENT

RULING

1. The applicant took out a motion on notice dated 15th October, 2019 and filed on 18th October, 2019, seeking stay of execution pending appeal. The motion was predicted on sections 1A, 1B and 63E of the civil Procedure Act, and Order 42 rule 6(2) of the Civil Procedure Rules. The application is supported by an affidavit by the applicant sworn on 18th October, 2019.
2. The applicant deposed that this court delivered its judgment on 11th October, 2019 dismissing his appeal, which he was aggrieved with; that the respondent was in the process of executing the judgment and decree and that his properties were likely to be attached. He stated that he was dissatisfied with this court's judgment and had filed a notice of appeal, signifying his intention to appeal; that he verily believed that his appeal was meritorious with high chances of success, and that the respondent would not suffer any prejudice if stay was granted.
3. The respondent filed a replying affidavit sworn on 5th November, 2019 and filed on 6th November, 2019. It was deposed that the suit was heard by the trial court and a judgment delivered on 9th February, 2015; that the appellant appealed to this court which delivered judgment on 11th October, 2019. She stated that the applicant had not satisfied the conditions for granting of stay of execution pending appeal; had not furnished security for due performance of the decree and that the applicant had not also demonstrated that the intended appeal had high chances of success or that it would be rendered nugatory if stay was not granted.
4. According to the respondent, the appeal is a delaying tactic and an afterthought; the applicant had not demonstrated that he would suffer substantial loss, or sufficient cause why stay should be granted. The court was urged to dismiss the application with costs.
5. The applicant filed written submissions dated 4th November, 2020 and filed on 3rd March, 2021 in support of his application. He submitted that the application is merited and should be allowed. He referred to the principles for granting stay of execution under order 42 Rule 6(2). He also relied on the overriding principle under section 1A and 1B of the Act. In furtherance of this overriding objectives, he relied on **Vishram Ravji Halai v Thornton & Turpin** [1990] KLR 365 on the Court of Appeal's power to grant stay of execution pending appeal and the unfettered powers of this court under Order 42 rule 6 to grant stay for sufficient cause.
6. The applicant cited **Machira t/a Machira & Co. Advocates v East African Standard (No. 2)** [2002] KLR 63, that in applying the principles for stay; the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure to do justice in accordance with the law and to prevent abuse of the process. He further cited the decision in **John Gachanja Mundia v Francis Muriira alias Francis Muthika & Another** [2016] eKLR, that even where an applicant has not shown substantial loss, the court should be guided by the greater sense of justice and take a wider view of justice in interpreting the prescriptions of law designed for grant of relief.
7. The applicant again cited the decision in **Century Oil Trading Ltd. v Kenya Shell Ltd** (HCM C.A NO. 15614 of 2007), that substantial loss cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case, and is deprived of his property in consequence. The court has to balance the interests of the applicant who seeks to preserve the status quo pending hearing of his appeal and the interest of the respondent who is seeking to enjoy the fruits of his judgment.
8. On the respondent's inability to repay the amount; the applicant argued, citing **National Industrial Credit Bank Ltd v. Agumas Francis Wasure** (civil application No. 238 of 2005), that since an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.

9. On whether the intended appeal would be rendered nugatory, the applicant relied on HGE v SM [2002] eKLR, citing Butt v Rent Restriction Tribunal [1979] eKLR, that the power of the court to grant or refuse stay is discretionary and the discretion should be exercised in such a way as not to prevent an appeal. He also relied on RWW v EKW [2019] eKLR, that the purpose of an application for stay is to preserve the subject matter in dispute so that the rights of the appellant, exercising his right of appeal, are safeguarded if the appeal were to be successful.

10. With regard to security, the applicant cited Absalom Dova v Tarbo Transporters [2013] eKLR, that the discretionary relief of stay is designed on the basis that no one would be worse off by virtue of an order of the court and, therefore, such an order should not introduce any disadvantage but administer justice. He urged the court to adopt the amount of Kshs. 335,000 deposited in court as security.

11. The respondent filed written submissions dated 10th January, 2020 and filed on 22nd January, 2020. She argued that the applicant had not satisfied the conditions for grant of stay of execution, and that the applicant had not shown that he would suffer substantial loss. She relied on the Machira case (Supra), that it was not enough for the applicant to merely state that substantial loss would result, but must prove specific details and particulars of the loss.

12. She also relied on Equity Bank Ltd v Taiga Adams Company Ltd [2006] eKLR, to argue that the only way of showing or establish substantial loss was by demonstrating that if the decretal sum was paid to the respondent, in the event the appeal succeeded, the respondent would not be in a position to reimburse. She again cited James Wangalwa & Another v Agnes Naliaka Cheseto for a similar preposition.

13. On security, the respondent argued that the applicant had not furnished security for due performance of the decree, and relied on Masisi Mwiti v Damaris Wanjiku Njeri [2016] eKLR. She argued that the appeal would not be rendered nugatory, and relied on Kenya Shell Ltd v Kibiru & Another [1986] eKLR to submit that it is not easy for appeals in money decrees to be rendered nugatory. She urged that the application be dismissed with costs.

14. I have considered this application, the replying affidavit and submissions made on behalf of the parties. I have also considered the decisions relied on. What is before court is an application for stay of execution. The principles upon which an application for stay should be granted are well settled.

15. Order 42 rule 6 provides:

1. No appeal or second appeal shall operate as a stay of execution or 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 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 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 of stay 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. (emphasis).

16. One of the requirements is that such an application be filed without delay. This is not in contention. The judgment was delivered on 11th October 2019 while the motion was filed on 18th October 2019 within seven days. There is no question therefore that the application was timeously filed.

17. The most important requirement is that an applicant should show to the satisfaction of the court, that he will suffer substantial loss if stay of execution is denied.

18. In Butt v Rent Restriction Tribunal (Civil App No. NAI 6 of 1979) the Court of Appeal stated that *the power of the court to grant or refuse an application for stay of execution, is discretionary. The discretion should be exercised in such a way as not to prevent an appeal. The court added that in exercising its discretion whether to grant or refuse an application for stay it should consider the special circumstances of the case and its unique requirements.*

19. What is clear from Order 42 rule 6 as well as the above decision is that in an application for stay the court exercises judicial discretion and like any other discretion, it should act judicially. Whether to grant stay or not, the Court has also to consider the circumstances of each case.

20. Under Order 42 rule 6, the guiding principle is that an applicant should show that he will suffer substantial loss should stay be denied. It is not the putting in motion the *process of execution amounts to substantial loss. Not even the execution itself when levied. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect him as the successful party in the appeal.* (James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR)

21. In Equity Bank Ltd v Taiga Adams Company Ltd [2006] eKLR, the Court again stated that *the only way of showing or establishing substantial loss, is by showing that if the decretal sum is paid, the respondent would not be in a position to reimburse should the appeal succeed because he has no means of doing so.*

22. In the case Machira T/A Machira & Co Advocates v East African Standard (No 2 (*supra*), which both parties relied on, the court stated that to demonstrate that he will likely suffer substantial loss, the applicant is under a duty to do more than merely repeating words of the relevant statutory provision or rule or general words, and that it is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory.

23. I have carefully read through the application and the supporting affidavit as well as the grounds on the face of the motion. The applicant did not state that he would suffer substantial loss and how, if stay was not granted. The applicant submitted at length on substantial loss and cited several decisions on this point. However, in the motion, he only made general statements without stating what substantial loss he would suffer.

24. The respondent deposed in her replying affidavit and stated in her submissions, that the respondent had not demonstrated what substantial loss he would suffer if stay was denied. The applicant did not answer the deposition and submissions. He did not even allege that the respondent was not a person of means or that she would not refund the decretal sum if the appeal did eventually succeed. In other words, the applicant merely alleged that the appeal would be rendered nugatory without substantiating. That is not the meaning of substantial loss as contemplated by Order 42 rule 6 and the decided cases. The applicant was required to do much more than merely assert that the appeal would be rendered nugatory.

25. As this court stated in Kenya National Highways Authority v Ahmednasir Maalim Abdullahi [2020] eKLR:

It must be clear to an applicant seeking stay of execution that the law places a duty on him to demonstrate to the satisfaction of the court that he will suffer something special and that he may not be put back to the original position he was in before execution and, therefore, deserves exercise of the court's discretion in his favour.

26. In Kenya Shell Ltd v Benjamin Karuga Kibiru & Others (*supra*), Platt, Ag. JA, stated:

It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made. The affidavit in support has not set out any information to show that the appeal will be nugatory. It is loud in its claim that the appeal will fail. But no reasons are given why the appeal will be rendered nugatory...If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money

27. More recently, the Court of Appeal stated in Kenya Pipeline Co. Ltd v Zakhem International Construction Ltd (*supra*), execution with regard to a liquidated amount, would not render an appeal if successful, nugatory.

28. It is clear to this court that the applicant failed to demonstrate that he would suffer substantial loss if stay was not granted in his favour.

29. When the court is called upon to consider an application for stay, it has to balance interests of the applicant and those of a successful respondent who has a judgment in his favour. A decree holder requires protection just like the applicant who wishes to exercise his right of appeal against that decree. The applicant has a duty to satisfy the court that without stay, he would suffer substantial loss. It is not a question of apprehension but must be about real substantial loss.

30. Having considered the application, the depositions in the supporting affidavit and the response, and on the strength of the decisions referred to, I am not satisfied that the applicant has met the threshold for grant of stay of execution. Consequently, the application dated 18th October 2019, is declined and dismissed with costs.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 16TH DAY OF APRIL, 2021.

E.C MWITA

JUDGE