



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 372 OF 2019

GEORGE OBONYO.....APPELLANT

= VERSUS =

MARCEL OCHIENG.....RESPONDENT

RULING

The Applicant filed a Notice of Motion dated 1st July, 2019 under the provisions of Order 42 Rule 6(1), Order 51 Rule 1, Order 22 Rule 22, Order 10 rule 11 of the Civil Procedure Rules, Section 3 and 3A of the Civil Procedure Act and all other Enabling Provisions of the Law seeking the following orders;

i. Spent

ii. Spent

iii. THAT this Honourable Court be pleased to grant an Order of Stay of Execution of the Ruling and consequential Orders of the Chief Magistrate's Court at Nairobi, Milimani Commercial Court delivered on 30th May, 2019 pending the hearing and determination of the appeal.

iv. THAT the costs of this application be provided for.

The application is premised on the grounds on the face of the application and the supporting affidavit of George Obonyo, sworn on 1st July, 2019. The Respondent opposed the application through her Replying Affidavit sworn on 27th January, 2020. The parties agreed to have the application canvassed by way of written submissions. Both parties filed their submissions dated 25th January, 2021 and 9th February, 2021 respectively.

The Appellant being aggrieved by the decision of Hon. I. Orege (SRM) delivered on 30th May, 2019 dismissing his application dated 4th April, 2019 seeking inter alia review of consent order recorded in court on 14th February, 2019 has lodged an appeal by filing a Memorandum of Appeal dated 1st July, 2019 and the present application. The Appellant is apprehensive that unless stopped by the orders of this Honourable Court, the Respondent will execute the orders of 30th May, 2019 and the Appellant stands to suffer irreparable loss noting that he is terminally ill and may not survive imprisonment. It is the Applicants' contention that the appeal, if successful, will be rendered nugatory and justice subverted if execution is not stayed pending the hearing and determination of the appeal. The Appellant further avers that the application is made without undue delay and that the Respondent will not suffer any prejudice if the orders sought are granted. The Appellant is also willing to abide by any conditions set by the Court for grant of the Orders sought.

The Appellant/Applicant in his Supplementary Affidavit sworn on 5th July, 2019 state that on 2nd November, 2018 warrants of arrest were issued by the Milimani Commercial Chief Magistrates' Court in execution of the decree in CMCC 5459 of 2017 and he was subsequently arrested and detained at Industrial Area Prison. It is the Appellant's case that he was later released after reaching an agreement on how to settle the decretal amount however his advocate on record recorded a different consent from what he had instructed which then necessitated filing of an application to review the terms of the consent recorded on 14th February, 2019.

Miss Wanyonyi, Counsel for the appellant/applicant submit that the only issue for determination is whether the applicant has satisfied the conditions for granting an order of stay of execution. Counsel referred to Order 42 rule (6) of the Civil Procedure Rules and maintain that the applicant will suffer substantial loss if the orders are not granted. Counsel relies on the decision of the Court of Appeal in the case of **BUTT –V- RENT RESTRICTION TRIBUNAL (1982) KLR 417**.

It is the applicant's case that he had instructed his former advocate to record a consent whereby he was to pay kshs.5000 monthly in

settlement of the decretal sum but his counsel recorded Kshs.50,000 yet the applicant is currently depending on relatives for upkeep. Miss Wanyonyi made reference to the case of **KENYA TEA GROWERS ASSOCIATION & ANOTHER –V- KENYA PLANTERS AND AGRICULTURAL WORKERS UNION** (Nairobi Civil Application No. 72 of 2011 where the court stated:-

“the applicant need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the court should pronounce its decision.”

It is further submitted by the applicant that the purpose of an order of stay of execution pending appeal is to preserve the subject matter so that the right to appeal can be exercised without prejudicing the applicant as the appeal might be rendered nugatory. The mode of execution against the applicant is by way of committing him to civil jail and this will be irreparable loss as being committed to civil jail may be fatal since he is terminally ill and may not survive the prison conditions. Counsel for the applicant contend that the application has been filed without unreasonable delay. The applicant is ready to furnish security for due performance of the decree.

In response to the application, the Respondent filed Notice of Preliminary Objection dated 8th July, 2019 which was dismissed by Justice L. Njuguna on 31st October, 2019. The Respondent further filed a replying affidavit sworn on 27th January, 2020 where she confirms that judgement in default was entered in her favour in **Milimani Commercial Cmcc No. 5459 of 2017; Marcel Ochieng vs George Obonyo** for Kshs. 569,400.00 and after numerous attempts at execution, the Appellant/Applicant was sent to civil jail. The Respondent further states that the Appellant/Applicant is undeserving of the orders sought and that his application should be dismissed for the reason that he has neither appealed against the lower court decree nor made any payment towards settlement of the decretal amount and that his conduct throughout the proceedings has been towards crippling the wheels of justice. The Respondent argues that failure to serve his application for review dated 4th April, 2019 on the Respondent on several occasions as directed by the court is what necessitated the oral application to have the warrants of arrests issued.

The Respondent submits that in light of the principles laid down in Order 42 Rule 6(2), the issues for determination are:

- i) Whether the order issued on the 30th May, 2019 by Hon. I. Orange is capable of being stayed.*
- ii) Whether the Appellant has established substantial loss that would result if the order is not issued.*
- iii) Whether this Court should exercise discretion in favour of the Appellant*
- iv) Whether this is a proper case where the Appellant herein should be required to give security for performance.*

The Respondent submits that the Order that the Appellant/Applicant seeks this court to stay is not before the court for perusal and that the order of 30th May, 2019 is a negative order that cannot be stayed and that the Appellant/Applicant has failed to provide the ruling and order of the court which he seeks to challenge therefore making the present application improper and irregular. The Respondent has referred to the case of **Milcah Jeruto vs Fina Bank Ltd [2013]eKLR** where the Court held that an Order for stay cannot be granted where a negative order has been issued and further emphasized that under Section 2 of the Civil Procedure Act, the definition of a decree holder alludes to an order that was capable of being executed.

It is the Respondents submission that the Appellant/Applicant has not shown what substantive loss he is likely to suffer if the warrants against him are executed. The Respondent argues that the prison facilities in Kenya have access to public medical facilities and therefore his medical condition will be well managed by the prison medical facilities. The Respondent has referred to the case of **HGE V SM [2020]eKLR** where Justice W. Musyoka in defining ‘Substantial loss’ referred to the case of **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR**, where the court held that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

The Respondent further submits that this court should weigh her right to enjoy the fruits of her judgment and the right of the Appellant/Applicant who is exercising his right of appeal in deciding whether or not to exercise its discretion in favour of the Appellant/Applicant especially where there is no subject matter to be safeguarded by the court. The Respondent urges this court not to exercise its discretion in favour of the Appellant/Applicant who has failed to make any effort to pay the decretal amount despite offering to pay monthly installments of Kshs. 5,000. Reference was made to the case of **HGE V SM (Supra)** where the Court cited the holding in the case of **RWW vs. EKW [2019] eKLR**, where the court in addressing its mind on the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

The Respondent submits that the Appellant/Applicant should deposit the decretal amount in court as security for performance since the same is not in dispute. The Respondent has relied on the case of *Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd [2019] eKLR* as cited in *HGE V SM (Supra)* where the Court stated;

“...Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree.”

Analysis/Determination:

The only issue for determination in the present application is whether the Appellant/Applicant is entitled to stay of execution pending hearing of the appeal. The present application is in pursuant to the provisions of **Order 42 of the Civil Procedure Rules, 2010**, therefore, it is necessary to consider the requirements, which an applicant for stay of execution has to meet in order to be entitled to such order of stay. **Order 42 Rule 6 (2)** provides that:

“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.”

The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

As regards the time taken by the Appellant/Applicant to lodge the application, it has not been disputed that the warrants of arrest were issued on 30th May, 2019 and that the Appellant/Applicant filed the present application on 1st July, 2019 simultaneously with the Memorandum of Appeal. It is therefore quite clear that the application has been made timeously as it was filed within a month. Hence, I find the application was filed without unreasonable delay.

The Court of Appeal in the case of **Kenya Shell Ltd v Kibiru & Another [1986] KLR 410** where the appellant had sought stay of execution of a monetary decree issued by the High Court in favour of the respondent while dismissing the application stated as follows:

“It is usually a good rule to see if Order XL1 Rule 4 of the Civil Procedure Rules can be substantiated. 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 cornerstone 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.”

The Appellant/Applicant in his appeal is challenging the procedure used by the trial court in the issuance of the warrants of arrest and is apprehensive that he will go to jail following the alleged flawed procedure. In his Memorandum of Appeal, the Appellant/Applicant raises the ground that the trial court erred in law and in fact by proceeding to hear and make substantive adverse orders when the matter was coming up for mention for directions without giving him fair hearing. Additionally, the Appellant/Applicant submitted that he is terminally ill and may not survive being imprisoned. Although, the Respondent have argued that the Prison facilities are equipped with medical facilities and can refer inmates to public medical facilities, this court takes judicial notice of the adverse effects of the COVID-19 Pandemic on individuals with pre-existing medical conditions and holds that the Appellant/Applicant has proved substantial loss.

As to whether the appeal has high chances of success, I need not delve into the same at this juncture but leave it for the hearing of the appeal. The Appellant/Applicant has also averred that the consent on the payment of the decretal sum was recorded without his instructions and he had sought a review of the consent order in the trial court. All these issues would best be determined in the appeal. I find that in the event of the appeal succeeding and without an order of stay of execution of warrants of arrest, there is high likelihood that the applicant will suffer substantial loss.

On the issue of security, the duty of this court is to do justice to both parties in an appeal by imposing certain conditions. The Appellant/Applicant is entitled to be heard on his appeal while the Respondent is equally entitled to enjoy the fruits of her judgment. The Appellant/Applicant herein has indicated willingness to abide by any conditions to be imposed by this court as security for the orders sought. The Respondent however is of the view that since the Appellant/Applicant is not challenging the decretal amount awarded by the trial court then a deposit of the decretal amount should be made to court as security for performance. This court has taken into account the Respondent's concerns about the Appellant/Applicant indebtedness and default and the reasons given by the Appellant/Applicant for failure to make the payment as directed by the trial court and the steps they had taken and holds that the Appellant/Applicant is entitled to this court's discretion.

The nature of the dispute is that there is already in place a judgment in favour of the respondent for the sum of Kshs.569,400. The applicant has had ample time to liquidate the decretal sum for the period of about two years when the appeal was filed. Although the applicant contends that he is sick and depends on relatives for his upkeep, that position cannot entitle him not to settle the decretal sum. The appeal does not seek to set aside the judgment but is based on execution. Even if the appeal succeed, the appellant will still be liable to pay the decretal sum.

For the reasons I have set out above, I find the applicant has satisfied the requirements of Order 42 Rule 6 of the Civil Procedure Rules and the Notice of Motion dated 1st July, 2019 is allowed on the following terms:

- a) There shall be a stay of execution of the order of warrant of arrest issued against the Appellant/Applicant on 30th May, 2019 by Honourable I. Orege (SRM) in Milimani Commercial CMCC No. 5459 of 2017; Marcel Ochieng vs George Obonyo pending the hearing and determination of the Appellant's/Applicant's appeal.***
- b) The Appellant to pay to the Respondent the sum of Kshs. 250,000.00 within 45 days from the date of this ruling. In default by the Appellant/Applicant, the stay orders herein shall stand vacated and the Respondent shall be at liberty to execute.***
- c) The costs of the application shall abide the outcome of the appeal and shall follow the cause.***
- d) The appellant to set down the appeal for hearing on priority basis.***

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF MAY, 2021.

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S. CHITEMBWE

JUDGE