



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. E035 OF 2020

1. ANWAR ALI.....1ST APPELLANT

2. FARID AHMED SWALEH.....2ND APPELLANT

VERSUS

1. MONICA MUTHONI.....1ST RESPONDENT

2. MARGARET MUTHONI.....2ND RESPONDENT

RULING

1. The application for determination is the **Notice of Motion** application dated **18th December, 2020**. It is brought at the instance of the Appellants pursuant to the provisions of **Order 42 Rule 6, Order 51 Rule 1** both of the **Civil Procedure Rules** and **Sections 1A,1B,3A & 63(e)**, all of the **Civil Procedure Act Cap 21** and **Rule 3** of the **High Court Practice and Procedure Rules**.

2. The **1st** Appellant is now deceased and I will consider the application to be canvassed by the **2nd** Appellant who I shall refer hereto as the Applicant.

3. The **Motion** seeks, in the main, stay of execution of the Judgment in **Mombasa CMCC No.2207 of 2019** and consequently the Ruling of that court delivered on **27th November, 2020**, pending the hearing and determination of the Appeal lodged herein. The Applicant also seeks costs of the application.

4. The reasons given by the Applicant are on the face of the application and further reiterated in her own **affidavit** sworn on the **18th December, 2020**. She averred that on **27th November, 2020**, the trial court delivered a **Ruling** dismissing the Applicant's application which sought an ex-parte default Judgment to be set aside. That default Judgment was for a tune of Kshs.2,000,000/= and the Applicant is apprehensive that the Respondents may at any time move to execute and occasion substantial loss to her and even render the appeal herein nugatory as the Respondents are of unknown means. She avers that at the time of the accident which led to the litigation herein she had no custody or control of the subject motor vehicle and that ground alone makes the Appeal arguable with high chances of success. Secondly, she grieves for having been condemned unheard and asserts that she was never served and unlike her, the Respondents will not be prejudiced if the orders sought are granted.

5. The Response to the **Motion** is vide a **Replying Affidavit** that the **1st** Respondent swore on **13th January, 2021**. She asserts that the Applicant has not satisfied the threshold for grant of stay as provided for under **Order 42 Rule 6** of the **Civil Procedure Rules** for failing to show what substantial loss she would suffer or in any case offer to provide security as a condition for stay and performance of the decree under question. She added that prior to the filing of the lower court suit, a search was conducted and it was revealed that the Applicant was the registered owner of the subject motor vehicle and service was effected to both Appellants by way of substituted service. That although the **1st** Appellant entered appearance, it was stated that the **2nd** Appellant neglected and failed to entered appearance. The lower court case then proceeded as against the **1st** Appellant and at some point the trial court presided by Hon. Odenyo entered **Judgment** on **29th September, 2012** but the same was set aside on application by the **1st** Appellant and the case was again heard *de novo* before the late Hon. R. Kirui. The case was however re-heard again before the Hon. Kyambia wherein the Judgment which the **2nd** Appellant now seeks to set aside was delivered.

6. The **2nd** Appellant/Applicant however filed an application seeking to set aside the Judgment entered by Hon. Kyambia and even attached a draft statement of defence therein but the application was dismissed on ground that the defence raised no germane trial issues and further, that the court was satisfied that the service of summons was proper. As such, the Respondents aver that the trial was proper and there was no issue of mistrial here hence have urged the court to dismiss the application with costs. Attached to the **Replying Affidavit** are several

documents including two affidavits which the Respondents filed in the lower court suit reiterating the grounds advanced in the present affidavit, a postage receipt showing that the Applicant had been served on several occasions in relation to the matter before the lower court and lastly a search showing records from the **Kenya Revenue Authority** which indicate that the Applicant was the owner of the subject motor vehicle.

7. Directions were taken on **2nd February, 2021** for disposal of the **Notice of Motion** by way of written submissions and both sides have complied by filing their respective submissions. The ones by the Applicant were filed on **11th February, 2021** whilst the Respondents filed theirs on **2nd March, 2021**. When the matter came up for highlighting, counsel for the parties opted to rely on the submissions as filed. I have benefitted from reading the submissions whose gist reiterates the pleadings and the opposing position taken by the parties as summarized herein above and I need not to duplicate the same here.

ANALYSIS AND DETERMINATION

8. Having considered the application and the response thereof as well as the submissions of both parties, I find that the only issue in contention is whether this court can exercise its discretion to grant stay orders pending the determination of the Appeal herein.

9. Stay of execution pending an appeal is governed by **Order 42 Rule 6** of the **Civil Procedure Rules**. The power to grant an application for stay of execution pending appeal is a discretionary one where sufficient cause must be shown being *that the applicant may suffer substantial loss; the application is made without unreasonable delay and on provision of such security as the Court may impose*. These three conditions in my view must be met simultaneously. However, in exercising its discretion in deciding whether to grant or refuse an application for stay of execution pending appeal, the court has to balance the interests of the Appellant with those of the Respondent. (See **M/S Portreitz Maternity -vs- James Karanga Kabia Civil Appeal No.63 Of 1997**).

10. The above notwithstanding, I have not lost sight to the fact that the subject of the application under consideration seeks stay for both the default Judgment entered in the lower court suit as well as the **Ruling** delivered by that court on **27th November, 2020**. I will first address on the Ruling before considering on merit whether the stay can issue as regards the execution of the default Judgment.

11. I have read through the **Ruling** delivered on **27th November, 2020** and established that its effect was dismissing the Applicant's **Notice of Motion** application dated **21st August, 2020** with costs. In my view, that Ruling was a negative order incapable of being stayed as the Applicant seeks. Simply put, this court cannot grant stay on an order dismissing an application because there is nothing to be executed in that Ruling. The Ruling did not direct any of the parties to do or to refrain from doing anything or to pay any sum that can be stayed by this court.

12. This could have been the end of my discussion in this Ruling. However, I will then proceed to consider whether stay of execution can be granted in relation to the default Judgment entered against the Applicant vis-à-vis the three prerequisite conditions for stay outlined above. Needless to say, it is worth-noting that the Judgment was not annexed by any of the parties hence I am unable to tell the reasoning of the trial court or what is entailed in the said Judgment save for the statement of the Applicant under **paragraph 5** of the **Supporting Affidavit** where she avers that there is imminent danger of execution for Kshs.2,000,000/=.

13. On the issue of substantial loss, the Applicant has argued that if stay is not granted, he will suffer prejudice and loss if the Respondents, who are of unknown means initiate the execution process and even render the Appeal nugatory. He further added that the Appeal is an arguable one with high chances of success. What I understand the Applicant to be insinuating is that the Respondents are unlikely to repay the decretal sum in the event of a successful Appeal.

14. On the other hand, the Respondents' contentions are that the Applicant has not shown the substantial loss he is likely to suffer if stay is not granted. However, they have not responded to the fears as regards their source of income.

15. My understanding of the law is that in view of the Applicant's apprehension over the Respondents' financial muscle, the Respondents were under a duty to dispel this fear by showing their means or otherwise clear the air on their capability to refund the decretal sum should they lose at the appeal. Quite unfortunately, the Respondents did not even respond on this issue leave alone filing any **Affidavit of Means** thereby leaving this court with nothing to look at in determining its financial standing.

16. The same position was taken in the case of **National Industrial Credit Bank Ltd -vs- Aquinans Francis Wasike, Court of Appeal Civil Application No.238 of 2005**, wherein the Court of

Appeal held:-

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once 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.”

17. In the circumstances, and in line with the Court of Appeal's decision in the above case, I am satisfied that on a balance of probabilities that the Applicant is likely to suffer substantial loss if stay is not granted and subsequently execution kicks off.

18. Secondly, on whether or not the application was brought without undue delay, I am satisfied that there was no delay since the **Memorandum of Appeal** was filed within time as well as the present application.

19. Lastly, as regards security, although the Applicant deponed that there is a likely execution for the sum of Kshs.2,000,000/=, he submitted that that the power to order a party to furnish security is to be exercised with great caution because at the time when it is exercised, the dispute has not been determined in one way or the other, on merit. He laid much emphasis on his right to be heard by contending that he was condemned unheard and the lower court case proceeded without his knowledge and participation for more than 11 years. The Respondents on the other hand maintained that the Applicant is duty bound to deposit security owing to the fact that the case was filed way back in the year 2004.

20. It seems to me that the Applicant heavily relies on the subsisting objective of the court to oversee justice and render a fair trial. However, the Applicant fails to realize that it is in the same mandate of upholding justice by requiring him to deposit security that the court has to evenly balance the rights of both parties. It is noteworthy that a litigant who has lost his case (as the Applicant herein) has a right to appeal against the findings of the court all the way to the apex court if need be. It must also be understood that until and unless the Judgment/Decree has been set aside by the superior court, it remains in force capable of being executed. The Courts therefore must balance the two competing interest of the decree holder and that of the Appellant.

21. In the case of **Arun C Sharma –vs- Ashana Raikundalia T/A Rairundalia & Co. Advocate,s** Justice Gikonyo stated that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the Judgment debtor..... Civil process is quite different because in civil process the Judgment is like a debt hence the applicants become and are Judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

22. In the end, I wish to reiterate that the need to furnish security is not to punish the Applicant but to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. Once a Judgment is entered, the unsuccessful party remains indebted in the sums indicated in the Judgment and is bound to settle the same. Therefore, to balance the rights of both parties pending appeal, the security to be deposited by an Applicant must be one which can serve that purpose.

23. In the resultant, an order of stay of execution of the **Judgment** in in **Mombasa CMCC No.22o7 of 2009**, pending the hearing and determination of the Appeal herein is hereby granted on the following

conditions:-

a) The Appellant/Applicant do deposit the decretal amount of Kshs.2,000,000/= as security in an escrow interest earning account in the joint names of the Counsel on record for Appellant and the Respondents.

b) The said amount to be deposited within thirty (30) days from the date hereof.

c) Failure to comply with orders (a) and (b) above, the stay order hereby granted will stand discharged and the Respondents will be at liberty to execute.

d) Costs of the application shall be in cause of the Appeal.

It is hereby so ordered.

SIGNED, DATED and DELIVERED VIRTUALLY at MOMBASA this 24th day of JUNE, 2021.

D. CHEPKWONY

JUDGE

In the presence of:

Mr. Mutigi for both Respondents

No appearance for Applicant

Court Assistant - Bancy