



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 133 OF 2007

1. JOACHIM VON STACKELBERG

2. YOLANDA FIRTH.....PLAINTIFFS/APPELLANTS

VERSUS

SYLKE OBST.....DEFENDANT/RESPONDENT

RULING

1. The Application for consideration before this court is the Appellant's **Notice of Motion** dated the **11th November, 2020**. The same is expressed to be brought under **Sections 1A, 3A and 63 (e)** all of the **Civil Procedure Act** and **Order 42 Rule 6** and **Order 51 Rule 1** both of the **Civil Procedure Rules 2010, Laws of Kenya** and all other enabling provisions of the Law and seeks the following orders: -

a) Spent;

b) Spent;

c) THAT pending the hearing and determination of the intended Appeal, this Honorable Court be pleased to grant stay of execution of the Judgment/decree delivered on the 6th November, 2014 and all consequential orders arising therefrom and/or until further orders from this Honorable Court;

d) THAT this Honorable Court be pleased to make such orders as may appear to be fit and convenient to meet the ends of justice.

e) THAT the cost of this application be provided for.

2. The **Motion** is supported by the grounds presented on its body and the **Affidavit of Yolando Firth**, the 2nd Applicant/Appellant. She has averred that a Judgment was delivered on **6th November, 2014** against herself and the 1st Applicant/Appellant. That on the **17th November, 2014**, they filed an application for leave to Appeal before the Court of Appeal which is pending hearing and determination but the Court of Appeal in return ordered for empanelment of a three (3) Judge bench to hear the Appeal which is yet to be done. It

3. She further deponed that on **6th November, 2020** the Defendant/ Respondent proceeded to her premises being both her place of business and dwelling and attached both moveable and immovable property with a defective **Proclamation of Attachment Notice** which only gives **seven (7) days' Notice** as compared to the required **ten (10) days' Notice**. In addition, the **Proclamation of Attachment Notice** is said to not have stated the estimated value of the moveable items proclaimed, and therefore contrary to the provisions of the law. The Proclamation Notice is further faulted for failing to attach the subject order and consequently described as irregular for not following the laid down procedure in law and thus the Defendant/Respondent should be precluded from proceeding with any execution grounded on the proclamation.

4. The deponed further argued state that they have an arguable and highly meritorious Intended Appeal with overwhelming chances of success and interest of justice would only demand that a stay of execution pending the Appeal be granted.

5. The application is opposed by the Respondent and in doing so filed **Grounds of Objection** and a **Replying Affidavit** both on **14th December, 2020**. The Replying Affidavit was sworn on even date, by **Sylke Obst** the Defendant herein and she has asserted the view that the Applicants have not made an application for extension of time for filing the Notice of Appeal pending before the High Court and the **Civil Application No.29 of 2016** mentioned by the Applicants was dismissed on **25th November, 2016**.

6. It was further deponed that contrary to the Applicant's averments that they should have been issued with 10 day notice, **Rule 12(1) (c) of the Auctioneer Rules, 1997** provides for seven (7) days' notice to the owner of the goods to be attached. And in addition, the **Proclamation Notice** indicates the values of the goods against the allegations made by the Appellants.

7. According to the Respondent, a decree in his favour for a sum of Kshs.19,320,000/=but the Applicants/Appellants have not offered any security in performance of the decree and if execution proceeds and the intended appeal succeeds, then she will be able to refund the decree sum from her hotel business in Ukunda or from the prime parcels of lands she owns. In addition, the Respondent deponed **that the application herein has been filed after inordinate delay of six (6) years after delivery of the Judgment.**

8. The above averments are reiterated in the Grounds of Opposition with an addition that the Applicants have not shown any substantial loss they are likely to suffer and this court cannot assume an appeal to be filed within the meaning of Order 42 Rule 6(4) of the Civil Procedure Rules without a valid appeal already filed under Rule 75 (2) of the Court of Appeal rules. It is on these grounds that the Respondent described the instant application as frivolous and sought the court to dismiss it.

9. Following the directions given by the court, the application was disposed of by way of written submissions. Parties dutifully obliged with the Applicants filing their submissions dated the **3rd February, 2021** on **4th February, 2021** whilst the Respondent's submissions dated the **9th March, 2021** were filed on even date.

Applicant's Submissions

10. The gist of the Plaintiff/Applicant's submissions is that the former advocate on record mistakenly filed a Notice of Appeal out of the prescribed time and those mistakes should not be visited on them. Nonetheless, an application for extension of time for filing the Notice of Appeal was launched before the Court of Appeal and was presided over by a single Judge who dismissed the application and thereafter the Applicants wrote letters on several occasions to the Court of Appeal requesting that the application be reconsidered and be heard by a full bench of three Judges. Since then, the Applicants avers that they have never received any feedback and the power to constitute a full bench is beyond their control hence the delay exhibited. Lastly, it is argued that the intended full bench hearing will be rendered nugatory and/or overtaken by events if the stay orders are not granted.

Respondent's Submissions

11. On part of the Respondent, three main issues were isolated for determination. They as follows;

- a) Whether the Plaintiff has a valid or competent appeal upon which a stay may be anchored;*
- b) Whether the Plaintiff has satisfied the conditions for grant of stay of execution; and*
- c) Whether the proclamation of the plaintiff's property was irregular.*

12. On the first issue, it is submitted that vide the Judgment made on **6th November, 2014**, the Plaintiffs were inter alia ordered to pay the Defendants Kshs.23,000,000/= but the notice to appeal was never effectively filed and was dismissed vide a Ruling delivered on **25th November, 2016** by the Court of Appeal. As such it is argued that there is no competent Notice of Appeal in which the intended appeal can be anchored as stipulated under **Rule 75(2) of the Court of Appeal Rules**. Similarly that a competent Notice of Appeal is the first prerequisite to granting stay under **Order 42 Rule 6** of the **Civil Procedure Rules** and if that is not the case, the court lacks jurisdiction to make an order of stay and should forthwith down its tools. To buttress that line of argument, reliance was placed in the cases of **Multi Choice Kenya Ltd –vs- Wananchi Group (Kenya) Limited & 2 Others [2020]eKLR** and **Nairobi City Council –vs- Resley [2002] 2 EA 493.**

13. On whether the Applicants had met the conditions for stay, the Respondent took issue with the appellant's failure to furnish any security in the sum of decretal amount, establishing substantial loss and not explaining the delay thoroughly contrary to **Order 42 Rule 8(2)** of the **Civil Procedure Rules, 2010**. As such the Applicants never discharged their onus to show that they have complied with **Order 42 rule (6)** for the orders sought to be granted. In any event, it was argued that the Respondent is a woman of resources owning prime plots and could adequately compensate the Applicant.

14. The last issue was on whether the **Proclamation Notice** was irregular. Here it was submitted that the **Proclamation Notice** is regular and was issued by an auctioneer who is not party to this suit hence caution should be taken to avoid condemning the auctioneer unheard against the rules of natural justice. Reliance was placed in the case of **Kosar Sultan –vs- Khalid Iqbal [2017] eKLR.**

Analysis and determination

15. I have carefully considered the Applicants' application, the affidavits sworn in support and rebuttal thereof, the Respondents grounds of opposition and the parties' respective submissions. The following issues arise up for determination;

- a) Whether the Applicants have made up a case for stay of execution orders to issue;*
- b) Whether the Proclamation Notice dated 6th November, 2020 was irregular, but first, whether the court has the jurisdiction to address that issue; and*

c) What appropriate orders should the court make in the interest of Justice.

16. This application is premised on **Order 42 rule 6** of the **Civil Procedure Rules, 2010** which specifies the circumstances under which either the trial court or an appellate court may order stay of execution of a decree or order pending an appeal.

17. **More specifically, Order 42 Rule 6(2) enjoins an Applicant invoking it to satisfy the court that he/she stands to suffer substantial loss if stay is not granted the stay, that the application had been filed without unreasonable delay and lastly, that he must show that he was willing to offer such security as may be ordered by the court.** However, I must hasten to add here that the conditions set out in **Rule 6(2)** only serve as guidelines which the court can use as beacons in exercising its unfettered discretion in deciding whether or not to grant stay of execution pending appeal depending on the circumstances of each case.

18. The case at hand espouses unique and worrying circumstance but in the end the court will endeavor to balance the interest of both parties fairly. I will not delve in the deep history of this matter at this stage since that has well been capture in the parties pleading and summarized earlier in this Ruling.

19. Nonetheless, the Applicants' case is that the substantial loss will be occasioned upon them in that the intended appeal will be render nugatory, be overtaken by events and be made a mere paper Judgment. Nonetheless, the Applicants do admit that there has been a delay of 6 years in pursuing the appeal and the delay thereof attributed to reluctance by the Deputy Registrar of the Court of Appeal in advising on the formation of full (three) bench to reconsider or otherwise review the Ruling delivered on **25th November, 2016** by a one Judge of the same court dismissing an application for extension of time for filing the Notice of Appeal. The Applicants added that unless the said bench is formed to revise the Ruling, then the intended appeal cannot be launched until then.

20. The Respondent on other hand was of completely different view. She submitted that the Appellants were directed on **6th November, 2014** to pay her Kshs.23,000,000/= from the date of transfer of the subject suit premise and no competent Notice of Appeal was ever filed to warrant the stay of that Judgment. That notwithstanding, the Appellants had not satisfied the grounds for stay under **Order 42 Rule 6** of the **Civil Procedure Rules**.

21. It can be gain said that an appeal from this court to the Court of Appeal has to be preceded by a Notice of Appeal filed within 14days of the delivery of the impugned Judgment. A party may however apply extension of such period either before the trial court or the appellate court. Since there is no such Notice of Appeal in the instant case, the Respondent submitted that the court cannot grant the orders of stay being sought since the Notice of Appeal is precondition to granting of any stay orders. However, in my humble view, this does not mean that the court's hands are tied, the court can issue and appropriate and just order depending on the circumstances of each case. This takes me to the next point on whether stay orders can be issued.

22. Beginning with '**substantial loss**', this was defined in the case of **Sewankambo Dickson –vs- Ziwa Abby HCT-00-CC MA 0178 of 2005** as follows;

“...substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal...insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals –especially in a Commercial Court, such as ours, where the underlying transactions typically tend to lead to colossal decretal amounts”.

23. While it is true in this case that execution would stifle any possible appeal by the Appellant it is unclear at what point the Applicants will ever obtain leave for filing the Notice of Appeal the same having been denied at first instance by the Court of Appeal. The Applicant merely clinches on its efforts to obtain orders for review before a three Judge bench. However, in my view, there would be no difference between a one Judge bench correctly exercising the correct jurisdiction from a three Judge bench exercising the similar jurisdiction. However, I preserve any comments beyond that as issue will be within the purview of the Appellate Judge if indeed the Applicant will properly move the superior court. What I can say next is that assessing substantial loss does not necessarily depend on the Respondent's financial muscle to repay the decretal sum and any consequent costs thereof. Money would not be a better compensation in certain circumstance, say for example when a Defendant is allowed to sell Plaintiff's matrimonial home and the Plaintiff successfully challenges the subject Judgment, it would be difficult if not impossible for the Plaintiff to obtain a similar house at the same costs as it was sold and at the same place such is the Applicant's case herein.

24. As for the delay for 6 years exhibited, the Applicants submitted that the same was beyond their control and wholly on part of the Deputy Registrar for the Court of Appeal. The Respondents on the other hand insisted that the reasons advanced were never sufficient to warrant any stay to be granted. I have perused the court file and have indeed seen the correspondences, the last one having been sent on **13th December, 2019**. In an as much as I agree that the Respondent should not be kept away from the fruits of her Judgment, the Applicants have a corresponding right for information in form of response or further directions as regards their inquiries. Had this happened I believe there would not be an issue for delay in this matter.

25. Lastly, on whether the Applicants have offered any security, it is true that the Applicants never commented on it and the Respondent was adamant in submitting that unless security is offered, an order for stay can never issue. Being an application for stay, in my humble view, the main consideration is the need to balance the competing interests of the parties in the litigation. The Decree Holder's crystalized right to enjoy the fruits of a successful litigation which ought not to be disregarded unless there exist viable reasons to vis-à-vis the Judgment Debtor/Appellant equally important right to appeal.

26. An equilibrium can be reached by directing that the decretal sum be deposited in a joint account to safeguard those rights. In this case the Appellant has however showed displeasure on the Proclamation Notice and submitted that it could not be executed since it is defective. The Respondent disputed the Applicants view by submitting that the court had no jurisdiction to consider such an invite because the auctioneer is not a party to these proceedings and could be condemned unheard. In my view, for the Respondent argument to stand depends on whether

the auctioneer as an agent of the Respondent complied with **Rule 12(1)(b)&(c)** of the **Auctioneers Rules** which stipulates thus;

12 (1) Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock—

a)

b) prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect.

c) in writing, give to the owner of the goods seven days notice in Sale Form 3 of the Schedule within which the owner may redeem the goods by payment of the amount set forth in the court warrant or letter of instruction.

27. Having read through the Proclamation Notice dated **6th November, 2020**, I am satisfied that it only complied with **Rule 12 (1)(c)** in issuing the 7 days Statutory Notice. In the same note it is evidently clear that the Applicants were wrong in alleging that the Proclamation Notice had to give 10 days notice.

28. As regards **Rule 12 (1)&(b)**, the auctioneers filled the Schedule S in the Sale Form 2, as follows,

No.	Item	Particulars	Values	Remarks
		Restaurant chairs and table both in the cottages	To be determined at the date of auction	
		Land sitting on the restaurant/cottages	1,000,000/=	
		Any other attachable available		

29. The complacent manner of the auctioneer in which he filed the sales form as reproduced above hardly met the statutory threshold. The wording of **Rule 12(1)(b)** is that “*the value of specific items and the condition of each item,*” should be set out by the auctioneer. The auctioneer, casually stated that there were proclaimed chairs and tables without stating how many they were, without describing their condition and failed to specify their value as required. He further described other goods as “any other attachables” **contrary to Rule 12(1)(b)**. Therefore any subsequent execution would be flawed with impropriety.

30. In the case of **Lakeland Motors Limited –vs- Harbhajan Singh Sembi [1998]eKLR**, the Court of Appeal held;

“There does not appear to be any provision in the Auctioneers Act, 1996 nor in the Auctioneers Rules, 1997 for dispensing with the foregoing rule [Rule 12 (1)(b) of the Auctioneers Rules] . Yet the respondent proceeded to execute the decree and physically attach the applicant's movable goods without complying with the said rule. The flagrant disregard of the provisions of this rule smacks of gross irregularity in the respondent's execution process of the decree of the superior court in Civil Case No. 227 of 1997. It would be an abuse of the process of this Court if we were to countenance such an execution. (emphasis added)

31. From the foregoing authority, I disagree with the Respondents submissions that this court lacked jurisdiction to consider the validity of the Proclamation Notice least the auctioneers who is not party to this suit would be condemned unheard. Firstly, I have already stated that the auctioneer is an agent of the Respondent and both had duty to comply with the law. Secondly, the failure to comply with the **Auctioneers Rules** marred the entire proclamation and any the execution thereof would be an unlawful process. Thirdly, the inherent jurisdiction of the court is that which enables it to fulfil itself, properly and effectively, as a court of law. In exercise of that power the court has a duty to otherwise prevent what would otherwise amount to abuse of court process. In the same vein, I respectively depart from the **Kosar case (supra)** cited by the Respondent and in doing so I rely on the Court of Appeal case of **Kenya Power & Lighting Company Limited –vs- Benzene Holdings Limited t/a Wyco Paints [2016] eKLR**, where the court put it beyond doubt that the power of the court wide and unfettered in the following words:-

“This inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice”.

32. In the upshot, and for the reasons stated hereinabove, the following orders do hereby issue;

a) The Applicants directed to move the court with the proper application to addresses their contentions on the issue of Notice of Appeal within 30 days from the date hereof.

b) A stay of any execution is granted pending the directions the Court of Appeal may grant. The stay will last for ninety (90) days unless otherwise extended by the Court of Appeal.

c) The Respondent is directed to advise his auctioneer in the terms of this Ruling and thereafter be at liberty to file a proper proclamation subject to order (b) above.

d) Each party shall bear its own costs.

It is hereby so ordered

DATED and SIGNED AT MOMBASA THIS 26TH DAY OF JULY, 2021.

D. O. CHEPKWONY

JUDGE

DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF JULY, 2021.

A. ONG'INJO

JUDGE