



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 267 OF 2005

MICHAEL WAIHENYA.....PLAINTIFF

-VERSUS-

BAOBAB BEACH RESORT MOMBASA LIMITED

T/A BAOBAB BEACH RESORT.....DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 8th September, 2020 brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 and Orders 42 Rule 6 and 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The defendant seeks the following orders -

i. Spent;

ii. Spent;

iii. Spent;

iv. After the said *interpartes* hearing of this application this Court be pleased to grant a stay of execution of the judgment and decree of the Honorable Court rendered on 8th May, 2020 pending the hearing and determination of the defendant's/applicant's appeal;

v. This Honourable Court do grant such further orders as it deems necessary and expedient in the circumstances; and

vi. An appropriate order be made for costs of this application.

2. The application has been brought on the grounds on the face of the application and is supported by an affidavit sworn on 8th September, 2020 by Silvester Mbandi, the defendant's General Manager. The plaintiff on 23rd September, 2020 filed a replying affidavit sworn on the same day by Gikandi Ngibuini, the plaintiff's Advocate.

3. The application was canvassed by way of written submissions. The law firm of Gikandi & Co. Advocates on 19th October, 2020 filed the plaintiff's submissions after the defendant's Counsel failed to file written submissions for the defendant within the timelines given by this Court. On 12th November, 2020, the defendant's written submissions were filed by the law firm of Daly & Inamdar Advocates.

4. Mr. Kinuthia, learned Counsel for the defendant submitted that the applicant herein seeks orders for stay of execution pending the hearing and determination of the intended appeal in the Court of Appeal, whose draft memorandum of appeal was filed together with the application. He relied on the case of **G.N Muema P/A (sic) Mt View Maternity & Nursing Home v Miriam Maalim Bishar & another** [2018] eKLR, where the High Court referred to the case of **Kenya Commercial Bank Limited v Sun City Properties Limited & 5 others** [2012] eKLR, in reiterating the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules and stated that an applicant must demonstrate that substantial loss may result unless the order is made and that an application for stay of execution has been made without unreasonable delay.

5. On the issue of substantial loss, Mr. Kinuthia relied on the case of **G.N Muema P/A (sic) Mt View Maternity & Nursing Home v Miriam Maalim Bishar & another** (supra) where the Court held that it is sufficient for an applicant seeking stay of execution to demonstrate that it would go through hardship such as instituting legal proceedings in the event of a successful appeal, to recover the decretal sum paid to a respondent. It was submitted by Mr. Kinuthia that the plaintiff had not demonstrated by way of evidence that he was capable of refunding the decretal sum thus the defendant stands to suffer substantial loss in the event the orders sought are not granted.

6. Mr. Kinuthia submitted that substantial loss is two fold, the capability or lack thereof of the defendant to raise the entire decretal sum at this very point such that should the Court refuse to grant the stay and allow the plaintiff to execute the contested decretal sum, the damage that would be in the immediate payment of the money might be so severe that the defendant may never recover from it, even if the money were to be refunded in the event of a successful appeal.
7. The defendant's Counsel stated that the other aspect is that if this Court orders the release of two-thirds of the entire decretal sum, which principal sum the defendant is ready to deposit as security, it will cause a substantial loss to the defendant in the event the appeal will be successful and the plaintiff incapable of refunding the money. Mr. Kinuthia relied on the case of **National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another**, Nairobi Civil Application No. 238 of 2005 as quoted in **Stanley Karanja Wainaina & Another v Ridon Anyangu Mutubwa** [2016] eKLR, where the Court of Appeal held that once an applicant expresses doubt that a respondent would be able 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.
8. On the authority relied on by the plaintiff's Counsel, Mr. Kinuthia stated that in **Kenya Shell Co. Ltd v Benjamin K. Kibiru** [1986] KLR 410, the Court held that there was no evidence that the respondent would not repay the decretal sum in the event the appeal was successful since he had proved to Court that he was a man of means and would be in a position to repay the decretal sum should the appeal succeed. He stated that the duty of this Court is as much as possible to balance the interests of the parties by looking out for the plaintiff's interest with regards to his entitlement to the decretal sum while at the same time ensuring that should the appeal succeed, it will not be rendered nugatory by an earlier payment made to a party incapable of paying it back. He therefore submitted that the plaintiff's failure to satisfy the evidential burden of proof is sufficient for the Court to grant the orders sought for stay of execution.
9. On whether the present application has been made without unreasonable delay, Mr. Kinuthia relied on the case of **Focin Motorcycle Company Limited v Ann Wambui Wangui & another** [2018] eKLR, where the Court when dealing with a similar application stated that having filed the appeal within the stipulated time and in view of the explanation offered, a delay of two months cannot be said to be unreasonable. He submitted that the defendant herein applied to the Court of Appeal seeking an extension of time and for its Notice of Appeal lodged on 26th May, 2020 to be deemed as being properly on record. He further submitted that just before judgment was rendered in this matter, the parties had to partially reconstitute the Court file long after the defendant's submissions had been filed in 2016. He submitted that the plaintiff's inference that the delay in disposal of the instant suit was attributed to the defendant's conduct was misleading to this Honourable Court.
10. On the issue of deposit of security, Mr. Kinuthia submitted that the defendant was ready to deposit the principal award in damages in an interest earning bank account in the joint names of the parties' Advocates as security for the due performance of the decree. He stated that the overwhelming bulk of the judgment award comprises the award of interest. To this end, Counsel for the defendant relied on the case of **Lee G. Muthoga v Habib Zurich Finance Limited & another** [2016] eKLR, where the Court of Appeal declined to award interest for half the period of the delay on the ground that the normal period for the disposal of the suit should not have been so lengthy therefore the parties should be in *pari causa* in relation to the period of delay caused by the Court.
11. Mr. Kinuthia submitted that the Court awarded the plaintiff interest from the date of the filing of the suit till payment in full thus in the event that the defendant is required to pay all the interest as part of the security for due performance, it stands to suffer loss on account of delays occasioned by the Courts and the plaintiff who failed to prosecute his matter with due diligence. He thus urged that for deposit of security for due performance of the decree, the Court ought to be guided by the fact that the suit was filed on 13th December, 2005 and judgment delivered on 8th May, 2020, which culminates in a delay of over 14 years in the disposal of the suit. The defendant's Counsel contended that it would be unfair to penalize the applicant to pay the entire decretal sum inclusive of all interest as security.
12. He cited the case of **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another** [2015] eKLR, in which the Court of Appeal allowed an application for stay of execution on condition that the applicant deposits only the principal sum as security. He urged this Court to allow the present application with costs to the defendant.
13. Ms. Murage, learned Counsel for the plaintiff submitted that the suit was filed in the year 2005 and therefore any attempt to unduly delay the conclusion of the same will negatively impact on the overriding objective of the Court. She submitted that the defendant filed the Notice of Appeal out of time which is contrary to the provisions of Rule 74 of the Court of Appeal Rules and that there is no application seeking the Notice of Appeal to be deemed as being properly on record. She further submitted that the defendant only filed the present application after it was served with a hearing notice for the bill of costs. Reliance was placed on the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others** [2013] eKLR, where the Court held that a Notice of Appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not and that it is a jurisdictional requirement.
14. It was submitted by Ms. Murage that for one to plead substantial loss, they must demonstrate that the appeal shall be rendered nugatory if the orders for stay of execution are not granted but the same does not summarily apply for money decrees as the same can be paid back if the intended appeal succeeds. She relied on the case of **Kenya Shell Co. Ltd v Benjamin K. Kibiru** (supra), where the Court while determining an application for stay of execution held that in that case, the refusal of an order for stay of execution would not render the appeal nugatory as the case involved a money decree capable of being repaid.
15. Ms. Murage submitted that the burden of proof rests on he who alleges and it was not sufficient for the defendant herein to merely state that it would suffer substantial loss simply by paying the decretal sum to the plaintiff whom they believe is not capable of refunding the same in the event that the appeal was successful. She indicated that the appeal will proceed to its logical conclusion and in the event that it will be successful and the defendant will have paid the decretal sum to the plaintiff, the defendant like any other successful litigant will execute the decree against the plaintiff. She further submitted that every person is presumed innocent until his guilt is proven thus it is improper for the defendant to make unsubstantiated allegations as to the plaintiff's economic status since every litigant is assumed to be of sound economic status until his impecuniosity is proved.
16. The plaintiff's Counsel proposed the payment of the decretal sum by two-thirds of it including costs, being paid to the plaintiff within a

limited period of time and the remaining third to be deposited in a joint bank account in the names of the parties' Advocates. She relied on Order 42 Rule 6 of the Civil Procedure Rules, 2010 with regard to not denying a successful litigant the fruits of his litigation and in consonance with the fact that the suit has been pending for the past 15 years. Ms Murage also relied on the holding by Cotton LJ in **Wilson vs Church (No 2)** [1879] 12 ChD 454 at page 458, where he said that if it is shown that execution would render a proposed appeal nugatory, then a stay can properly be given. He also held that parallel to that is the proposition that a successful litigant should not be deprived of the fruits of a judgment in his favor without just cause.

17. The plaintiff's Counsel further relied on the case of **James Wangalwa & another v Agnes Naliaka Cheseto** [2012] eKLR, where the Court held that the issue of substantial loss is the cornerstone of both jurisdictions thus the applicant must show other factors which indicate that the execution will create a state of affairs that will irreparably affect the essential core of the applicant as the successful party in the appeal. Ms. Murage urged this Honourable Court to dismiss the application dated 8th September, 2020 with costs.

ANALYSIS AND DETERMINATION.

18. This Court has considered the application filed herein, the affidavit filed in support thereof, the replying affidavit by the respondent and the written submissions by Counsel. The issues which arise for determination are as follows-

i. Whether there is a competent appeal and/or Notice of Appeal filed before the Court of Appeal; and

ii. Whether the defendant has satisfied the requisite conditions to warrant grant of an order for stay of execution pending appeal.

19. In the affidavit filed by the defendant it deposed that judgment was delivered in this matter on 8th May, 2020 and the defendant was found liable for wrongfully terminating the plaintiff's tenancy. The plaintiff was awarded general damages in the sum of Kshs. 2,000,000.00 together with costs of the suit and interest thereon. The defendant being dissatisfied with the said judgment intended to contest the whole decision in the Court of Appeal. To this end, it filed a Notice of Appeal dated 26th May, 2020 and requested for a copy of the proceedings in the suit by way of a letter dated the same day.

20. The defendant averred that it believed that the intended appeal raises arguable grounds for determination by the Court of Appeal thus granting of the orders sought will advance its inalienable right to prosecute an effective appeal as recognized under Article 50 of the Constitution. It further averred that it is apprehensive that the plaintiff would commence execution proceedings for recovery of the entire decretal sum at any time unless the orders sought were granted in light of the fact that the temporary orders for stay of execution granted on 8th May, 2020 lapsed on 8th June, 2020.

21. The defendant stated that following the reports of the first case of the Covid-19 pandemic in Kenya and in compliance with the guidelines issued by the Ministry of Health to minimize its spread, its Advocates' law firm's partners decided to implement a change in office operations which saw most of the support staff proceed on compulsory leave. It further stated that the delay in filing the present application was not inordinate and was partly caused by an inadvertent lack of oversight to bring up their office file for preparation of the instant application within time and by the fact that Silvester Mbandi, the defendant's deponent tested positive for Coronavirus and was advised to self-isolate at home as from 9th August, 2020 until the 25th August, 2020, when a second test revealed that he had recovered from the virus.

22. The defendant deposed that it is willing to abide by any conditions that the Honourable Court may find just and equitable to issue as a condition for grant of an order for stay of execution including depositing the decretal sum in an interest bearing account in the joint names of both parties' Advocates.

23. The plaintiff in his replying affidavit deposed that the defendant filed the Notice of Appeal out of time and made the present application only after it was served with a notice of the hearing of the bill of costs. The plaintiff's contention is that that the defendant has filed this application with unwarranted delay and that it has not demonstrated with any credible evidence that the plaintiff would not be in a position to refund the decretal sum if the same was to be released to him and the appeal succeeds thereafter.

24. It was stated by the plaintiff that the defendant has also not demonstrated by any credible evidence at all that the intended appeal has any chance of succeeding. He deposed that the application herein should be dismissed and in the event the Court allows it, it should be on condition that the defendant releases two-thirds (2/3) of the decretal sum including costs to the plaintiff, within a limited period of time and the remaining third (1/3) to be deposited in a joint interest earning bank account in the names of the parties' Advocates.

Whether there is a competent appeal and/or notice of appeal filed before the Court of Appeal.

25. Judgment by the Trial Court was delivered on 8th May, 2020 in favour of the plaintiff against the defendant. The defendant being dissatisfied with the said decision, intended to lodge an appeal to the Court of Appeal. To this extent, the defendant filed a Notice of Appeal dated 26th May, 2020 and a letter requesting for a copy of the Trial Court proceedings dated 26th May, 2020. The law on appeals to the Court of Appeal can be found under Rule 75 of the Court of Appeal Rules, 2010. Rule 75(1) and (2) of the Court of Appeal Rules, 2010 provide as hereunder: -

“1. Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

2. Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”

26. In light of the above it is evident that a Notice of Appeal should be filed within fourteen days from the date of the judgment which the appellant seeks to appeal against. In the instant case, judgment was delivered on 8th May, 2020 which means that the defendant ought to have filed the Notice of Appeal on or before the 21st May, 2020 for it to be deemed as being duly filed. The Notice of Appeal referred to herein by the defendant was filed on 27th May, 2020. It was thus filed out of time. In its submissions, the defendant submitted that it had filed an application to the Court of Appeal seeking an extension of time and consideration of its Notice of Appeal lodged on 26th May, 2020 as being properly on record.

27. The application before me has been brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 which provide as hereunder -

“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 to 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”

28. It is trite that a party who seeks stay of execution pending appeal, must demonstrate the intention to appeal by lodging a Notice of Appeal within fourteen days of the date of the decision they intend to appeal against. In **Wavinya Ndeti v The Independent Electoral and Boundaries Commission (IEBC) & 4 others** [2013] eKLR the Court stated as follows-

“the application before the Court is a formal application. It is not an informal application made orally after delivery of the decision but a formal one constructed upon clear instructions to lodge an appeal. In my view there being no Notice of Appeal and any letter bespeaking proceedings in terms of the Court of Appeal Rules makes this application speculative at best and a non-starter.

I therefore find and hold that the intention to lodge an appeal has not been established as a preliminary fact. In the absence of such a demonstrated intention the court lacks jurisdiction to grant and order of stay of proceedings pending appeal.” (emphasis added).

29. The Supreme Court in **James Mbatia Thuo & Ephantus Mwangi v Kenya Railways Corporation & Attorney General of Kenya** [2018] eKLR when dealing with a similar issue held as follows-

“The Notice of Appeal was filed on 23rd December 2015, while the application for stay was lodged at the Supreme Court Registry on 15th May 2017; more than a year after the expiry of the statutory time provided for filing appeals. The applicants have not provided any reason for their failure to apply for an extension of time, which application, had it been granted, would have enabled them to file their appeal and thereby provided legal grounding for the rejected application for stay.

In the absence of an appeal, or an application for extension of time, accompanied by a memorandum of appeal, the rejected application had no legal basis. We therefore see no reason to interfere with, or upset the decision by the Honourable Registrar rejecting the application. (emphasis added).

30. In this instance, it is this Court’s finding that there is currently no competent appeal and/or Notice of Appeal before the Court of Appeal. In the absence of a valid, competent and/or duly filed Notice of Appeal, this court lacks jurisdiction to grant the prayers sought in a vacuum. It is my finding that the application before this Court is not only defective but also a non-starter and an abuse of the Court process. Having so found, it will be an academic exercise for this Court was to deal with the issue of whether or not the defendant has satisfied the requisite conditions to warrant the grant of an order for stay of execution pending appeal.

31. The upshot is that the application dated 8th September, 2020 is bereft of merit and the same is dismissed with costs to the plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 30TH DAY OF JULY, 2021. IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO THE COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020, THE RULING HEREIN HAS BEEN DELIVERED THROUGH TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Murage for the plaintiff

Mr. Kinuthia for the defendant

