



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISC. CIVIL CASE NO. 85 OF 2019

MARTIN MUTHEE.....APPLICANT

VERSUS

PATRICK MUCHIRI.....RESPONDENT

RULING

1. Before me is an application dated 6.12.2019 filed under certificate of urgency and wherein the applicant basically seeks orders of stay of execution of the judgment and the consequential orders of the Chief Magistrate in Embu Chief Magistrate's Civil Case No. 18 of 2017 delivered on 28.08.2019 pending the hearing and determination of the intended appeal; for leave to file an appeal out of time against the said judgment by the trial court and for the costs of the application to be in the cause.
2. The application is premised on the grounds on its face and further supported by the affidavit sworn by the applicant herein. The applicant's case is that the judgment was delivered but he has not been able to get copies of proceedings and judgment for the purposes of appeal. As such, the delay in filing the appeal was not intentional and the same is not inordinate. That the respondent may execute the orders of the lower court at any time and thus it's fair that there be a stay of execution and the applicant be allowed to file the appeal out of time. The applicant further deposed that he is ready to abide by any order issued by this court.
3. The application is opposed by way of a replying affidavit sworn by the respondent herein and wherein he deposed that the applicant has not demonstrated the substantial loss he is to suffer nor exhibited any appeal that has been filed. Further that if the court grants the orders of stay, the respondent would suffer substantial loss. Further that there has been a similar application dated 22.10.2019 seeking similar orders and which was dismissed on 20.11.2019 and that the applicant should be ordered to deposit Kshs. 140,000/- plus the costs from the date of filing of the suit until payment in full.
4. Directions were given that the application be canvassed by way of written submissions. However, the respondent did not file his submissions. The applicant submitted that he has not been supplied with the certified copies of the proceedings and judgment for the purposes of the appeal and hence there is danger of execution against him before he can file the intended appeal. Reliance was made on Order 50 Rule 6 of the Civil Procedure Rules 2010 on the powers of this court to enlarge time and section 79G of the Civil Procedure Act on filing of an appeal out of time. Further reliance was made on Order 42 Rule 6 of the Civil Procedure Rules on the conditions for grant of stay of execution pending appeal.
5. I have considered the application herein, rival responses and the submissions filed herein. As I have already noted, the applicant in his application of 22.07.2019 seeks stay of execution of the judgment of the lower court and further for the leave to appeal out of time against the said judgment.
6. I will start with the prayer for leave to appeal out of time since if the applicant has not satisfied the conditions for grant of leave to appeal out of time, there will be no need of considering the prayer for stay of execution.
7. When it comes to appeals from the subordinate court to the High Court, the applicable provision is Section 79G of the Civil Procedure Act which expresses that appeals of such nature must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. The proviso to the said section however allows for extension of time to appeal where good and sufficient cause has been shown.
8. Section 95 of the Act further bestows on this court the discretion to enlarge time. The said section provides as thus;-

“95. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

9. As such, extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so.

10. In exercise of that discretion, the court is supposed to take into account the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted. (See Leo Sila Mutiso –v- Rose Hellen Wangari Mwangi - Civil Application No. NAI 255 of 1997 (unreported) and Thuita Mwangi –vs- Kenya Airways Limited [2003] eKLR).

11. The question therefore is whether the applicant has satisfied the above conditions.

12. As for the length of the delay, it is not disputed that the judgment of the trial court was delivered on 28.08.2019. The application herein was filed on 06.12.2019 which is slightly more than three (3) months from the date of the said judgment. In the case of Jaber Mohsen Ali & Another v Priscillah Boit & Another E & L No. 200 of 2012 {2014} eKLR the Court stated that what is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after Judgment could be unreasonable delay depending on the Judgment of the Court and any order given thereafter. In the circumstances of the instant case, it is my view that the delay herein is not inordinate or excessive.

13. As for the reasons of the said delay, the applicant's case is that he failed to file the appeal in time for the reason that he was still waiting for certified copies of proceedings. He annexed a copy of the letter dated 28.08.2019 from the firm of Victor L. Andande & Co. Advocates to the Chief Magistrate requesting for the same. Though it is not clear whether the same are now ready, it is my considered view that the reason for failure to file the appeal within the legal time frame required by law is plausible and satisfactory.

14. As for the prejudice which the respondent stands to suffer should leave be granted for the applicant to file an appeal out of time, from the respondent's replying affidavit, I did not come across any credible evidence to indicate the prejudice that would befall him, that cannot be compensated by way of costs. It should be noted that the right to be heard is provided for in our constitution. The applicant having expressed his intention to be heard, it is paramount that he be granted the said opportunity.

15. For all the foregoing reasons, I am satisfied that it would be a proper exercise of my discretion to enlarge the time required for the applicant to file an appeal against the judgment and decree of the trial court. The prayer in that respect (prayer 4) is merited and the same is allowed. The applicant should file the appeal within 14 days of the ruling herein.

16. The prayer for leave to file an appeal having been allowed, this court will then proceed to determine the issue as to whether the orders of stay of execution pending appeal (prayer 3) ought to be allowed.

17. Stay of execution pending appeal is another discretionary power bestowed upon this court by the law. The Court of Appeal in the case of Butt –vs- Rent Restriction Tribunal {1982} KLR 417 gave guidance on how a court should exercise the said 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.”

18. The principles upon which stay of execution pending appeal can be allowed are now well settled from the authorities from this court and from the superior courts. Generally, stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules. Sub-rule 1 gives the court discretionary powers to stay execution which provides as follows:

“6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

(2) 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 undue 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.

19. As such, for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.

20. In the instant case, I have already found that the applicant has satisfied the requirement for leave to file the appeal out of time and that the delay was not inordinate. It is my considered view that the requirement is also settled in this respect. The application was timeously made having been brought three (3) months after the judgment of the trial court.

21. As for the applicants having to suffer substantial loss, in the case of **Kenya Shell Limited –vs- Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988)KAR 1018** the Court of Appeal pronounced itself to the effect that:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdiction for granting stay.”

(See also the case of **Machira T/A Machira & Co Advocates –vs- East African Standard (No.2) (2002)KLR 63**)

22. The applicant has a burden to show the substantial loss he is likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Appellant to his Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. {See the case of **Absalom Dora –v-Turbo Transporters (2013) (eKLR)**}

23. As F. Gikonyo J stated in **Geoffery Muriungi & another v John Rukunga M’imonyo** suing as Legal representative of the estate of **Kinoti Simon Rukunga (Deceased) [2016] eKLR** and which wisdom I am persuaded with:-

“...the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or “rendering the appeal nugatory” within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal.....”

24. I note that the decree whose stay of execution is sought is a monetary decree. The applicant deposed that the intended appeal will be rendered nugatory if the stay is not granted, In his written submissions, he submitted that he is apprehensive that if the orders of stay are not granted, he will suffer irreparable damage that cannot be compensated by any monetary value. Further that on several occasions, the respondent had threatened to execute the impugned judgment by attaching the applicant’s land which is his only piece of land and whereof he earns livelihood. That if the same is sold, he will be rendered destitute. He further submitted that he may be unable to recover his money in the event he is successful in the intended appeal as the respondent has not demonstrated that he is a person of means. As I have noted, the respondent did not file his submissions where he would have (maybe) controverted these assertions. In **Century Oil Trading Company Limited vs. Kenya Shell Limited Nairobi (2008) eKLR**, it was stated that:-

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment”.

25. It has been held by the courts that the applicant bears the legal burden to prove that substantial loss would occur. Further that mere claim that the respondent cannot refund the decretal sum is not sufficient. At least there must be reasonable grounds provided by the applicant to show that the applicant cannot make refund of the decretal sum; after which the respondent will be called upon to discharge his evidential burden. This is always in recognition that both parties have rights with the applicant having the right to appeal and the respondent having a right to enjoy the fruits of his judgment which must not be restricted or postponed except on a lawful and justifiable cause. The court as such has to balance these competing rights.

26. In the instant case, the applicant’s averments to the effect that the respondent has threatened to attach his only piece of land in execution of the decree was not substantiated or proved with for instance warrants of attachment having been issued by the court. I have perused the trial court’s record and I cannot trace such warrants of attachments. However, I note that despite the respondent having been served with the submissions, he did not file his own to dispute these averments. More so he did not submit or controvert the assertion that he is not a man of means.

27. From the depositions on record, it is more probable that the issue at hand calls for status quo pending the hearing of the appeal. Indeed if the respondent is left to execute the decree, it will complicate the situation further as the applicant if successful will have to commence other processes to seek refund of the decretal sum (or part thereof depending on the outcome of the appeal). I say so bearing in mind that the applicant has offered to abide with any orders issued by this court. In my view, such offer to abide with the orders includes offer to deposit security for the performance of the decree.

28. That being the case, and in balancing the rights of the parties herein, the balance tilts in favour of the applicant. The respondent will not suffer prejudice which cannot be compensated by way of costs as in most cases, costs are awarded to the winning party. If at all the respondent wins the appeal, the costs awarded to him will be a reasonable panacea to him for the period he shall have to wait so as to enjoy the fruits of his judgment. This is further bearing in mind that interests are also awardable. In my view, the applicant stands to suffer substantial loss if there is execution herein.

29. As to the applicant giving security for due performance of the decree, the applicant deposed that he is ready to abide by any order that the court might give and which in my view can only be taken to include the order that he deposit security for the due performance of the decree. The security must be one which can serve the purpose of guaranteeing due performance of such decree or order as may ultimately be binding on the applicant (See **Arun C Sharma vs. Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others [2014] eKLR**).

30. As such, the applicant having offered to provide security, it has satisfied the third condition for grant of stay of execution of the decree of the lower court. However, the security to be deposited must be one which serves the purpose of ensuring that there shall be due performance of the said decree.

31. In the end, the application is allowed in the following terms;

- 1) *That the applicant is hereby granted leave to file appeal against the judgment in Embu Cause No. 185 of 2017 out of time. The intended appeal to be filed within 21 days from today and to be prosecuted within 90 days from the date of the ruling.*
- 2) *That an order of stay be and is hereby issued staying the execution of the judgment and consequential orders of the Chief Magistrate in Embu CM's Civil Case No. 184 of 2017 delivered on 28.08.2019 pending the hearing and determination of the intended appeal.*
- 3) *That the applicant do deposit half (½) of the decretal sum in an interest earning account in the joint names of counsel for the parties within 30 days.*
- 4) *That failure to comply with order No. 3 above, the respondent shall be at liberty to execute the said judgment delivered on 28.08.2019.*
- 5) *That the respondent shall have the costs of the application.*

32. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF SEPTEMBER, 2021.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondents