



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram D. K. Kemei – J

CIVIL APPEAL NO. 3 OF 2020

ST MARY ACADEMY LIMITED....1ST APPELLANT/APPLICANT

MICHAEL MBURIA NAMISU.....2ND APPELLANT/APPLICANT

VERSUS

GRACE NJERI MUKORA.....1ST RESPONDENT

CYRUS MWENDIA2ND RESPONDENT

(Appeal arising from the ruling of Hon. (Mr.) E. Michieka (PM) at Mavoko Chief Magistrate's Court in CMCC NO. 1133 of 2013 dated the 18th December, 2019)

RULING

1. The Appellants vide their application dated 23/01/2020 sought for the following orders namely:-

1. (Spent).

2. (Spent).

3. That an order of stay of execution do issue in Mavoko CMCC No. 1133 of 2013 pending the hearing and determination of the appeal.

4. That costs herein abide in the appeal.

2. The application is supported by grounds set out on the face thereof as well as an affidavit by **Ephantus Mugo Mburia** a director of the 1st Appellant sworn on even date. The Appellants gravamen *inter alia* is that the lower court at Mavoko dismissed the Appellants application seeking for stay of execution following the Respondents illegally taking out warrants of attachment and sale of the 1st Appellants goods; that the 1st Appellant stands to suffer substantial loss; that the Application has been made without unreasonable delay and that the Appellants are ready to give such security as the court may order for the due performance of the decree; that the Respondents do not have the wherewithal to recompense the Appellants should the attached property be sold.

3. The application was strenuously opposed by the Respondents vide a replying affidavit of the 1st Respondent **Grace Njeri Mukora** sworn on 3/02/2020 who averred *inter alia*: that the Appellants application had been properly dismissed by the lower court for duplicity; that the prayers sought are misconceived as no appeal had been served upon the Respondents; that the claim of existence or interim orders is denied as same have not been served upon the Respondents; that in the event of the court granting the order then the decretal sums should be deposited into a joint interest earning account in names of both Advocates.

4. The Application was canvassed by way of written submissions. The Appellants submissions are dated 17/07/2021 while those of the Respondents are dated 12/07/2021.

5. It was submitted for the Appellants that they have fully complied with the conditions imposed under Order 42 Rule 6 of the Civil Procedure Rules and hence the court should proceed to grant the prayer sought.

6. It was submitted for the Respondents that the Appellants application has not satisfied the grounds for stay of execution. Learned counsel raised one issue for determination namely whether this court can issue an order of stay of execution on the basis of a negative order. It was submitted that a negative order is one which is not capable of being executed. The court was referred to its decision in the case of **Ann Namukhula Namulala –vs- Nicholas Mutuku & Another [2020] eKLR** where it held that the court has no jurisdiction to stay any action unless there is a positive order of court for something to be done or enforced. It was urged that the application should be dismissed with costs.

7. I have considered the application and the submissions filed herein. It is not in dispute that the trial court vide its ruling dated 18/12/2019 dismissed the Appellants application dated 11/10/2019 on the grounds that the orders sought for stay of execution of warrants of attachment were similar to an earlier application dated 4/07/2019 that had been determined. It is also not in dispute that the order of dismissal by the trial court was a negative one which is not capable of execution. That being the position, I find the issues for determination is whether the Appellants application has merit.

8. The Appellants main prayer is for an order of stay of execution pending determination of the appeal. The requisite conditions to be met by an Applicant seeking an order of stay of execution pending appeal are laid down in order 42 Rule 6(1)(2) of the Civil Procedure Rules 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 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 decisions 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 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.

9. I have perused the Appellant's Memorandum of Appeal dated 20/01/2020 which raises three (3) grounds of appeal against the trial court's ruling dated 18/12/2019 in which the Appellants application dated 11/10/2019 seeking for orders of stay of execution of warrants of attachment was dismissed on the ground that the same was similar to an earlier application dated 4/07/2019 that had been duly determined. Indeed, the aforesaid grounds of appeal indicate that the Appellants appeal is arguable. On the issue of whether the application was filed timeously, it is noted that the impugned ruling was delivered on 18/12/2019 while the present application was filed on 23/01/2020 which is a period of almost one month. I find there was no inordinate delay. On the issue of furnishing security for the due performance of the decree, it is noted that the Appellants have averred vide paragraph 28 of their supporting affidavit that they are ready and willing to furnish the same. That condition has thereby been met by the appellant. The last hurdle remaining to be surmounted by the Appellants is on the issue of whether they stand to suffer substantial loss if the order sought for stay is not granted.

10. The Appellants have maintained that they stand to suffer substantial loss if the Respondents are allowed to execute the decree and further that the Respondents are persons of straw who might not refund the decretal sums in the event of success of the appeal. The Appellants took issue with the Respondents failure to file a rebuttal regarding their economic status by disclosing their source of income if any.

11. The Respondents on their part have maintained that an order of stay of execution should not be granted and have gone ahead to raise a germane issue namely that the orders by the trial court were in the nature of negative orders which are not capable of being executed. They have urged the court to dismiss the Appellants application.

12. The trial court vide the impugned ruling had dismissed the Appellants application dated 11/10/2019 seeking for orders of stay of execution of warrants of attachment on the grounds that a similar application dated 4/07/2019 had been heard and determined. Hence, the order of dismissal of the application was a negative one which is incapable of execution unlike in the case of a positive order of the court directing for something to be done or enforced. This court in the case of **Ann Namukhula Namulala –vs- Nicholas Mutuku and another [2020] eKLR** held that the court has no jurisdiction to stay any action unless there is a positive order of court for something to be done or enforced and that even if the application in the trial court was refused, the court has no power to stay a negative order of dismissal of the application. The issue of negative order was also discussed by the Court of Appeal in the cause of **Ndungu Kinyanjui –vs- Kibicho Kugeria Services & Another – Civil Application No. NBI 79 of 2007** (unreported) when it held as follows:-

“This court has repeatedly stated in previous decisions that in an application under Rule 5 (2) (b) for stay of execution, where the court whose order is sought to be stayed has not ordered any of the parties to do anything, or to pay any sum there would be nothing arising out of that decision for this court to enforce or restrain by injunction:-

Again, in the case of **Kenya Commercial Bank –vs- Tamarind Meadows limited & 7 others [2016] eKLR** the Court of Appeal expounded on the issue of stay of execution as follows:-

“ 16. In Kamwal Sarjit Singh Dhiman –vs- Keshavji Jursaj Shah [2008] eKLR the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgement with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus a negative order which is incapable of execution save in respect of costs only (see western College of Arts & Applied sciences –vs- Oranga & Others [1976] 63 at page 66 paragraph c).”

17. The same reasoning was applied in the case of Raymond Omboga –vs- Austin Pyan Maranga that a negative order is one that is incapable of execution, and thus incapable of being stayed. This is what the court had to say on the matter:

“The order dismissing the application is in the nature of a negative execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the Respondent which is capable of execution of such an order..... The Applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the Applicant has lost. The refusal simply means that the Applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and/or the appeal being rendered nugatory does not arise”.

13. In light of the above authorities, it is clear that the dismissal of the Applicant’s application dated 11/10/2019 by the trial court was a negative order incapable of being stayed. The trial court dismissed the application with costs and hence the Applicant’s concern would be on the issue of costs and nothing else. There is no evidence that the Respondents have sought to extract a decree on the costs and attempted to execute the same. Hence, the Appellants fear of execution is premature and misplaced. I am not satisfied that the Appellant has shown that he will suffer any substantial loss or that the appeal will be rendered nugatory if the request for stay of execution is declined.

14. In the upshot, it is my finding that the Appellants application dated 23/01/2020 lacks merit. The same is dismissed with costs to the Respondents.

Orders accordingly.

DATED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER, 2021

D. K. KEMEI

JUDGE