



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL CASE NO. 4 OF 2021

MARGARET WARUI T/A

WANKEN DISTRIBUTORS.....1ST APPELLANT/ APPLICANT

PAUL K. OLE YIALLE T/A

NASIOKI AUCTIONEER.....2ND APPELLANT/ APPLICANT

-VS-

BOARD OF MANAGEMENT ABERDARE

TEACHERS TRAINING COLLEGE.....RESPONDENT

RULING

INTRODUCTION:

1. The matter pending before Court is the application dated 18th May, 2021 filed by Margaret Warui t/a Wanken Distributors and Paul K. Ole Yialle t/a Nasioki Auctioneer the Appellants/ Applicants herein seeking for the following orders:-

i. Spent

ii. Spent

iii. That this court be pleased to grant a stay of execution of the orders emanating from the ruling herein delivered on the 22nd February 2021, herein pending herein and determination of the appeal against the said ruling.

iv. That the costs of this application be provided for.

2. The application is grounded on the grounds asserted on the face of the application and further supported by the supporting affidavit by Margaret Warui and the Applicants' written submissions dated 18th May 2021.

3. The application is opposed by the Respondent through the replying affidavit deponed by Esther Iregi and the Respondent's written submissions dated 14th June 2021.

APPELLANTS SUBMISSIONS:

4. The Appellants submitted that this application should be decided within the law provided for in ***Section 42 Rule 6 (1) and (2) of the Civil Procedure Rules 2010***. On whether substantial loss may result to the Applicants unless the order sought is granted, the Appellants submitted that they filed the instant appeal to challenge the validity of the ruling of the lower court finding them in contempt of its orders. That the execution of the orders emanating orders from the ruling of 22nd February 2021 finding the Appellants in contempt of court orders therefore ought to be stayed so that the instant appeal if successful, may not be rendered nugatory. Reliance was placed on the cases of ***Butt vs. Rent Restriction Tribunal (1979) eKLR*** and ***James Wangalwa & Another vs. Agnes Naliak Cheseto (2012) eKLR***.

5. The Appellants averred that the question of punishment of the Applicants by the lower court is the substantial loss that has to be prevented by preserving the status quo because such loss will render the instant appeal nugatory in the event that the Appellants are successful therein.

6. On whether the instant application had been brought or made without unreasonable delay, the Appellants asserted that their advocate attempted to move the lower court vide an oral application due to the unavailability of the 1st Appellant who was ailing at the time but was ordered to file a formal application and hence the instant application. Moreover, the 1st Appellant enumerated on how the Covid-19 pandemic had affected not only their businesses but also the restriction of movement to and from counties where she was caught up.

7. It was the Appellants' submission that the 3 months' delay cannot be considered unreasonable given the prevailing circumstances. They quoted the case of *Directline Assurance Company Limited Vs Macheal Njima Muchiri & Another (2020) eKLR.*

8. On whether the Appellants are ready and willing to abide by the court's orders as to security, they deponed their willingness to comply with the conditions to be set by this honorable court. Reliance was placed on the case of *Focin Motorcycle Co. Limited vs Wambui Wangui & Another (2018) eKLR.*

9. In conclusion, the Appellants prayed that the application be allowed as sought as they had met the requisite grounds for the grant of the orders sought and award them the costs of this application.

RESPONDENT'S SUBMISSIONS:

10. The Respondent submitted that in the ruling delivered on 22nd February 2021, the learned magistrate gave the Appellants an opportunity to purge the contempt and further ordered them to deposit a sum of kshs 100,000/- as security for the contempt but as late as 31st May 2021 the Appellants had not made any attempt to purge the contempt and neither had they fulfilled the order of the court ordering them to deposit the security sum in court.

11. The Respondent asserted that the Appellants had not proffered any evidence to the court to show or merely suggest substantial loss on their part. Reliance was placed on the case of *Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997.*

12. It was the Respondent's submission that the Appellants' reason for delay in filing this application was unreasonable and cannot be allowed to stand. That the reason for delayed filing given by the 1st Appellant was superfluous for two reasons: one, the Respondent has stated that she is a resident of Nyahururu and the address for her counsel was given as Nyahururu therefore they were in the same jurisdiction and which jurisdiction was not affected by the lockdown. The Respondent asserted that this was just an afterthought excuse in a bid to mislead the court of their indolence. The second reason submitted by the Respondent was that the Appellants had not stated her co-Appellant could not execute the affidavit in support of the application.

13. On security pending appeal, the Respondent placed reliance on the cases of *Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 others (2015) eKLR* and *Arun C Sharma Vs Ashana Raikundalia t/a Rairundalia & Co. Advocates.* It was their submission that the Applicants have not proposed any security to be deposited to guarantee the due performance of the lower court order that is binding on them. That all the Applicant have offered is excuses for not depositing the amount Kshs.100,000/- to ensure and guarantee the performance of the purge of the contempt by the Applicants.

14. In conclusion, the Respondent submitted that appeal would not be rendered nugatory should the application fail and that the Applicants had not satisfied any of the conditions set out under *Order 42 Rule 6(2) of the Civil Procedure Rules* and thus cannot claim the reliefs therein.

ANALYSIS AND DETERMINATION:

15. In the instant case, there is only one issue for determination, and that is whether the order of stay of execution should be granted.

16. First and foremost, as stated by both parties, the grant of stay of execution pending appeal is provided for under *Order 42 Rule 6 of the Civil Procedure Rules*, the relevant part of which states as follows:

“(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 subrule (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.

(3) ...

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) ...

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

17. In *Butt vs. Rent Restriction Tribunal [1979]*, the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, 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 the appeal court reverse the judge's discretion. Thirdly, 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. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

18. (See also *Antoine Ndiaye vs. African Virtual University [2015] eKLR.*)

19. Accordingly, the principles guiding the grant of a stay of execution pending appeal as provided for under aforementioned rule prescribe that an Applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the certain conditions namely:-

i. that substantial loss may result to the Applicant unless the order is made;

ii. that the application has been made without unreasonable delay, and;

iii. that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the Applicant has been given

20. With regard to the issue of substantial loss, the court in *Elijah B. Wamburi & 2 others v Joshua Wilson Muthioma & 6 others [2020] eKLR*, held that:

“It was therefore incumbent upon the Applicants to demonstrate to the Court the kind of substantial loss that would result to them if the stay of execution was not ordered. Further, the Applicants ought to establish that the execution will create a state of affair that will irreparably affect or negate the very essential core of Applicant as a successful party in the Appeal.”

21. And in *James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR* the High Court held in part as follows:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.....”

22. Further in the case of *RWW vs. EKW [2019] eKLR*, the Court held that;

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

23. Moreover, I associate with the words of Warsame J (as he was then) as highlighted by the Respondent, in *Samvir Trustee Limited Vs. Guardian Bank Limited (2007) eKLR*, that:

“...It is my humble view that for the applicant to obtain a stay of execution, it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss.”

24. With the above in mind, the court must then determine whether the Applicants in this case have established that they will suffer substantial loss and or have presented special circumstances that will warrant the Court to exercise its discretion and grant stay.

25. In the instant case, the Applicants filed an appeal against the ruling of the trial court dated 22nd February 2021 finding them in contempt of court orders. Notably, the learned trial magistrate gave the Applicants an opportunity to purge the said contempt by depositing a sum of

Kshs.100,000/= each. The Applicants' main contention in the appeal before this court is that they were not in contempt of court, thus, they are challenging the finding of the subordinate on that aspect. They therefore submitted that if a stay of execution orders is not granted, substantial loss will result to them as once the impugned ruling and its consequential orders are implemented, their appeal will be rendered nugatory.

26. The Applicants were ordered to deposit a sum of Kshs.100,000/= each to purge the contempt. The amount in issue is therefore quantifiable. From the Applicants' Supporting Affidavit and their submissions, they have stated that they will suffer substantial loss and that the intended Appeal will be rendered nugatory. However, they have not indicated to the Court what the substantial loss they will suffer and what it entails.

27. The court while seeking to ensure that the intended appeal will not be rendered nugatory should not do so at the prejudice of a successful party. The Court ought to balance the rights of the two. In this instant case, the Applicants have not satisfactorily demonstrated the existence of any special circumstances to warrant the exercise of the court's discretion in their favor. This is more so as any loss occasioned to the Applicants if the appeal is successful, can be compensated by an award of costs since the amount in issue is quantifiable.

28. In light of the foregoing and having carefully considered the material on record, it is my finding that the Applicants have **NOT** met the threshold to warrant the court to exercise its discretion in their favour. Thus the court makes the following orders;

i. The Applicants' Notice of Motion dated 18th May, 2021 is NOT merited in the circumstances and is dismissed.

ii. The applicants to bear the costs of this application.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 23RD DAY OF SEPTEMBER, 2021.

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CHARLES KARIUKI

JUDGE