



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 44 OF 2019

KENYA TEA DEVELOPMENT AGENCY.....APPLICANT

VERSUS

CHARLES NYAUNDI OKEMWA.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. The application for consideration before this court is the Appellant's Notice of Motion dated 2/10/2020. The same is brought under **Sections 3 and 3A** of the **Civil Procedure Act, Order 22 Rule 22 and Order 42 Rule 6** of the **Civil Procedure Rules**. By the Application, the Appellant/Applicant seeks the following orders: -

a) Spent.

b) Spent

c) That this Honourable court be pleased to order stay of execution of the Judgment and decree of this honourable court delivered on 22/7/2020 pending hearing and determination of the intended appeal lodged in respect of the said Judgment to the Court of Appeal.

d) That costs of this application be provided for.

2. The Motion is premised on the grounds set out therein and those in the affidavit sworn on 2nd October 2020 by Susan Musyoka who is the Appellant/Applicant's Head of Legal services. The deponent avers that judgment was delivered on 22nd July 2020 against the Appellant. Being aggrieved by the said judgment, the Applicant instructed their advocate on record to file a Notice of Appeal to the Court of Appeal and they have also applied for typed and certified proceedings in this appeal for the purposes of compiling a Record of Appeal.

3. The deponent further avers that the instant application was filed without unreasonable delay since there is an imminent threat of execution, and the appeal has high chances of success. Therefore, the intended appeal will be rendered nugatory if the orders sought herein are not granted. That the appellant had already given security by depositing the entire decretal amount in a joint interest earning account and therefore, the Respondent will suffer no prejudice if the instant appeal is allowed.

4. The Respondents opposed the application vide replying affidavit sworn on 6th November 2020 by the 1st Respondent. The deponent avers that even though a Notice of Appeal (which in his view is not an appeal) was served upon his advocates on record intimating the Applicant's intended appeal, three months down the line the intended appeal has not been lodged. Therefore, since no appeal has been filed by the Applicant, then the orders of stay pending appeal cannot issue and the Applicant cannot aver that their appeal has high chances of success.

5. The deponent avers that there is no threat of execution of the decree since the decretal sum was deposited in a joint account, and his advocate cannot access the said monies without consent of the Applicant's counsel. Nevertheless, since the intended appeal was never lodged, his advocate on record wrote to the Applicant's advocate requesting for the release of the decretal sum since there was nothing pending.

6. The deponent further avers that the suit subject matter of the appeal was filed way back in 2009 and it has been 11 years of search for justice. However, the Applicant is bent on frustrating justice and preventing the 1st Respondent from enjoying fruits of judgment by seeking the assistance of the court, in order to decline the signing of relevant consent for the release of the money.

7. In rejoinder, the Appellant/Applicant vide a further affidavit sworn on 2nd July 2021 reiterated the contents of the Applicant's supporting

affidavit and the deponent averred that the Applicant has filed **Kisumu Civil Appeal No. 119 of 2021**, and the said appeal has a high chance of success.

SUBMISSIONS

8. Following the directions given by the court, the matter was disposed of by way of written submissions. The Appellant/Applicant's submissions are filed on 23rd July 2021 whilst the Respondent's submissions are filed on 30th July 2021.

9. Mr. Ndege for the Appellant submitted that the Applicant herein had satisfied all the conditions for grant of stay pending appeal as provided under **Order 42 rule 6 of the Civil Procedure Rules**. Therefore, the court in exercising its discretionary power ought to ensure that the discretion is exercised in such a way as not to prevent an appeal and/or render it nugatory should the Appeal Court reverse the judge's discretion. Counsel cited **HGE V SM [2020] eKLR** in support of his submissions.

10. Miss Kusa for the Respondent submitted that there has been no attempt at execution by the Respondent, since the decretal amount was deposited in the joint account and cannot be accessed by the Respondent without consent from the Appellant or an order from court. Therefore, in this case the Appellant will have an opportunity to challenge an application for leave by the Respondent to access the funds in the joint account, since such an application cannot be heard ex-parte. Therefore, currently, the Applicant has not demonstrated any substantial loss that is likely to be suffered should the orders sought be denied.

ANAYLSIS AND DETERMINATION

11. Having set out the respective parties' affidavits and submissions in summary, it is my view that the sole issue for determination is whether or not, in the circumstances, this court ought to grant Stay of Execution of the Judgment delivered on 22nd July 2020.

12. **Order 42 Rule 6 of the Civil Procedure Rules, 2010** specifies the circumstances under which the court may order Stay of Execution of a Decree or Order pending an Appeal. It provides:

“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 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 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.”

13. From the above provision, it is clear that the court must be satisfied that there is **“sufficient cause”** to grant a Stay. All three (3) conditions must be met simultaneously.

14. The Applicant states that its appeal would be rendered nugatory if the order sought are not granted as the Applicant is likely to execute against it. The Respondents on the other hand argued that there is no threat of execution since the Respondent is yet to seek leave of court to access the funds in the joint interest earning account in the name of advocates for the parties.

15. In **Antoine Ndiaye v African Virtual University [2015] eKLR**; the court had the following to state: -

“The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the Applicant; it follows after the long age legal adage that he who alleges must proof. Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed.”

16. Lenaola, J (as he then was) in **Mutua Kilonzo v Kioko David Machakos - HCCC No 62 of 2008** where he expressed himself as hereunder:

“To my mind, the Applicant has failed to establish what loss he will suffer if the decree is executed. I say this with respect because Lilian Munyiri aforesaid is an officer at Gateway Company Ltd and has not stated that she personally knows the means of the Respondent. She merely states that from evidence at the trial he is a man of straw. How that conclusion is reached and based on what evidence, I cannot tell. It is now a catchphrase that every Respondent in an application for stay of execution is called a man of no means. That is all fine if there is evidence to back up that position. If for example, the job done or other means of living are clearly deponed (sic) to, then it is easy to fathom what means the Respondent has. Ringera, J in Lalji Bhimji put it succinctly when he stated thus;

‘...he (the Applicant) must persuade the court that the decree holder is a man of straw from whom it will be nigh to impossible or at

least very difficult to obtain back the decretal amount in the event the intended appeal succeeding. Such persuasion must spring from affidavits or evidence on record.’

...

Let this also be a warning that as far as possible, executives in Insurance Companies and advocates for parties should unless absolutely necessary or clearly from the record desist from swearing affidavits on contested matters and for which they have no personal knowledge.”

17. I have considered the Applicant’s position on substantial loss and I find that the Applicant has not demonstrated the inability of the Respondent to repay the decretal amount if and when Court of Appeal finds in favour of the Applicant in the Appeal. Further, no document was annexed by the Applicant to prove that substantial loss will be suffered by the Applicant if the 1st Respondent proceeds to execute the decree against the Applicant.

18. The Court of Appeal in the case of **Kenya Shell Ltd. v Kibiru [1986] KLR 410** held as follows:

“Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the Respondent should be kept out of their money.”

19. The Applicant herein has not made any attempt at all in claiming that the 1st Respondent is incapable of paying back the decretal amount. It is upon the party seeking to deprive the successful party from enjoying his fruits of judgment that ought to prove that those circumstances do exist. That threshold cannot be said to have been attained by mere bare allegations devoid of sources of information or grounds of belief. The Applicant should demonstrate clearly that the Respondent is such a person of straw who cannot be expected in all probability to refund the decretal sums in the event of success of the appeal. Regrettably, I find that the Applicant has therefore not discharged its evidentiary burden.

20. That the 1st Respondent intends to proceed with execution is not reason enough to grant stay, since being the successful litigant, he is lawfully entitled to enjoy the fruits of his judgment. Therefore, in proceeding with the execution process the Respondent is simply exercising a right which has been bestowed upon him by the law and such an exercise cannot be stayed unless good reasons are given by the Applicants. In view of the foregoing finding, and the Applicant having failed to discharge its evidential burden on substantial loss, the court needs not consider the other grounds required for the grant stay under **Order 42 rule 6 of the Civil Procedure Rules**, since all three (3) conditions must be met simultaneously.

21. As a consequence of the matters and findings above, stay of execution pending appeal is declined and the Motion dated 2nd October 2020 dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 21ST DAY OF OCTOBER, 2021.

R. E. OUGO

JUDGE

In the presence of:

Mr. Ndege For the Applicant

Miss Kusa For the Respondent

Ms Rael Court Assistant