



REPUBLIC OF KENYA



KENYA LAW
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**Mutunga v Musyoka (Civil Appeal 49 of 2014)
[2021] KEHC 278 (KLR) (22 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 278 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 49 OF 2014
MW MUIGAI, J
NOVEMBER 22, 2021**

BETWEEN

JOHN BOSCO MUTYETUMO MUTUNGA APPLICANT

AND

KIMANZI MUSYOKA RESPONDENT

RULING

1. By a Notice of Motion dated 19th February, 2020 filed under Certificate of Urgency on the same day, the Applicant seeks:-
 - a. Spent.
 - b. THAT this Court grants an order of stay of execution of the Judgment on appeal issued on 28th September, 2018 in this case and the Judgment issued on 18th March 2014 in Machakos CMCC No.1006 of 2007 the decrees extracted therefrom and all consequential orders pending the hearing of this application inter partes.
 - c. THAT this Court grants an order of stay of execution of the Judgment on appeal issued on 28th September, 2018 in this case and the Judgment issued on 18th March, 2014 in Machakos CMCC No.1006 of 2007, the decrees extracted therefrom and all consequential orders pending the hearing and determination of the intended appeal in the Court of Appeal.
 - d. THAT costs of this application be provided for.
2. The application is supported by the Applicant's affidavit sworn on 19th February, 2020 whose averments the court has considered.
3. It is submitted that that the Applicant filed Notice of Appeal before the Court of Appeal, Nairobi against the Judgment of this court on appeal delivered on 28th September, 2019. According to the Applicant, the Appeal has high chances of success. The Applicant claims that he was served with a



Proclamation Notice by Samumu Auctioneers on 12th February, 2020 yet himself or his advocate were not served with a draft decree to approve or amend as stipulated under Order 21 Rule 8(5) of the *Civil Procedure Rules, 2010* hence the decree was illegally extracted and incapable of being enforced.

4. According to the Applicant, the Proclamation does not state the things to be attached leaving the Applicant to be apprehensive that the auctioneers will attach his personal items like clothing and tools of trade which are not supposed to be legally attached. It is submitted that the Proclamation is ambiguous. According to the Applicant, the Proclamation seek to attach a gas cooker which is a cooking vessel incapable of being attached and a motor vehicle, a tool of trade he uses to attend to emergencies when he is called as he is a doctor involved in the department of surgery at Machakos Level 5 Hospital and other County hospitals.
5. According to the Applicant he will suffer substantial loss if the Auctioneers attach and sell his properties during the pendency of the intended appeal. The Applicant asserted that the Respondent will not suffer prejudice if stay orders are granted. According to the Applicant, the application was filed without unreasonable delay and he is willing to offer any security as may be ordered by court hence it is in the interest of justice that the application be allowed.
6. As the Court undertook to write the Ruling, the Court record did not contain any pleadings and/or Submissions by the Respondent and there was no confirmation that the Respondent was duly served. Hence the Court halted the process and sought through the Deputy Registrar to confirm and seek from the Respondent to confirm service of the application and/or avail response and/or written submissions. The Respondent opted and availed only the Replying Affidavit and waived the right to file written submissions.

REPLYING AFFIDAVIT

7. In opposition to the application, the Respondent swore a Replying Affidavit on 12th May, 2020. He deposed That the application is made in bad faith and made to deny the Respondent fruits of his judgment; the suit was filed in 2007 13 years ago, arising from the incident in 2002, that he is a man of means capable of paying the decretal sum which continues to earn interest. According to the deponent, the Applicant has not demonstrated the kind of loss he is going to suffer if the application is not allowed.
8. According to the deponent, the Applicant is guilty of inordinate delay since the judgment in HCCA No.49 of 2014 was delivered on 28th September, 2018 and no reasons have been advanced for such delay.
9. He deposed that the Applicant has not demonstrated to have an arguable appeal.
10. According to the deponent, he will suffer great prejudice if the application is allowed owing to the injuries sustained. To the Respondent, it is in the interest of justice that the application be dismissed with costs. He deposed that the Applicant has come to court with unclean hands.
11. The Respondent has also averred that in the event court is inclined to grant stay, he should be given half the decretal sum and the balance be deposited in a joint interest earning account in the name of both advocates on record. Based on the advice of his advocate, he deposed that security must be deposited for the decretal sum.
12. The Applicant was granted 30 days stay of execution by the Trial Court and the Applicant seeks to delay the matter further. Justice delayed is justice denied and the Respondent implored the Court to assist him as he is suffering.

SUBMISSIONS



13. On behalf of the Applicant, the Intended appeal to the Court of Appeal has high chances of success hence stay of execution is not granted, the Applicant shall stand to suffer irreparable loss and appeal will be rendered nugatory. See *Rhoda Mukuma vs John Abuoga*[1988] eKLR on determining substantial loss. According to the Applicant, the Notice of Appeal has already been lodged before the Court of Appeal.
14. According to the Applicant, the items sought to be attached are tools of trade hence the proclamation notice is ambiguous and incapable of being enforced.
15. In addition, the Applicant contends that the draft decree was not sent to his advocate for approval as required under Order 21 Rule 8(2) of the Civil Procedure Rules, 2010. According to the Applicant, the Decree is irregularly obtained. See *David Makau vs Maua Mutile Ndunda MHC No 72 of 2004* on the effect of non-compliance with Order 21 Rule 8 (2) of CPR 2010.
16. To the Applicant, the warrants of attachment procured by Respondent’s advocate to be used by the auctioneers to attach the Appellant’s property was a deliberate move to defeat ends of justice.
17. The Respondent relied on his replying affidavit sworn on 12th May, 2020.

DETERMINATION

18. I have considered the application, affidavits in support and in opposition and the written submissions.
19. The application is premised on Order 42 Rules 6 of the Civil Procedure Rules, 2010 wherein it is stipulated as follows:

“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.

20. It therefore follows that no appeal or second appeal will operate as a stay. A party must show sufficient reasons why stay orders should be granted. See *Vishram Raji Halai vs. Thornton & Turpin Civil Application No. Nairobi 15 of 1990 [1990] KLR 365*.
21. The court, in *RWW vs. EKW [2019] eKLR*, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

“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.”

22. The only issue necessary for determination would be whether the application seeking stay of execution is merited.

SUBSTANTIAL LOSS

23. The Applicant contends that if stay of execution is not granted, his goods will be auctioned by Samumu Auctioneers who are already in possession of the Proclamation Notice and Warrants of Attachment. To the Applicant, the goods to be attached are his tools of trade hence he will suffer irreparable loss.

24. In *James Wangalwa & Another vs. Agnes Naliaka Cheseto in Misc Appl No. 42 of 2011 [2002] eKLR* Gikonyo J. stated that;

“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.”

25. The court notes that the Applicant asserted that he is doctor hence the items listed in the proclamation are his tools of trade. However it will be noted that he has not attached any professional documents to establish that he is a doctor. The Respondent has averred that he is a man of means capable of paying the decretal sum. The Applicant has not averred whether he is apprehensive that the Respondent will not be able to repay back the decretal sum. Instead the Applicant’s concentration is on his tools of trade and not settlement of the decretal sum.

26. Gachuhi, Ag,JA (as he then was) in *Kenya Shell Limited vs. Kibiru [1986] KLR 410* at 417 held:-

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

27. The court finds that the Applicant has not demonstrated that he will suffer substantial loss in the event stay orders are not granted. In fact it is the Respondent who is to suffer substantial loss if the stay of execution is granted, he was amputated his right arm in 2002, he filed suit in 2007 and detailed loss and pain from the injury and the process of treatment and costs incurred. Whilst the matter proceeded he was deprived of the use of the arm and had to obtain an artificial arm and learn to write using the left hand. To date he is patiently waiting to be compensated from the ordeal. The Applicant lodged the 1st appeal which was partly upheld and partly dismissed in 2018. To date not a single cent has been paid or proposals made.

28. The fact that the Applicant and/or his advocate were not served with a draft decree to approve or amend as stipulated under Order 21 Rule 8(5) of the Civil Procedure Rules, 2010 does not vitiate the judgment but only execution of the judgment. The requirement under Order 21 Rule 8 (5) CPR 2010 is not timebound, another decree maybe issued in compliance with the law and execution may



proceed. Similarly, on the items proclaimed to be attached and sold, again this issue does not vitiate the judgment, it relates to execution which is a matter that can be rectified. For these reasons, there is no substantial damage injury or loss that would be occasioned. This ground fails.

UNREASONABLE DELAY

29. The Respondent contends that there is undue delay to file the application seeking stay of execution of the Judgment. The judgment on appeal before this court was delivered on 28th September, 2018. The court granted the Applicant 30 days stay of execution. The application seeking stay of execution of the judgment pending the Intended appeal to the Court of Appeal was filed 1 year 6 months later on 19th February, 2020. The Court notes that no explanation has been given by the Applicant on the delay.
30. The court finds that there is an undue delay in filing the intended appeal.

FURNISH SECURITY

31. The Applicant has pleaded that he is willing to offer any security as may be ordered by court. It will be needless for the Court to determine whether the Applicant has satisfied this ground when he has not demonstrated the substantial loss he will suffer.

ARGUABLE APPEAL

32. As to what constitutes an arguable appeal, the Court of Appeal in *Nairobi Women's Hospital vs. Purity Kemunto [2018] eKLR*:-

“To say that an appeal is arguable is another way of saying that it is not frivolous and that it raises a bona fide issue deserving full consideration by the Court. Even one bona fide issue will satisfy the requirement, for the law does not look for a multiplicity of arguable issues.”

33. Applicant contends that he has filed a Notice of Appeal hence the Intended appeal will be rendered nugatory. The Notice of Appeal was filed on 19th October, 2018 and stamped received by the High Court in Machakos. It is not sufficient evidence that an appeal is filed in the Court of Appeal as it does not bear the Court of Appeal stamp. Secondly, in the absence of the Memorandum of Appeal this Court is not in a position to satisfy itself that there is an arguable appeal or not.
34. Omondi J. in *ANM vs. VN [2021] eKLR* stated that the mere filing of a Notice of Appeal does not automatically warrant the issuance of orders of stay of execution of the decree.
35. The Applicant contends that his appeal has high chances of success. According to the Notice of Appeal, the appeal is against the whole judgment.
36. The Notice of Appeal do not contain the grounds of appeal hence court is not in a position to determine whether the appeal raises arguable issue with high chances of success.
37. Platt, Ag.JA (as he then was) in *Kenya Shell Limited vs. Kibiru [1986] KLR 410*, at page 416 expressed himself as follows:-

“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 a rare case when an appeal would be rendered nugatory by some other event. 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 respondents should be kept out of their money”.



38. As to whether the appeal is arguable, the court finds that the Applicant has not demonstrated so. The ground is dismissed.

DISPOSITION

- a. The Notice of Motion dated 19th February, 2020 lacks merit.
- b. The same is dismissed with costs to the Respondent.

It so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 22ND DAY OF NOVEMBER, 2021.

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

No appearance - for Applicant

Mr. Odhiambo -for Respondent

Geoffrey - Court Assistant

