



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. E094 OF 2021

VICTOR OGOLA.....APPELLANT/APPLICANT

VERSUS

MARY WAITHE KIHU.....RESPONDENT

(Being an appeal from the Judgment delivered by Hon. E. Kigen, SRM, in Eldoret CMCC No.661 of 2019)

RULING

BRIEF FACTS

1. What is pending before the court is the Notice of Motion dated 9th August, 2021. The application in a nut shell seeks a stay of execution to the judgment delivered by Hon E. Kigen SRM on 23rd July 2021.

APPLICANT'S CASE

2. The applicant filed submissions on 12th October 2021.

3. He submitted that the Respondent has only filed grounds of opposition dated 19th August 2021 merely stating that the Applicants application offends the provisions of Order 42 Rule 6 of the Civil Procedure Rules and that there is no substantial loss demonstrated. Therefore, all issues of facts raised in the two supporting affidavits in the application are uncontroverted.

4. He relied on **Mombasa High Court Civil Appeal No. 242 of 2018 Mustano Rocco v Aniello Sterelli** whereby D. Q Chepwony held that;

“I find the Respondent only filed grounds of opposition there being no replying affidavit to the application, the facts deponed to in the supporting affidavit are therefore considered un rebutted and I take them to be true.”

5. He submitted that that this Honourable Court in exercising its discretion on whether to grant an application for stay ought to consider special circumstances and the unique fundamental principles/requirements as laid out under Order 42 of the Civil Procedure Rules.

6. The pre- requisite conditions for such an application are as follows;

a) The courts should be satisfied that substantial loss may ensue if the application is not allowed.

7. On this issue the Applicant submits that they are apprehensive that they will not be able to recover the decretal sum from the Respondent in the event the Orders of stay sought is denied. The general damages involved in this suit are to the tune of kshs 306,600/= (Three Hundred and Six Thousand Six Hundred Only) exclusive of costs.

8. The Respondent has not demonstrated that she will be able to pay this sum back to the Applicants in the event the appeal is successful. The Applicant is likely to suffer substantial loss if the decretal sum is paid out to the Respondent. The burden of proof as to whether the Respondent will be able to repay the decretal sum lies with the Respondent as was emphasized in the case of **Nairobi Civil Application No. 238 Of 2005 National Industrial Credit Bank Limited v Aquinas Francos Wasike & Another (UR)**.

9. The Respondent has not proved that she is a person of means and that they would be able to repay back the decretal amount in the event the appeal succeeds.

b) That the application has been brought without unreasonable delay.

10. This application has been brought without undue delay. The judgement in this matter was delivered on 23rd July 2021 and the Applicant herein filed this instant application on the 9th August 2021 for the orders sought. The period within which judgement was delivered and when the application was lodged is not inordinate.

c) Whether the Applicant will be prejudiced if the application herein is not allowed and the sum shall be rendered nugatory and whether the appeal is arguable.

11. The Applicant submits that he will be unduly prejudiced and the Appeal herein shall be rendered nugatory if stay of execution is not granted pending Appeal. The Applicant cites the case of **Ishmael Kagunyi Tande v Housing Finance Company of Kenya Ltd [20051 ekLR** in support of this submissions.

12. The appeal is arguable and is not frivolous. The annexed Memorandum of Appeal no E94 of 2021 has the Grounds of Appeal which are arguable. Further, an arguable appeal is not one that will necessarily succeed but it's one that raises tenable issues and this appeal raises legitimate points.

d) Such security as the court orders for the due performance of such decree or orders as ultimately be binding on him.

13. The Applicant is willing to abide by such reasonable stay terms as the court may order in the interest of both parties. In the event that the Court orders conditional stay the Applicant prays that they be allowed to give security of the entire decretal amount by way of bank guarantee, as demonstrated in paragraph 10 of the supporting Affidavit by Kelvin Ngure dated 6th August 2021. This will secure the interests of both the Applicant and Respondent herein and prevent any substantial loss if monies are paid out. Bank Guarantee is an acceptable mode of furnishing security. He cites the case of **Mombasa Civil Appeal no 152 of 2011 Equity Bank Ltd v Gerald Wangombe** in support of this submission.

14. The Applicant has met all the conditions that warrant grant of stay pending appeal. It is the applicant's humble submission that this application be allowed as prayed.

RESPONDENT'S CASE

15. The Respondent filed submissions on 19th August 2021 together with a grounds of opposition.

16. The grounds of opposition are that;

- (a) The application offends the mandatory provisions of Order 42 Rule 6 of the Civil Procedure Rules.
- (b) No substantial loss to be suffered by the Appellant/Applicant has been demonstrated.
- (c) The affidavit in support of the application is incompetent.
- (d) The application is based on mere apprehensions.

17. The Applicant has not demonstrated substantial loss or damage that will be occasioned upon him.

18. The Respondent submitted that the applicant stated in their application that they stand to suffer irreparable loss and damage if execution is levied. The decretal sum is to be paid by the insurance company and not the Appellant and essentially no substantial loss will be occasioned on the Appellant.

19. The Insurance Company Directline Assurance Company Ltd did defend the matter to its logical conclusion and it is upon them to settle the decretal sum and not the Appellant. They have even sworn an affidavit by Kelvin Ngure to support this assertion. The allegation of substantial loss by the Appellant would be a loss without any value or loss that will be merely nominal as the decretal dues are to be settled by the Insurance Company. The Appellant has not demonstrated any substantial loss to be suffered and or to be occasioned if the decretal sum is paid to the Respondent and the application therefore fails to meet the pre-requisites of Order 42 Rule 6 (1) of the Civil Procedure Rules.

20. The Respondent submitted that should this application be allowed then the same should be in the terms that half the decretal sum plus full costs be paid to the Respondent through his Advocate whilst the remaining half be deposited in a joint interest earning account within a period of thirty (30) days in the names of the Advocates on Record.

21. The Respondent submits that the Appellant's financial ability is unknown. The Respondent has a judgement in her favour and as such the Honourable court should allow the Respondent enjoy the fruits of her judgment.

22. The more the decretal amount stays in the hands of the Appellants the more substantial loss the Respondent stands to suffer.

23. The respondent prays that the application for stay pending be allowed with conditions.

ISSUES FOR DETERMINATION

a) Whether the order for stay should be granted.

WHETHER THE ORDER FOR STAY SHOULD BE GRANTED

24. The threshold for granting orders for stay has been set out in Order 42 Rule 6 of the Civil Procedure Rules. In a nutshell, the applicant must prove that;

[a] that substantial loss may result to the applicant unless the order is made;

[b] that the application has been made without unreasonable delay;

[c] 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.

25. In **Butt v Rent Restriction Tribunal [1979] eKLR**, the court held following:

a) 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;

b) The general principal 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;

c) 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; and

d) 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.

Whether the applicant shall suffer substantial loss.

27. Substantial loss was determined in the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, where the court observed 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.... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo.”

28. The decree herein is for the sum of kshs. 360,600/-. The applicant contends that the respondent has not proven she is a person of means and thus would be able to repay the sum if the appeal succeeds.

29. In **National Industrial Credit Bank Limited v Aquinas Francis Wasike and Another (UR) C.A. 238/2005** the court stated: -

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the respondent or lack of them. Once an applicant expresses that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

30. The Respondent has not shown that she is in a position to refund the decretal sum. She should at least have filed an affidavit of means. In the absence of the same I opine that the appellant is likely to suffer substantial loss if orders of stay are not granted.

Whether there was unreasonable delay

31. The decision being appealed against was delivered on 23rd July 2021. The applicant filed the present application on 9th August 2021. I opine that there was no unreasonable delay.

Security

32. The Applicant has submitted and deponed that he is willing to abide by any conditions on security. In the premises the application meets all the conditions necessary for granting of orders of stay.

33. However, I note that the respondent opposed the application on the basis that the affidavit in support of the application is incompetent. There is no further elaboration on this incompetence and as such I opine the same cannot stand as a ground of opposition. Despite the fact that the decretal sum is to be settled by the insurance company, and as such the respondent believes there will be no substantial loss, the burden of proof shifted to the respondent to prove that she was a person of means and she has not.

34. I further note that the respondents submitted that they are open to conditional stay on the condition that half of the decretal sum be deposited in a joint account and the other half being given to the respondent.

35. In the premises the application succeeds on the condition that the security be issued in the form of either a bank guarantee as proposed by the respondent or alternatively having the decretal sum deposited in a joint account in the name of the parties advocates.

DATED AND DELIVERED IN ELDORET THIS 23RD DAY OF NOVEMBER 2021.

E. K. OGOLA

JUDGE