



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 19 OF 2015

KIARIE G. KARIUKI T/A KIARIE KARIUKI & CO. ADVOCATES.....APPELLANT

-VERSUS-

OMAR PAMBA HAMISI.....RESPONDENT

RULING

1. The application before me is a Notice of Motion dated 4th December, 2019 brought under the provisions of Order 51 Rule 1 and Order 42 Rule 6(1) and (2) of the Civil Procedure Rules and Sections 1, 1A, 3A & 65 of the Civil Procedure Act, Cap 21 Laws of Kenya. The appellant seeks the following orders -

(i) Spent;

(ii) That this Honourable Court be pleased to order a stay of execution of the judgment and/or decree issued on 21st November, 2019 in HCCA No. 19 of 2015, KIARIE G. KARIUKI T/A KIARIE KARIUKI & CO. ADVOCATES VS OMAR PAMBA HAMISI and the security held in joint names of the appellant's Counsel and the respondent pursuant to the orders issued in (Mombasa) CMCC No. 1085 of 2007, OMAR PAMBA HAMISI VS KIARIE G. KARIUKI T/A KIARIE KARIUKI & CO. ADVOCATES to continue being held as security pending the hearing and determination of this application;

(iii) That this Honourable Court be pleased to order a stay of execution of the judgment and/or decree issued on 21st November, 2019 in HCCA No. 19 of 2015, KIARIE G. KARIUKI T/A KIARIE KARIUKI & CO. ADVOCATES VS OMAR PAMBA HAMISI and the security held in the joint names of the appellant's Counsel and the respondent pursuant to the orders issued in (Mombasa) CMCC No. 1085 of 2007, OMAR PAMBA HAMISI VS KIARIE G. KARIUKI T/A KIARIE KARIUKI & CO. ADVOCATES to continue being held as security pending the hearing and determination of this appeal; and

(iv) The costs of this application be provided for.

2. The application is brought on the grounds on the face of it and is supported by an affidavit sworn on 4th December, 2019 by Kiarie G. Kariuki, the appellant herein. In opposition to the application herein, the respondent on 13th December, 2019 filed a replying affidavit sworn on 11th December, 2019 by Omar Pamba Hamisi, the respondent herein.

3. The application was canvassed by way of written submissions. The appellant's submissions were filed on 9th April, 2021 by the firm of P. A. Osino & Company Advocates, while the respondent's submissions were filed on 26th April, 2021 by the firm of Odhiambo S. E & Company Advocates.

4. Ms. Osino, learned Counsel for the appellant submitted that the grounds for granting an order for stay of execution pending appeal are provided under Order 41 Rule 4 of the Civil Procedure Rules, 2010. She relied on the case of **Blue Shield Insurance Co. Ltd v Sheila William Mkasi** Mombasa HCCC No. 36 of 2008 (unreported), where the Court held that in order for an order for stay pending appeal to be granted, the applicant has to establish sufficient cause, that he stands to suffer substantial loss if the judgment is not stayed, that the application has been made without delay and that he is ready to tender security as offered or as may ordered by the Court.

5. On the issue of sufficient cause, Ms. Osino submitted that the appeal filed in the Court of Appeal is meritorious and not frivolous as the same can be seen from the draft memorandum of appeal. She stated that refusing to grant orders for stay of execution would cause great injustice as the said appeal which would be rendered nugatory.

6. On the issue of substantial loss, the appellant's Counsel argued that the appellant had demonstrated that he stands to suffer substantial loss

if stay of execution is not granted. She explained that the appellant obtained an order for stay of execution pending appeal in (Mombasa) CMCC No. 1085 of 2007, OMAR PAMBA HAMISI VS KIARIE G. KARIUKI T/A KIARIE KARIUKI & CO. ADVOCATES (sic) and deposited the decretal sum as ordered by Court in a joint bank account with the respondent, which order is still in force. She submitted that unless an order for stay of execution was granted, the monies being held in the said account shall be released to the respondent, who is unemployed and whose source of income is unknown, thus rendering the appeal nugatory. She further submitted that the said money continues to accrue interest hence the same ought to continue being held as security.

7. On the issue of whether there has been delay in filing the present application, Ms. Osino stated that the application dated 4th December, 2019 was made with no delay since judgment was delivered on 21st November, 2019. She urged this Court to be guided by the provisions of Article 159(2)(a) of the Constitution of Kenya, 2010, which provides that in exercising judicial authority, the Courts and Tribunals shall be guided by several principles among them being that justice shall be done to all irrespective of status.

8. Mr. Odhiambo, learned Counsel for respondent submitted that the appeal filed in the Court of Appeal does not raise serious points of law, and in any event, it is not for this Court to consider whether or not the appeal has high chances of success. He further submitted that it has been more than one year since the High Court delivered its judgment within which period the appellant had not requested for certified copies of the proceedings and judgment in order to prepare, file and serve the Notice of Appeal (sic).

9. He submitted that the respondent has been waiting for over six years to enjoy the fruits of the judgment of the lower Court and that the appellant's actions are only meant to continue frustrating the respondent. Mr. Odhiambo urged this Court to dismiss the present application and in the event it is inclined to grant the orders sought, then the same should be granted on condition that the appellant deposits a sum of Kshs. 250,000/= towards costs within a stipulated period of time.

ANALYSIS AND DETERMINATION.

10. This Court has considered the application filed herein and the affidavit in support of the application. It has also considered the replying affidavit by the respondent and the written submissions by Counsel for the parties. The issue that arises for determination is whether the instant application is merited.

11. In the affidavit filed by the appellant, he deposed that the High Court delivered a judgment on 21st November, 2019 dismissing his appeal and being dissatisfied with the said decision, he lodged a Notice of Appeal against the said decision and subsequently, he applied for typed certified proceedings and judgment, which had not been issued to date. The appellant averred that the application herein had been made without unreasonable delay and that he has an arguable appeal. He also averred that the appeal raises serious points of law which the Court of Appeal should be granted an opportunity to hear and determine and that if successful, the said appeal shall be rendered nugatory if orders for stay of execution are not granted.

12. The appellant deposed that on 2nd June, 2017, he was served with warrants of attachment of his office desks, chairs, computers and printers yet he had provided security as was ordered by the Court and unless the orders for stay of execution are granted, the respondent stands to execute the judgment in the primary suit. He averred that the aforesaid would result in the appellant suffering substantial loss and damage as any attachment upon execution of the judgment would involve attachment of office furniture which is vital in the operation of his office, thereby eroding its operational basis. He stated that as a consequence thereof, he would suffer irreparable loss and damage and the security already provided would not be recoverable once released, as the respondent's income is unknown.

13. It was also stated by the appellant that he has already provided security for the implementation of the said orders by depositing the decretal sum in a joint interest earning bank account as ordered by the Court and he is ready to abide by any orders that may be issued by this Honourable Court.

14. The respondent in his replying affidavit deposed that execution cannot be done without taxation of the bill of costs and that the decree had not been sent to the applicant's Advocate for approval. He stated that the applicant has no chances of succeeding in the appeal filed in the Court of Appeal.

15. The respondent deposed that the appellant should be given limited time within which to prosecute the appeal in the Court of Appeal as the former has waited for long to enjoy the fruits of the judgment. He urged this Court to order the appellant to deposit a sum of Kshs. 250,000/= which is the estimated costs of the appeal that was before the High Court and the one before the Court of Appeal, which sum should be deposited in a joint interest earning account opened in the names of the Advocates on record.

16. In determining the application herein this court has considered if it has jurisdiction to pronounce itself on the said application. It has therefore had to consider if it is *functus officio* or not. The doctrine of *functus officio* is a principle of law that prevents the re-opening of a matter before a Court that rendered the final decision. The Supreme Court of Kenya when expounding on the doctrine of *functus officio* in **Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others vs. IEBC & Others** [2013] eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius, in **"The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,"** (2005) 122 SALJ 832. The said excerpt states as follows-

"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

17. Similarly, in the case of **Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)** [2014] eKLR, the Court of Appeal held that-

“The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.”

18. In the present case, the appellant obtained an order for stay of execution in Mombasa CMCC No. 1085 of 2007, Omar Pamba Hamisi Vs Kiarie G. Kariuki T/A Kiarie Kariuki & Co. Advocates pending the hearing and determination of the appeal before the High Court. The order for stay of execution was on condition that the appellant deposits the decretal sum into a joint interest earning account in the names of the Advocates on record. The appellant deposited the said sum of money as was ordered by the Court and the funds are currently held in NCBA Bank Kenya Plc formerly known as NIC Bank.

19. The appeal was heard by the High Court and a judgment was delivered on 21st November, 2019 dismissing the said appeal. Dissatisfied with the said judgment, the appellant filed a Notice of Appeal and on 4th December, 2019, he filed an application for stay of execution pending appeal. The principles guiding the grant of a stay of execution pending appeal are well settled. They are provided under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 as follows-

“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. In addition to the provisions set out hereinabove, the Court in exercising its discretion on whether or not to grant an order for stay of execution pending appeal, also has to determine whether the applicant has demonstrated that he or she has an arguable appeal with high chances of success. The Court of Appeal in **Kenya Tea Growers Association & another v Kenya Plantation and Agricultural Workers Union** [2012] eKLR, addressed what is considered to be an arguable appeal in the following words-

“The power of the Court under rule 5(2)(b) of the Court of Appeal Rules is discretionary. Two principles guide the court in exercising that discretion. First, for an applicant to succeed in such application he must show that his appeal or intended appeal is arguable, or put another way that it is not a frivolous one. He need not show that such appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision. It is also trite that the applicant need not show several issues. As stated earlier at least one issue suffices for purposes of an application under rule 5 (2) (b). Second, the applicant must in addition, show that, unless he is granted either a stay or injunction as the case may be, the success of his appeal or intended appeal will be rendered nugatory”

21. It is this Court’s finding that since the appellant was granted an order for stay of execution pending the appeal in the High Court and thereafter the said appeal was heard and determined on merits and a judgment rendered dismissing the said appeal, all pertinent issues of fact and points of law were fully canvassed and considered by the High Court. This Court has as such conclusively dealt with the issue of whether the appellant’s appeal is arguable and if it has high chances of success and concluded that it has no merit.

22. It is therefore my finding that this Court is *functus officio*, having discharged its function on appeal to finality. This Court is guided by the definition in Black’s Law Dictionary, Tenth Edition that *functus officio* means **“having performed his or her office (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished”**.

23. In conclusion, the application dated 4th December, 2019 is devoid of merit and the same is dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA on this 19th day of November, 2021. In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through the Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of-

Ms Osino for the appellant/applicant

No appearance for the respondent

Mr. Oliver Musundi – Court Assistant.