



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 186 OF 2016

EDWARD MWANGI MACHARIA.....APPELLANT

-VERSUS-

MAINA & MAINA ADVOCATES....RESPONDENT

RULING

1. The appellant/applicant in this instance has brought the Chamber Summons dated 14th October, 2021 supported by the grounds set out in its body and the facts stated in the affidavit of Edward Mwangi Maina. The applicant sought for an order for stay of execution and all consequential orders pending the hearing and determination of Civil Appeal No. E086 of 2021 lodged in the Court of Appeal.
2. The respondent put in a replying affidavit sworn by advocate Gideon Mutai on 4th November, 2021, to oppose the Motion.
3. When the Motion came up for interparties hearing before this court, the appellant filed its written submissions and the respondent relied on its Replying Affidavit.
4. I have considered the grounds laid out on the body of the Motion;

the facts deponed in the affidavits supporting and opposing the Motion; and the appellant's submissions and authorities cited therein.
5. A brief background of the matter is that the respondent's firm of advocates was instructed in the month of July 2018 by the appellant to appear for him in place of Waiganjo & Co. Advocates in Nairobi H.C Misc. Application No.426 of 2006, a judicial Review Application where the applicant had sought for the orders of mandamus and prohibition against the Registrar General.
6. The appellant on his part filed the motion dated 10th April 2014 in which the appellant sought for the advocate-client bill of costs to be struck out. The two matters were heard by Hon. Makungu, learned Taxing Officer and in the end the appellant's motion dated 10th July 2014 was dismissed and the respondent's bill of costs proceeded to hearing without the appellant filing any objection. In the end the advocate-client bill was taxed at ksh.232,690/=.
7. The appellant being dissatisfied filed this appeal seeking to challenge the aforesaid rulings. The respondent filed a notice of preliminary objection against the appellant's appeal. This court heard and upheld the preliminary objection vide its ruling delivered on 8th December 2017.
8. Being dissatisfied, the appellant filed a notice of appeal to challenge this court's decision to strike out this appeal before the Court of Appeal and an application for stay of execution pending the appeal which was dismissed.
9. Being aggrieved by the aforementioned ruling, the applicant desires to challenge it on appeal with the Court of Appeal.
10. In his affidavit filed in support of the application dated 14/10/2021, Mr. Edward Mwangi Maina stated that this court has issued the respondent with warrants of attachment and he is in danger of getting his properties attached and sold by the M/s Junice Investments Auctioneers.
11. It is the submissions of the appellant that the application before this court has been triggered by the attachment threats by the said

auctioneers despite the fact that the respondent having been served by the Record of Appeal lodged at the Court of Appeal.

12. The appellant contends that the Appeal at the Court of Appeal will be rendered useless if the respondent is allowed to proceed with the execution in this matter. He further submitted that the respondent will not suffer any prejudice if this application is allowed and that they will participate in the prosecution of the said appeal.

13. In response, Mr. Gideon Mutai stated that the appellant's application brought under section 42 Rule 6 (2) of the Civil Procedure Rules, 2010 but does not meet the threshold set out therein.

14. He further stated that the appellant is guilty of undue delay as he has brought this application more than eight months from the date of filing the appeal and no reason has been advanced by the appellant for the delay.

15. He avers that the appellant/applicant has not adduced any facts to demonstrate that he will suffer substantial loss if the application is not allowed and that the Respondent is capable of paying the money decree in the event the appeal is allowed hence the applicant cannot suffer substantial loss.

16. He further avers that the applicant has not indicated any willingness of depositing security needed to guarantee the due performance of the Certificate of taxation.

17. Having considered the material placed before this court together with the submissions, it is clear that under Order 42 rule 6(2) of the Civil Procedure Rules, that the following principles should be met before an order for stay of execution pending can be granted. **First**, an applicant must show that the application for stay was made without unreasonable delay.

Secondly, that an applicant must show the substantial loss he would suffer if the order for stay is denied.

Thirdly, that the provision for security for the due performance of the decree must be considered.

18. The first condition is whether the appellant's application for stay was filed without an unreasonable delay. The application seeking for stay of execution and proceedings was filed on 14th October 2021 about eight (8) months from the date of filing the appeal and about eleven months from the date of delivery of this court's ruling. In my view, I find the delay of 8 months to be unexplained and hence unreasonable.

19. The second condition to be considered is whether the Appellant/applicant has shown the substantial loss he would suffer if the order for stay of execution is denied. The appellant has basically stated that his appeal will be rendered as overtaken by events if the order of stay is not granted. The appellant has not shown how the appeal will be rendered useless if the execution process is not halted.

20. I am guided by the case of **Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR** in which the court reasoned that:

“The corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted... 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.”

21. On their part, the respondent is of the view that no substantial loss has been demonstrated by the applicant. It has not been stated that the respondent will be unable to refund the decretal sum if the appeal turns out to be successful. The appellant has failed to discharge the burden of proving the substantial loss.

22. The provision of security for the proper execution of the order is the final principle to examine. The respondent is accurate in stating that the appellant has made no offer of security. It should be highlighted that, notwithstanding the lack of such an offer, the court has the authority to make directions on what type of security should be offered as a condition of the stay being granted. The appellant is not entitled to be granted the order of stay because he failed to show that he suffered a substantial loss, which is the cornerstone of a stay claim. It is not essential to issue a security order in the current circumstances.

23. In the end, the appellant's summons for stay of execution and proceedings is found to be without merit. It is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 30TH DAY OF DECEMBER, 2021

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent