



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 30 OF 2019

ASIGE KEVERENGE AND ANYANZWA ADVOCATES.....APPELLANT

VERSUS

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

KENCONT CFS.....2ND RESPONDENT

RULING

1. The application before me is a Notice of Motion dated 11th December, 2020 brought under the provisions of Sections 1A, 1B, 3A & 78(1) of the Civil Procedure Act, Order 42 Rule 6(1), (4) & (5) of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The appellant/applicant seeks the following orders -

(i) Spent;

(ii) That there be a stay of execution of the decree/judgment delivered on 20th November, 2020, pending the hearing and determination of the appeal filed by the appellant/applicant to the Court of Appeal; and

(iii) That the costs of this application be provided for.

2. The application has been brought on the grounds on the face it and is supported by an affidavit sworn on 11th December, 2020 by Tadayo Muyala, an Advocate of the High Court of Kenya. In opposition to the said application, the 2nd respondent on 18th January, 2021 filed grounds of opposition.

3. On 18th January, 2021, the applicant filed another Notice of Motion application dated 15th January, 2021 brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3A & 63(e) of the Civil Procedure Act and all enabling provisions of the law. The applicant seeks the following orders-

(i) Spent;

(ii) Spent;

(iii) That upon the hearing of this application *interpartes* the Honourable Court be pleased to grant a stay of execution of the decree and warrants of attachment issued on 29th December, 2020 in Mombasa SRMCC No. 1924 of 2017, pending the hearing of the appeal filed in the Court of Appeal from the decision of this Court dated 20th November, 2020; and

(iv) That the costs of this application be provided for.

4. The application has been brought on the grounds on the face of it and is supported by an affidavit sworn on 15th January, 2020 (sic) by Japheth Asige, an Advocate of the High Court of Kenya. In opposition to the said application, the 2nd respondent on 1st February, 2021 filed grounds of opposition.

5. The application was canvassed by way of written submissions. The applicant's submissions were filed on 19th February, 2021 and 23rd February, 2021 by the law firm of Asige Keverenke & Anyanzwa Advocates, while the 2nd respondent's submissions were filed by the law firm of Njeru & Company Advocates on 1st March, 2021.

6. Mr. Asige, learned Counsel for the applicant stated that on 7th August, 2018 and 1st February, 2019, rulings were delivered by the Senior Resident Magistrate, Hon. Kassam and that the applicant being dissatisfied by the said rulings, filed an appeal to the High Court of Kenya at Mombasa on 21st February, 2019. That thereafter on 22nd March, 2019, the applicant filed an application for stay of execution. He indicated that the applicant was granted stay of execution by the High Court on condition that he provided security by depositing the taxed costs into an interest bearing account in the joint names of the Advocates for the parties within thirty days and to file and serve a Record of Appeal within 60 days from the said date.

7. Mr. Asige further submitted that the appeal was heard and thereafter judgment was delivered on 20th November, 2020 dismissing the appeal with costs to the 2nd respondent. He stated that the said dismissal was followed by a letter dated 25th November, 2020 from the firm of M/S Njeru & Co. Advocates for the 2nd respondent addressed to the applicant herein, demanding for payment of the sum of Kshs. 169,250.00 within three days, or in default, execution would issue. He stated that being dissatisfied with the judgment by the High Court, the applicant filed a Notice of Appeal dated 26th November, 2020 followed by an application for stay of execution dated 11th December, 2020.

8. It was submitted by Mr. Asige that in order for this Court to grant an order for stay of execution, the applicant needs to demonstrate that an appeal has been filed and that the applicant is likely to suffer substantial loss in the event that the orders sought are not granted. He further submitted that the entire decretal sum in the appeal and in Mombasa SRMCC No. 1924 of 2017 was deposited in a joint interest earning account in the names of the 2nd respondent's Advocates and the applicant herein, thus the 2nd respondent cannot suffer any prejudice as the decretal sum is secured.

9. Mr. Asige submitted that the applicant had already provided security for performance of the costs entered in Mombasa SRMCC No. 1924 of 2017. He relied on the case of **Kenya Power & Company Ltd v Khan Nassir Rustam** [2013] eKLR, where Kasango J., held that the wide discretion of the Court to grant stay should be liberally exercised once an applicant demonstrates sufficient cause, substantial loss and furnishes security. He submitted that the applicant herein appealed against the judgment of the Court delivered on 20th November, 2020 vide a Notice of Appeal dated 26th November, 2020. He further submitted that the application dated 11th December, 2020 had been made timeously. He stated that the 2nd application dated 15th January, 2021 had also been filed timeously since the warrants of attachment that led to the filing of the said application were issued by the lower Court on 29th December, 2020, on an application made by the 2nd respondent.

10. Mr. Asige urged this Court to grant the order for stay of execution sought as the applicant has met the threshold set out under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 for the Court to exercise its wide discretion.

11. Mr. Njeru, learned Counsel for the 2nd respondent submitted that the High Court had already granted the applicant stay of execution pending appeal when it filed an appeal before it and that the said order subsisted during the pendency of the appeal. He submitted that once the appeal was dismissed by the High Court on 20th November, 2020, this matter ceased to exist and is now fully and finally determined. He stated that this Court became *functus officio* and has no jurisdiction to grant further orders herein.

12. It was submitted by Counsel for the 2nd respondent that the jurisdiction to hear and determine any application for stay of execution pending appeal now lies with the Court of Appeal hence the applications dated 11th December, 2020 and 15th January, 2021 herein were fatally defective. He further submitted that the said applications had been brought under the wrong provisions of the law since Order 42 Rule 6 of the Civil Procedure Rules is the guiding provision governing grant of stay of execution for appeals from lower Courts to the High Court. He indicated that the proper provisions under which an application for stay of execution pending appeal in the Court of Appeal should be made is under Rule 5(2)(b) of the Court of Appeal Rules.

13. Mr. Njeru relied on the case of **Dickson Muricho Muriuki v Timothy Kagundu Muriuki & 6 others** Nyeri Civil Application No. 21 of 2013 (UR 5/2013) wherein the Court of Appeal was faced with a similar issue and held that once a Court has pronounced the final judgment, it becomes *functus officio* and must down its tools. He indicated that the said Court indicated that granting orders for stay of execution after judgment would be detrimental to the concept of finality in litigation within the hierarchy and structure of the Kenyan Courts. The Court further held that once the Court has delivered judgment, all pertinent issues and points of law have been fully canvassed and considered thus upon delivery of judgment all the rights of the parties have been determined.

14. Mr. Njeru argued that the applicant had not offered to deposit any security in Court as a condition for being granted stay since the costs of Kshs. 157,100.00 that the applicant deposited as security are the 2nd respondent's costs in the Magistrate's Court and no costs had been proposed for the dismissed appeal in the High Court, where the respondents were also granted costs. He further argued that the applicant had not demonstrated how the appeal if successful, would be rendered nugatory in the event the prayer for stay of execution was declined.

ANALYSIS AND DETERMINATION.

15. This Court has considered the applications filed herein, the affidavits filed in support thereof, the grounds of opposition by the 2nd respondent and the written submissions by Counsel for both parties. The issues that arise for determination are: -

(i) Whether this Court is *functus officio*; and

(ii) Whether the applicant herein has satisfied the conditions to warrant grant of an order for stay of execution pending appeal to the Court of Appeal.

16. In the affidavit sworn by the applicant on 18th December, 2020, he deposed that its intended appeal has overwhelming chances of succeeding due to the fact that no bill of costs was filed by the respondents for taxation by the Deputy Registrar of the High Court as required by the law, thus the sum of Kshs. 157,100.00 assessed *exparte* by the Senior Resident Magistrate's Court on 12th September, 2018 in

Mombasa SRMCC No. 1924 of 2017 cannot be executed against the applicant who was not a party to the said suit.

17. It was averred by the applicant that the Honourable Court failed to consider the provisions of Sections 1 and 2 of the Advocates Act, Cap 16 Laws of Kenya and that the lower Court had no jurisdiction to order the applicant to pay costs of the proceedings. The applicant stated that the Trial Court also failed to consider that he was not given an ample opportunity to meet the complaint against him and to answer it before the said Court made an order for costs.

18. In the affidavit sworn by the applicant on 15th January, 2021, he averred that judgment was entered by the High Court on 20th November, 2020 dismissing the appeal and that being dissatisfied with the said judgment, he filed a Notice of Appeal dated 26th November, 2020. He also averred that the applicant filed an application for stay of execution pending the hearing and determination of the appeal dated 11th December, 2020.

19. It was deposed by the applicant that during the pendency of the application dated 11th December, 2020, the 2nd respondent proceeded to obtain warrants of execution and attached the applicant's law firm's office furniture which was meant to pre-empt and undermine the hearing and fair determination of the application for stay of execution pending appeal, which was coming up for hearing on 19th January, 2021. The applicant deposed that the 2nd respondent would not suffer any prejudice upon the grant of stay of execution orders as the decretal sum was deposited in a joint interest earning account.

Whether this Court is *functus officio*.

20. 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 in the following words-

"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."

21. The 2nd respondent submitted that the High Court having delivered its judgment on 20th November, 2020 and dismissed the applicant's appeal with costs to the respondents, became *functus officio* and has no jurisdiction to grant further orders herein since the Court had already granted stay of execution during the pendency of the appeal and that it has no jurisdiction to grant any additional stay of execution herein. It further submitted that the filing of an application for stay of execution before the same Court that made the decision under challenge, is equivalent to asking the Court to sit as an appellate Court against its own judgment and determine that the appeal has chances of success.

22. It is trite law that the principles guiding the grant of 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."

23. 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. 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 as hereunder-

"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"

24. It is this Court's finding that having granted stay of execution pending appeal and thereafter, heard and determined the appeal before the High Court on its merits and rendered a judgment dismissing the said appeal, all pertinent issues of fact and points of law have been fully canvassed and considered. As such, this Court conclusively dealt with the issue of whether the applicant's appeal is an arguable one and concluded that it has no merit.

25. Having discharged its duty on the appeal which was before it, this Court is *functus officio*. Black's Law Dictionary, Tenth Edition defines the term "*functus officio*" as 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.

26. In view of the above finding, this Court has no jurisdiction to delve into the issue whether the applicant has satisfied the conditions for grant of an order for stay of execution pending appeal since Court orders are not given in vain. The upshot is that the applications dated 11th December, 2020 and 15th January, 2021 are devoid of merit and the same are dismissed with costs to the 2nd respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 17TH DAY OF DECEMBER, 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 Teams Online Platform.

NJOKI MWANGI

JUDGE

IN THE PRESENCE OF-

NO APPEARANCE FOR THE PARTIES

MR. OLIVER MUSUNDI – COURT ASSISTANT.