



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 89 OF 2020

JAMES KIIRU MWANGI.....APPELLANT/APPLICANT

VERSUS

GIBSON KIMANI MWANGI.....1ST RESPONDENT

CHRIS GANSURE.....2ND RESPONDENT

RULING

1. This ruling is premised on the Notice of Motion brought by the appellant/applicant herein dated 6th September, 2021 and supported by the grounds established on its face and the facts stated in the affidavit of the applicant, who sought the following orders:

i. Spent.

ii. Spent.

iii. THAT this Honourable Court do extend the time for complying with the court orders for stay pending appeal to deposit the decretal sum in court or to secure a bank guarantee for the decretal sum given on 11th June, 2021.

iv. THAT in the alternative, this court do review its orders aforesaid and have the appellant deposit a title deed as security of almost a similar value or exceeding the decretal sum.

v. THAT in the alternative, this court do review the court orders and have the appellant issue a bank guarantee of Kshs.450,000/ in court in compliance with the orders for stay of execution pending appeal.

vi. THAT consequently, execution be stayed pending disposal of the appeal herein.

vii. Any other or further orders that this court may deem fit and just to grant.

viii. THAT costs be in the cause.

2. The Motion is opposed by way of the Grounds of Opposition dated 22nd September, 2021 brought by the 1st respondent, where he put forward the following grounds:

a) THAT the Motion does not attach the application alluded to thereof placed before the Honourable Court during vacation.

b) THAT the certificate of urgency, application during vacation, are alluded to application seeking extension of the court order and the supporting affidavit were never served on the 1st respondent.

c) THAT no reasonable and logical grounds have been adduced to warrant the application and/or extension of the court order.

d) THAT the supporting affidavit is not factual and is a misrepresentation of material facts with no probative/evidential value as not sworn by the applicant.

e) THAT the application is an act of desperation and time wasting aimed at frustrating the plaintiff from enjoying the fruits of his judgment.

f) THAT the application is not in good faith, vexatious, frivolous, scandalous and an abuse of the court process and should be dismissed with costs to the plaintiff.

3. At the hearing of the instant Motion, the parties' respective advocates chose to rely on the averments made in the Motion and its supporting documents, and the Grounds of Opposition.
4. I have considered the grounds presented on the face of the Motion as well as the affidavit in support thereof. I have likewise considered the Grounds of Opposition brought by the 1st respondent.
5. The record shows that the 2nd respondent has never participated in the proceedings relating to the appeal thus far.
6. It is clear that the Motion is essentially seeking an extension of time within which to comply with the conditions set by this court for a stay of execution.
7. The record shows that the applicant had previously sought for an order for a stay of execution pending the hearing and determination of its appeal to the High Court. Upon hearing the parties on the same, the court vide its ruling delivered on 11th June, 2021 granted the order for a stay of execution on the condition that the applicant deposits the entire decretal sum of Kshs.1,452,878.57 in an interest earning account to be held in the joint names of the parties' advocates and/or firm of advocates within 45 days from the date of the ruling or in the alternative, provides a bank guarantee for the amount within a similar period, failure to which the application for a stay of execution would stand dismissed.
8. It is not in dispute that the applicant has not complied with the aforementioned conditions.
9. On his part, the applicant has explained his non-compliance by stating that his efforts to raise the decretal amount have proven futile due to the slow economy and that this too has delayed his attempts at selling his parcel of land.
10. The applicant further states that he is ready and willing to avail his title deed as security in the alternative to the conditions set by this court on 11th June, 2021; with the additional option of also providing a bank guarantee not exceeding the sum of Kshs.450,000/=.
11. The applicant is apprehensive that unless time for compliance is extended to him, the 1st respondent will swiftly move to execute the impugned judgment.
12. In retort, the respondent through both his Grounds of Opposition and the oral arguments presented by his counsel, Njuguna, submits that the applicant has failed to comply with the conditions for a stay of execution and without good reason, further terming the instant Motion an abuse of the court process.
13. Upon my perusal of the record, while it is apparent that the Motion was brought following the lapse of the timelines set for compliance by this court on 11th June, 2021 I am satisfied that the Motion has been brought without unreasonable delay. There is also nothing to indicate bad faith on the part of the applicant in bringing the Motion.
14. Upon further considering the reasons given by the applicant for non-compliance, I find the same to be reasonable in the circumstances and upon taking judicial notice of the overarching effects of the Covid-19 pandemic both countrywide and globally.
15. Further to the foregoing and more importantly, this court is granted the power to enlarge the time for doing any act pursuant to the provisions of **Order 50, Rule 6** of the **Civil Procedure Rules** which stipulate that:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”
16. Concerning the requests made by the applicant for compliance with the conditions for a stay of execution, while I am alive to the sentiments raised and challenges experienced by the applicant, I find that it would not be proper in the circumstances for the applicant to be permitted to deposit a title document as security since there is no way of establishing whether the value of the property in question constitutes adequate security commensurate to the decretal amount or whether the title document is registered in his name, in the absence of credible evidence.
17. In my view, the provision of a bank guarantee would constitute a more suitable option for the applicant.
18. In view of the foregoing circumstances and upon balancing the competing interests of the parties, I find it reasonable and only fair for me to enlarge the time required for the applicant since it has indicated its readiness and willingness to comply with the said conditions.
19. Consequently, I will exercise my discretion in allowing the Motion dated 6th September, 2021 and direct that the timelines for compliance with the conditions for granting the order for a stay of execution order issued on 11th June, 2021 be extended on the condition that the applicant provides a bank guarantee for the decretal sum of Kshs.1,452,878.57 from a reputable bank within 60 days from today, failure to which the order for stay shall automatically lapse.

20. Upon considering the nature of the Motion, I find it fair and reasonable to order the applicant to bear the costs of the Motion.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
17TH DAY OF DECEMBER, 2021.**

.....

J. K. SERGON

JUDGE

IN THE PRESENCE OF:

..... **FOR THE APPELLANT/APPLICANT**

..... **FOR THE 1ST RESPONDENT**

..... **FOR THE 2ND RESPONDENT**