



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 12 OF 2018

JAMES GITHINJI WAWERU.....APPELLANT

VERSUS

NIC BANK LIMITED.....RESPONDENT

RULING

INTRODUCTION

1. The Appellants' Notice of Motion application dated and filed on 7th May 2019 was brought pursuant to the provisions of Order 22 Rule 22(1), Order 42 Rule 6 and Order 51 Rule (1) of the Civil Procedure Rules and all enabling provisions of the law. Prayers Nos (1) and (2) were spent. It sought the following remaining orders:-

1. Spent.

2. Spent.

3. THAT pending the hearing and determination of the instant appeal this Honourable Court be pleased to stay the proceedings in respect of Nairobi CMCC No 6569 of 2016 and all consequential orders as against the Appellant.

4. THAT costs of this application be in the cause.

2. His Written Submissions were dated 23rd July 2019 and filed on 24th July 2019 while those of the Respondent were dated 22nd July 2019 and filed on 23rd July 2019.

3. The parties requested the court to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE APPELLANT'S CASE

4. On 7th May 2019, the Appellant swore an affidavit in support of his present application.

5. He contended that in 2017, he was served with a Notice to Show Cause for (NTSC) a matter he was not aware of as he was never informed of the judgment. It was his averment that the NTSC was for the execution of the sum of Kshs 242,525.85. He stated that he instructed his advocates to file an application to set the said NTSC aside but the same was dismissed. He therefore filed an appeal against the said decision.

6. He averred that sometimes in 2019, he was served with another NTSC and that it was therefore only fair that his application be allowed because if he complied with the *ex parte* judgment, then he would suffer prejudice of paying a debt he did not know about and thus render his appeal nugatory.

7. He thus urged this court to allow his application as sought.

THE RESPONDENT'S CASE

8. In response to the said application, the Respondent's Legal Officer, Ibrahim Mbogo Ngatia, swore a Replying Affidavit on 10th June 2019. It was filed on 12th June 2019.

9. The Respondent averred that the present application was unmerited, incompetent, bad in law and an abuse of the court process. It pointed out that the Appellant's application to set aside the default judgment was dismissed vide a Ruling dated 15th December 2017 as the Trial Court was satisfied that he had been duly served and hence the judgment had been regular and proper. It added that the Appellant's application in the lower court was dismissed on 18th October 2018 for having being a negative order which was untenable in law.

10. It was its further contention that the Appellant's third application that was filed on 8th April 2019 was yet to be determined and since a Memorandum does not operate as an order for stay, it was at liberty to proceed with execution.

11. It also stated that he had not offered security for the due performance of the decree and that in the event he was to succeed in his Appeal, it would be able to refund him the decretal sum as it was a very solvent entity.

12. It was emphatic that he was gambling with the court process and trying to delay the matter and/or obstruct justice to avoid paying the decretal sum by filing the present application and was thus undeserving of the orders he had sought.

13. It therefore urged this court to dismiss the Appellants' application with costs.

LEGAL ANALYSIS

14. The Appellant relied on the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules that gives the court power to grant a stay of execution pending appeal. He submitted that he had filed his application without undue delay, he would suffer substantial loss if the order for stay of execution was not granted and that he was willing to surrender the logbook as security for the due performance of the decree.

15. In this regard, he relied on the case of **Gitahi & Another vs Warugongo (1988) KLR 621** that was cited in **Mathu vs Gichimu [2004] eKLR** wherein it was held that it was "**right and proper that security should be given in a way which is least disadvantageous to the party giving that security.**"

16. He also referred this court to the case of **Butt vs Rent Restriction Tribunal (1982) eKLR** where the principles to be applied when granting an order for stay of execution were set out. In addition, he placed reliance on the case of **Kenya Commercial Bank Ltd vs East Cargo Forwarders Limited & 2 Others [2006] eKLR** where Ochieng J found that the question of whether summons had been properly served arose.

17. On its part, the Respondent also relied on the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules to support its argument that the Appellant herein was not entitled to the orders that he had sought. It averred that the present application was filed six (6) months after his application was dismissed on 16th October 2018, that he had not offered any security and that he had not demonstrated that he would suffer substantial loss if the orders he had sought were not granted.

18. It explained that the Appellant was truly indebted to it and that the motor vehicle in question was not undervalued. It, however, conceded that at this point, the court could not look at the merits of the Appeal as was stated in the case of **Carter & Sons vs Deposit Protection Fund & 2 Others Civil Appeal No 291 of 1997** cited in **Equity Bank Limited vs Taiga Adams Co Limited [2006] eKLR**.

19. It also relied on several cases amongst them **Kenya Shell Limited vs Kibiru & Another (1986) KLR 410** where the common thread was that when considering application for stay of execution pending appeal, there must be a just reason to deprive a successful litigant his fruits of judgment.

20. The conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules are not relevant in such an instant. In the case of **Kenya Power & Lighting Company Limited vs Esther Wanjiru Wokabi [2014] eKLR**, Githua J arrived at a similar conclusion.

21. As was held in the case of **Daniel Maore M'birithi vs Miriti M'ikanatha [2007] eKLR**, the court has unfettered discretion to grant an order for stay of proceedings pending appeal. An applicant is required to demonstrate that he has filed his application without delay, that he has an arguable appeal or *prima facie case* and that there is sufficient reason to grant an order for stay of proceedings.

22. As was also held in the case of **Global Tours & Travels Limited Nairobi HC Winding Up Cause No 43 of 2000**, the litmus test in matters of stay of proceedings is that the court must keep in mind of the need for expeditious disposal of cases, scarcity and optimal utilisation of judicial time and consider whether the applicant had established a *prima facie case* and if the application was filed expeditiously.

23. Notably, Order 42 Rule 6 (1) of the Civil Procedure Rules provides as follows:-

"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from (emphasis court), the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside."

24. It was therefore immaterial that the lower court had dismissed the Appellant's application for an order for stay of execution pending appeal because he still had a life line in this court.

25. As the Court of Appeal held in the case of **UAP Insurance Company Ltd vs Michael John Beckett[2004] eKLR**, all an applicant is required to show is that he has an arguable appeal which is not frivolous and that the appeal will be rendered nugatory if the stay of proceedings is not granted. In that case, it stayed proceedings pending hearing and determination of an appeal that had arisen from an order that had been made by the High Court. It held that an appeal would be futile if the proceedings before the arbitrator were not stayed.

26. This court took a similar view that in the event the execution proceedings continued against the Appellant herein and the appellate court found that the Trial Court had erred in not allowing the Appellants herein to participate in the lower court matter, then their appeal would have been rendered nugatory. Indeed, much precious time would have been wasted in the hearing of the case by way of formal appeal only for the proceedings to be overturned on appeal. It is better that a case is delayed for a little while longer and is heard on merit and an appeal be heard and determined on merit as opposed to an appellant seeking to be allowed to participate in lower court proceedings if it is found that he had been unfairly locked out in those proceedings.

27. The Appellant was categorical that he was not aware of the proceedings in the lower court. There was need for the appellate court to establish whether or not he was duly served with Summons to Enter Appearance leading to the entry of default judgment against him.

28. There was therefore merit in the Appellant's arguments that this court ought to be given an opportunity to interrogate the correctness and/or veracity or otherwise of his and the Respondent's said contentions because they were on diametrically opposite side of the poles. His assertions could not be wished away. His Appeal was not frivolous as it had raised a triable issue that was best determined on appeal before any further proceedings could continue in the lower court.

29. Accordingly, having considered the affidavit evidence, the Written Submissions and the case law that each party relied upon, it was the considered view of this court that if execution proceeded against the Appellant herein, the appellate court would have been denied an opportunity of determining whether or not there was any justification in the Trial Court having reached the decision it did. It was necessary that the appellate court determine if the Trial Court had exercised its discretion judiciously so as not to shut out the Appellant from tendering oral evidence should there be merit in his appeal.

DISPOSITION

30. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated and filed on 7th May 2019 was merited and the same is hereby allowed in terms of Prayer No (3) therein. **Costs of the application herein will be in the cause.**

31. To expedite this matter, it is hereby directed as follows:-

1. The Appellant is hereby directed to file and serve its Record of Appeal within forty five (45) days from the date of this Ruling i.e. by 16th March 2020

2. The Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division is hereby directed to facilitate the expeditious typing of the proceedings in the lower court to enable the Appellant comply with the timelines within which to file its Record of Appeal as aforesaid.

3. Either party is at liberty to apply.

4. Costs of the application will be in the cause.

32. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of January 2020

J. KAMAU

JUDGE