



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO. 66 OF 2019

MAKUENI COUNTY GOVERNMENT.....1ST APPELLANT/APPLICANT

JACKSON MUYA.....2ND APPELLANT/APPLICANT

-VERSUS-

STEPHEN MUTUKU MWANIKI.....RESPONDENT

RULING

1. The application for determination is dated 05/09/2019. It was filed under certificate of urgency and is brought under, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act, Article 159(2)(d) of the Constitution and all enabling provisions of the law. It seeks the following orders;

a) That there be a stay of execution of the judgment in Makueni SPMCC No. 112 of 2017; Stephen Mutuku Mwaniki –Vs- Makueni County Government & Jackson Muya pending hearing and determination of this Appeal.

b) That costs of this application do abide the outcome of the Appeal herein.

2. The application is supported by the grounds on its face and the 2nd Appellant's supporting affidavit sworn on 18/09/2019.

The Appellants are apprehensive that the Respondent will proceed to execute to recover the decretal sum which is approximately 3,000,000/=. The 2nd Appellant has also deposed that in the evidence before the trial Court, the Respondent testified that he was a *jua kali* artisan and would no longer be able to work. As such, he has deposed that it will be impossible or extremely difficult to recover the decretal sum if paid. It's also his deposition that the application has been brought without unreasonable delay.

3. The Respondent opposed the application through a replying affidavit sworn on 28/10/2019. He deposed that the application is incompetent, misconceived and bad in law. That it does not fully comply with the provisions of Order 19 Rule 4 of the Civil Procedure Rules (CPR), does not satisfy the legal threshold for grant of stay under Order 42 Rule 6 of the CPR and that the Insurance principal of subrogation does not apply.

4. The application was canvassed by way of written submissions. The Applicants through Mbai Waweru Advocates submit that the replying affidavit should not be considered because it was filed out of time and no leave was granted.

5. They further submit that the application is competent and meritorious as Order 42 Rule 6 of the CPR allows an Appellant to apply for an order of stay of execution of decree appealed from.

6. They further submit that their supporting affidavits are fully compliant with the requirements of Order 19 and that in any event, such defects would be mere technicalities curable under Order 19 Rule 7 of the CPR and Article 159(2) (d) of the Constitution

7. Further, they submit that the Respondent has not demonstrated capability to refund the decretal amount and as such, his proposal that half of the decretal sum should be deposited is untenable. He has not disputed the averment that he is no longer working.

8. The Appellants have offered to deposit the entire amount in an interest earning account to be opened in the joint names of the parties so that the sum is eventually available to the successful party in the appeal. They rely *inter alia* on **Nairobi H.C Misc. Application No. 1493 of 2003; Putton Ltd –vs- Joseph Mulei Mwasya** where the Court held that;

“Whereas the Applicant has offered to deposit the entire decretal amount in Court, the Respondent has not demonstrated his ability to repay should the appeal be successful. For this reason, the Appellant might suffer substantial loss.”

9. They also relied on **Nairobi HCCA No. 634 of 2017; Magnate Ventures Ltd –Vs- Simon Muatha & Anor (2018) eKLR** where the Court held that;

“It was the considered view of this Court that substantial loss does not have to be a colossal amount of money. It’s sufficient if an Applicant seeking stay of execution demonstrates that it will go through hardship such as instituting legal proceedings to recover the decretal sum it paid to a Respondent if his or her appeal succeeds. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful....”

10. It is also their submission that the Respondent does not dispute the fact that the application was filed without unreasonable delay. The application is opposed by the Respondent who submits that the application was filed more than six months after delivery of judgment and the delay has not been explained. They contend that where there is delay, it has to be explained irrespective of the length. They rely on **Joseph Ngigi Ibare –Vs- Myovi James & Anor (2016) eKLR** where the court noted that even a two days delay ought to be satisfactorily explained to the Court.

11. He submits that the Applicants have not shown the substantial loss that will result if stay is not granted and on how to prove substantial loss, he relies *inter alia* on **Lucy Nyamanu Kimani –Vs- Lawrence Mburu Muthiga (2006) eKLR** where the Court held that;

“...an Applicant demonstrates substantial loss by showing that the Respondent is not a person of means and payment of the decretal sum prior to the appeal would put the same beyond the reach of the Appellant.”

12. He has also cited the case of **Socfinac Company Ltd –Vs- Nelphat Kimotho Muturi (2013) eKLR** where Justice Odunga held as follows;

“The Appellant’s belief that the Respondent will be unable to repay the same is solely based on the Appellant’s lack of knowledge as to the Respondent’s financial ability or capability. In my view, the mere fact that an Appellant does not know the Respondent’s financial capability does not give rise to the presumption that the Respondent will be unable to repay the sum. There must be other factors that lead to that presumption. On the material before the Court, I am not satisfied that the Appellant has shown that it stands to suffer substantial loss if the stay sought is not granted.”

13. The Respondent argues that the Appellants’ proposal to deposit the decretal sum in Court will be prejudicial to him as it shall deny him the enjoyment of the fruits of his judgment. He contends that if the Court is inclined to allow the application, then it should be done on just terms. He relies on the case of **Kenya Shell Ltd –Vs- Kibiri & Anor (1986)KLR** where the Court of Appeal held;

“...in applications for stay, the Court should balance the parallel prepositions, first that a litigant, if successful, should not be deprived of the fruits of a judgment in his favor without a just cause and secondly that execution would render the proposed appeal nugatory...”

14. The Respondents did not submit on their concerns about non-compliance with Order 19 of the CPR and non-application of the subrogation principle. In my view, the concerns should be treated as abandoned.

15. Having considered the application, the supporting affidavit, the replying affidavit and the rival submissions, it is my considered view that the following issues arise for determination;

a) Whether the replying affidavit should be ignored for being filed out of time without leave.

b) Whether the Applicants have met the conditions for grant of stay of execution.

Issue (a) - The late Replying Affidavit

16. On 09/10/2019 when the application came up for inter parties hearing of the application, the Respondent was granted leave to file his response within 14 days. The leave lapsed on 23/10/2019 but the replying affidavit was filed on 05/11/2019. From the record, no leave was sought or granted to file the late response.

17. Although the Respondent’s conduct amounts to taking Court processes for granted, the Applicants’ reaction to the late affidavit stops them from complaining now. When the matter came up for mention on 05/11/2019, Ms. Luchemo for the Appellants stated as follows;

“I have just been served with the replying affidavit. I pray to be given 14 days to file a further affidavit and submissions.”

18. In addition to not raising an objection at that point, the Appellants were given leave to file a further affidavit and as such, the late replying affidavit did not prejudice them in any way. Substantive justice to the parties can only be served by hearing their respective cases on merit. In **Central Bank of Kenya –Vs- Uhuru Highway Development LTD & Others Civil Appeal No. 75 of 1998**, the Court of Appeal took the view that even if documents are filed late, a Court is obliged to consider them unless for reasons other than mere lateness, it considers it undesirable to do so.

19. It is therefore my considered view is that Court should exercise its discretion and consider the replying affidavit in the interests of justice.

Issue No. (b) - Whether Stay of Execution should be granted

20. As rightly submitted by the parties, the conditions which should guide the Court in determining whether to grant stay pending appeal are; whether substantial loss will occur if stay is not granted, whether the application has been filed without unreasonable delay and furnishing security for the due performance of the decree.

21. Judgment in the case appealed from was delivered on 21/03/2019 and this application was filed on 05/09/2019 which is approximately four months, months after lapse of the period allowed to file appeals. At paragraphs 7 and 8 of the supporting affidavit, the Applicants deposed that their Advocates on record were appointed by their insurer, M/S Heritage Insurance Co. Ltd, and there was a delay on the part of the insurance company in giving instructions on filing the appeal.

22. The record shows that the Appellants applied for leave to appeal out of time and their application was allowed on 30/08/2019. The current application seeking stay was filed thereafter and there is really no unreasonable delay between 30/08/2019 and 05/09/2019. Further and contrary to the Respondent's submissions, an explanation for the delay since delivery of judgment has been given and it is plausible in my view.

23. As for substantial loss, it is indeed true that the evidence was led before the trial Court to the effect that the Respondent was a *jua kali* artisan but he stopped working after the accident. In light of this and owing to the substantial decretal amount plus the fact that the appeal is against both liability and quantum, it was upto the Respondent to demonstrate his financial capability.

I agree with the sentiments of Lady Justice Mutende in **Swapan Sadhan Bose –Vs- Ketan Surenda Samaia & Others (2006) eKLR** where she stated as follows;

“This Court has said before and would bear repeating that while the legal duty is on the Applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an Applicant to know in detail the resources owned by the Respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has.”

24. Accordingly, I am of the view that substantial loss will result if stay orders are not granted, and the appeal succeeds.

25. As for security, the Court should balance the two competing interests i.e. that a successful litigant should enjoy the fruits of the judgment and at the same time allow an aggrieved party to exercise his right of appeal. The Appellants did not file submissions before their trial Court and it is therefore impossible to tell how much they would have proposed as quantum.

26. In the circumstances and after considering the decretal sum, I am of the view that Kshs. 500,000/= should be released to the Respondent pending the hearing and determination of the appeal. The balance should be deposited in an interest earning account to be opened in the joint names of the parties' advocates.

27. The upshot is that the Applicants have satisfied the conditions for grant of stay pending appeal.

28. I therefore grant the order for stay of execution pending the hearing and determination of Appeal on the following conditions;

(i) Kshs. 500,000/= to be paid to the Respondent through his advocates within thirty (30) days.

(ii) The balance to be deposited in an interest earning account in the joint names of the parties advocates within forty five (45) days.

(iii) Costs shall be in the cause.

Orders accordingly.

Delivered, signed and dated this 28th day of January, 2020 in open court at Makueni.

H. I. Ong'udi

Judge