



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 157 OF 2018

DAVID CHEROP ----- 1ST APPLICANT/APELLANT

MARY KIPTOON ----- 2ND APPLICANT/APELLANT

-VERSUS-

MARTHA JELANGAT MITICH ----- RESPONDENT

RULING

1. The application before me is the Notice of Motion dated 28th June, 2019 and filed 2nd July, 2019 brought under Certificate of Urgency of H. Chepng'etich of the same date. It is also brought under **Section 79 G & 3A of the Civil Procedure Act and Order 42 rule 6(1) of the Civil Procedure Rules** and all other enabling laws. It seeks orders;

1. Spent

2. Spent

3. THAT this Honourable Court be pleased to grant a stay of execution pending hearing and determination of the appeal against the Judgment made by Hon. G. Oduor on the 12th July, 2018.

4. THAT the costs of this application be provided for.

2. The said application is supported by the grounds of the face of it and the supporting affidavit of Mary Kiptoon sworn on 28th June, 2018 and the grounds include;

1. THAT the applicant has an arguable appeal with a high chance of success.

2. THAT a NTSC application was heard on the 25th June, 2019 and there is no doubt that a warrant of arrest was issued against the applicants.

3. THAT if the said stay of execution is not granted the applicant's appeal will be rendered nugatory and the applicant will suffer irreparable damage.

4. THAT unless this application is granted the respondent threatens to proceed with execution against the applicants.

5. THAT substantial loss will result to the applicants unless the order sought is granted.

3. It is opposed by the Replying Affidavit of Raymond Kiprop Kipkenei sworn on an unknown date, but filed on 31st July, 2019.

4. Parties filed written submissions in support of their rival positions.

5. Of relevance here is the deposition by Mr. Kipkenei that the applicant had sought similar orders in **High Court Miscellaneous Application Number 255 of 2018**, which orders were denied by my brother *Ngugi J.* I called for that file and noted that on 22nd October, 2018 the Judge perused the application dated 8th October, 2018 and Mr. Kipkenei's response. He noted that the applicant had filed **High**

Court Civil Appeal Number 157 of 2018 and the same was deemed as duly filed. He also made another order;

“Application for stay of execution is disallowed since there is no demonstration that the appeal will be rendered nugatory”. Then proceeded to close the file.

6. The applicant, has without reference to those orders brought similar application seeking the same orders. In the current application the only new ground is that there was a Notice to Show Cause (NTSC) hearing on 25th June, 2019 and that a warrant of arrest must have been issued against the applicants. The Notice to Show Cause was annexed to the applicant’s affidavit as “MKI”.

7. The issue then is, should the applicant have filed a fresh application or sought review of the orders of 22nd October, 2019? The orders of the Judge were that the application was denied, because there was no demonstration of substantial loss or that the appeal would be rendered nugatory. In the instant application there is no evidence that there was a Notice to Show Cause hearing during which a warrant of arrest was issued. In fact the applicant speculates in her affidavit ‘a warrant of arrest must have been issued’. My view is that if indeed there was a NTSC hearing it is in those proceedings where the applicant ought to have given whatever explanation she had for not complying with that court’s decree; and depending on the outcome of those proceedings; proceed to this court.

8. In the submissions for the applicant, it is submitted;

“THAT the applicants being aggrieved by the said Judgment were then granted leave to file an appeal out of time after filing Notice of Motion dated 8th October 2018 and a record of appeal was duly filed.

THAT the applicants were then served with a NTSC by the respondents threatening to execute the said judgment and since the said execution would render their appeal nugatory filed this application seeking that this Honourable Court exercises its discretion by granting a stay of execution of the said judgment pending the hearing and determination of their appeal.”

9. In this application the applicant appears to plead a new ground, the Notice to Show Cause, which could lead to the issuance of a warrant of arrest against the applicant. It is also argued that the respondent has not dispelled the applicant’s fear that the decretal sum be paid she will be able to refund the same in the event that the appeal succeeds. That she ought to have filed an affidavit of means, See **Industrial Credit Bank Limited vs Aquinas Francis Wasike C of A CA 238/2005**.

10. In response for the respondent it is argued the application is *res judicata* and that the applicant has not demonstrated she will suffer substantial loss or how the appeal will be rendered nugatory.

Relying on;

1. **High Court of Kenya at Malindi Civil Appeal No. 18 of 2017, Amal Hauliers Limited vs. Abdunasir Abubakar Hassan**
2. **High Court of Kenya at Kisii Civil Case No. 229 of 2010, Samuel Kimutai Korir (suing as personal and legal representative of Estate of Chelangat Silevia) vs. Nyanchwa Adventist Secondary School and Nyanchwa Adventist College.**
3. **High Court of Kenya at Kiambu Civil Appeal No. 2 of 2018, Margaret Njeri Mwigigi vs. Rose Nyambura Kamande.**

It is submitted that should the court consider granting stay then the decretal sum either be deposited in a joint interest earning account or half (1/2) the decretal sum be paid to the respondent.

11. The respondent was a passenger in the said motor vehicle. In the memorandum of appeal the appellant is not disputing liability but the award of 100% liability. The appellant alludes to having made some payments to the respondent to the tune of Ksh 56000. That is an issue, if it was before the trial court, to be dealt with in the appeal.

12. I have carefully considered the rival affidavits and the submissions. The relevant part of **order 42 rule 6** states:

...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.

(2) No order for stay of execution shall be made under subrule (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.

(3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4).....

(5).....

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."

13. The applicant is expected to establish that she will suffer substantial loss, that the application was filed timeously and that there is security for the performance of the decree.

14. The Judgment appealed from was delivered on 12th July, 2018. This application was filed on 2nd July 2019. There is no explanation for the delay in the application or in the supporting affidavit. The applicant's previous application filed on 18th October, 2018 was declined and no appeal, or application for review of those orders was filed. To that extent it is *res judicata and ought to be struck out*.

15. The appellant has also not proposed or offered any security for the performance of the decree.

16. Having found that the application was heard on the same ground by *Ngugi J*, and similar orders sought declined in Miscellaneous Application Number 255 of 2018, I find that this one is *res judicata* and abuse of the court process for the applicant to bring the same application, and seek the same orders.

17. The application is struck out with costs to the respondent.

Delivered, Dated and signed at Nakuru this 27th day of February, 2020.

Mumbua T. Matheka

Judge

In the presence of;

Edna Court Assistant

Ms Ombura for Mr. Wambeyi for applicant

Kipkenei for respondent