



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 42 OF 2018

STEPHEN KIARIE CHEGE.....APPELLANT

VERSUS

PAMELA AMOIYA OBONDE.....RESPONDENT

RULING

1. Before me is a Notice of Motion filed on 3rd January, 2019 and principally brought under Order 42 Rule 4 and 6 and Order 50 Rule 4 of the Civil Procedure Rules seeking an order to stay execution of the judgment and decree in the lower court in Kiambu CM's Civil Case No. 124 of 2014 pending the full hearing and determination of the appeal herein.

2. The application is premised on among other grounds that, unless stay of execution is granted, the appeal will be rendered nugatory and the Applicant will suffer irreparable loss and damage.

3. **KELVIN NGURE**, the Senior Claims Officer at **Direct Line Assurance Company** swore the affidavit in support of the application on behalf of the Applicant. He deposed therein that in the judgment appealed from, the successful Respondent was awarded general damages in the sum of Kshs. 900,000/= and special damages amounting Kshs.231,729/=; that the Applicant is thereby aggrieved and has appealed against the said judgment; that the appeal has a high chance of success; and that unless stay of execution is granted, the appeal will be rendered nugatory. Contending that the Respondent has no proven means to refund the decretal sum if the appeal succeeds, he further avers that the Applicants will suffer irreparable loss and damage. He asserts the Applicant's willingness to deposit the entire decretal amount into court as security for performance of the decree.

4. **PAMELA AMOIYA OBONDE**, the Respondent swore a replying affidavit in opposition to the motion. She deposed that the Appellant/Applicant had filed a similar application in the lower court suit which the trial court allowed on condition that, the Appellant deposits the entire decretal sum in an interest earning account, within a stipulated period, which order the Applicant did not comply with. That thereafter the Applicant's motion to extend time for compliance was dismissed by court below. She contended that the Applicant is bound by the orders of the lower court and that for failing to disclose these matters before this court, he is guilty of material non-disclosure. She urged the court to dismiss the application.

5. The Respondent also raised a Notice Preliminary Objection based. To the effect that the stay orders issued in the lower court are still in force and as such, the instant application is an abuse of the court process.

6. The Court directed that both the preliminary objection and the motion be canvassed by way of written submissions. The Applicant submitted regarding the preliminary objection that, the instant application was properly brought before this court. Citing the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules the Applicant argued that thereunder, an Applicant is at liberty to file a second application for stay in the appellate court notwithstanding the fact that a similar application has been dismissed in the lower court. It was submitted that the orders issued in that regard the lower court on 17/7/2018 are no longer in force as an application by the Applicant to extend time within which to comply was dismissed by the said court.

7. The Applicant further argued that, as an appellate court the High Court is not bound by the orders of the lower court as it exercises supervisory jurisdiction over the subordinate courts, pursuant to the provisions of Article 165(6) of the Constitution. In support of his submissions, the Applicant cited the case of **Stephen Wanyee Roki vs K-Rep Bank Limited & 2 others (2016) eKLR**.

8. Concerning the motion itself, the Applicant submitted that he has an arguable appeal and reiterated willingness to give security. He asserted that the instant application was made without delay. He contended that unless the application is granted pending appeal, he stands to suffer irreparable loss while the appeal, which has a high chance of success will be rendered nugatory.

9. It was argued for the Applicant that the Applicant only needed to show that he has an arguable appeal as held in the case of **Kenya Revenue Authority v Sidney Keitany Changole & 3 others (2015) eKLR**. It was submitted that it is highly unlikely that the Respondent will be capable of refunding the decretal amount in the event the appeal succeeds, which eventuality would occasion substantial loss to the

Applicant. Reliance was placed in the case of **Edward Kamau & Anor v Hannah Mukui Gichuki & anor (2015) eKLR**. In that case, it was held that where the Respondent's financial means are not disclosed, it may be construed that the Respondent is not possessed of sufficient means to reimburse decretal money should the appeal succeed.

10. Counsel for the Respondent reiterated the fact of the subsistence of the lower court orders and contended that the procedure rules do not allow an Applicant to file second similar application for stay of execution before the appellate court, between the same parties and therefore, the matters canvassed herein are *res judicata*. Reliance was placed on the case of **Nur Olow Farah vs Mohamed Mude Arale (2014) e KLR**. The court was urged to dismiss the application with costs.

11. The court has considered the material canvassed in respect of the motion. The Respondent complains that the instant application is *res judicata* coming subsequent to the lower court decision on a similar application, and that the Applicant is guilty of material non-disclosure. On the latter objection, I do agree with the Respondent that the Applicant was duty-bound in approaching this court to disclose the fact that a previous similar application had been made in the lower court. The orders he seeks are discretionary in nature and material non-disclosure could militate against the court's exercise of such discretion in his favour. The Applicant's failure in this case to disclose such a material fact is reprehensible. Nevertheless, that failure, in the circumstances of this case, is not enough to peremptorily defeat the motion and should be considered in the totality of other material proffered by the Applicant.

12. Regarding the *res judicata* objection, my considered view is that the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules accommodate the filing of a second stay application by the same party. The Rule is in terms that:-

“Whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such (substantive) 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 set it aside.”

13. In the case of **Peter Maina v Francis Monyo Kimere (2017) e KLR** I had occasion to consider a similar objection to a second application for stay of execution made to the appellate court, and observed that: -

“12. With regard to the legal objections raised by the Respondent, it does seem to me that this court does exercise both original and appellate jurisdiction with regard to applications for stay of execution pending appeal. Order 42 Rule 6 (1) contains the words:

“.....whether the application for such stay shall have been granted or refused by the court appealed from, the court to which the appeal is, preferred shall be at liberty to consider such application and make such order thereon as may to it seem just.....”

13. There is before this court an appeal filed by the Applicant in respect of the substantive decision of the lower court. On the authority of **Githunguri -Vs- Jimba Credit Corporation Ltd (No.2) [1988] 838** it seems that the existence of the memorandum of appeal clothes this court with a separate original jurisdiction under Order 42 Rule 6 (1) to consider a similar application to the one heard in the lower court. It matters not therefore that no appeal has been filed in respect of the specific decision on the application in the lower court.

14. In a recent case, **Equity Bank Ltd -Vs- West Link MBO Ltd [2013] eKLR** the Court of Appeal discussed at length the nature of its jurisdiction under Rule 5 (2) b) of the Court of Appeal Rules which states:

“Subject to sub-rule (1) the institution of an appeal shall not operate to suspend any sentence or to stay execution but the court may

a)....,

b) In any civil proceeding where notice of appeal has been lodged in accordance with Rule 75, order a stay of execution, injunction or stay any further proceedings on such terms as the court may think just.”

15. **Githinji JA** stated *inter alia* in his judgment:

“It is trite law that in dealing with 5 (2) b) applications the court exercises discretion as a court of first instance and even where a similar application has been made in the High Court or other similar court under Rule 6 (1) of Order 42 of the Civil Procedure Rules and refused, the court in dealing with a fresh application exercises an original independent discretion as opposed to appellate jurisdiction (Githunguri -Vs- Jimba Credit Corporation Ltd (No.2) [1988] 838.”

16. In his judgment **Musinga J A** observed on the same question that:

“The court is said to be exercising special independent original jurisdiction because on considering whether to grant or refuse an application for stay, it is not hearing an appeal from the High Court decision. It can grant orders of stay, irrespective of whether or not such an application had been made in the High Court. (See Stanley Munga Githunguri -Vs- Jimba Credit Corporation Ltd (Supra).”

17. **Kiage J A** in his judgment quoted a passage from the judgment of the Court of Appeal in **Gurbux Singh Suiri & Anor. –Vs- Royal Credit Ltd. Civil Application NAI 281 of 1995** expounding on the court’s reflection in its dictum in the **Githunguri** case as follows:-

“In ordinary circumstances the court has only appellate jurisdiction and in the absence of Rule 5 (2) (b) a party who has been refused a stay of execution or an injunction by the High Court would have been obliged to apply to the Court of Appeal to set aside the refusal and then, having done so, to grant the stay or injunction.

.....But because of the existence of Rule 5 (2) (b) one does not have to apply to the court to first set aside the refusal by the High Court and then having set aside the High Court order, to grant one itself. That is clearly the sense in which the expression ‘independent original jurisdiction’ is to be understood and that was made abundantly clear in the Githunguri case, supra, by use of the expressions such as “we have to apply our minds *denovo* for it is not an appeal from the learned Judge’s discretion to ours.”

12. I had then concluded in **Peter Maina’s** case above that:-

“ 18. Similarly, the jurisdiction of the High Court in this case was invoked when the substantive appeal (itself a fresh pleading separate from the suit in the lower court) was filed. It is true that the application for stay of execution was allowed with conditions in the lower court. The wording in Order 42 Rule 6 (1) however does not preclude the Applicant from approaching this court as he has done.”

14. Now turning to considerations in respect of an application for stay pending appeal, has the Applicant demonstrated likelihood of suffering substantial loss if stay is denied? One of the most enduring legal authorities on the issue of substantial loss is the case of **Kenya Shell Ltd V Kibiru & Another [1986] e KLR 410**. Holdings 2,3 and 4 therein are particularly relevant. These are that:

“1.

2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.

3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.

4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.

5.”

15. The ruling by **Platt Ag JA**, in the **Shell** case, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Ag JA (as he then was) stated inter alia that:

“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts...(emphasis added)”

16. The learned Judge continued to observe that:-

“It is usually a good rule to see if Order XLI Rule 4 of the civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.” (emphasis added)

17. Earlier on, **Hancox JA** in his ruling observed that:

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would,... render the appeal nugatory.

This is shown by the following passage of Cotton L J in Wilson -Vs- Church (No 2) (1879) 12ChD 454 at page 458 where he said:-

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to

see that the appeal, if successful, is not rendered nugatory.”

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

18. There is no dispute that the application herein was brought timeously after the dismissal by the lower court of the motion by which the Applicant had sought to extend time for compliance with orders for deposit of security. The decretal sum is not insubstantial and if the same were to be unrecoverable upon the determination of the appeal, the Applicant would no doubt suffer substantial loss. The Applicant has emphasised that the Respondent has no known means to enable him refund the decretal sum were the appeal to succeed. The Respondent, has, despite the challenge raised by the Applicant as to his financial incapacity to refund the decretal sums not attempted to controvert the Applicant’s assertions.

19. In the oft-cited case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] e KLR** the Court of Appeal stated that:

“This court has said before and it would bear repeating that while the legal duty is on an 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 applicant to know in detail the resources owned by a 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 since that is a matter which is peculiarly within his knowledge – see for example Section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

20. The Respondent’s replying affidavit is consumed by matters relating to previous proceedings and specifically, the Applicant’s alleged conduct in the lower court. Therefore, despite the evidential burden having shifted to him, the Respondent failed to address the question of his means. The Applicant would no doubt suffer substantial loss if he was unable to recover the decretal sum upon the appeal determining in his favour and the appeal rendered nugatory. As stated in the **Shell** case, that is the eventuality must be prevented.

21. The words stated in **Nduhiu Gitahi and Another -Vs- Anna Wambui Warugongo [1988] 2 KAR**, citing the decision of **Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198** are apt:

“We are faced with a situation where a judgment has been given. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff.....”

It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal.....”

22. That too is the import of part of the court’s observations in **James Wangalwa & Another –Vs- Agnes Naliaka Cheseto [2012] eKLR** and the **Shell** case above.

23. Reviewing all the above matters, the Court is inclined to grant the prayer to stay execution pending appeal. On condition that, within 21 days of today’s date, the Applicant deposits the entire decretal sum into Court. In view of the failure by the Applicant to disclose the fact that a similar application had been made in the lower court and that the Applicant had failed to comply with orders made therein in the stipulated time, this Court will award the costs of the motion to the Respondent in any event.

DELIVERED AND SIGNED AT KIAMBU THIS 12TH DAY OF MARCH 2020

.....

C. MEOLI

JUDGE

In the Presence of:

Mr. Ndolo for the Applicant

Respondent - absent

Court Assistant - Kevin/Nancy