



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 54 OF 2015

ERICA KETA KULUMBA T/A

RISE & SHINE ACADEMY.....APPELLANT

VERSUS

EZARA MUGERA.....RESPONDENT

(Being an appeal from the Judgment and Decree of Principal Magistrate (Hon. S.K. Gicheru), delivered on the 20th day of March, 2015 in CMCC (Msa) No. 4665 of 2002, between Ezera Mugera vs Erica Keta Kulumba t/a Rise & Shine Academy)

R U L I N G

1. The court is called upon to determine the application by the Notice of Motion dated and filed in court on the 17/3/2019 by which the Appellant, as the judgment debtor in this appeal and the trial court, seeks orders of stay pending an appeal to the Court of Appeal. The ground disclosed to premise the application and found on its face and in his Affidavit sworn and filed in support thereof are to the effect that the applicant is aggrieved with this court's decision dated 19/10/2018 which dismissed the appeal and has preferred an appeal to the Court of Appeal by a Notice of Appeal dated and filed in Court on the 4/4/2019, but despite such a move the respondent has taken out execution proceedings by attaching its immovable asset being KILIFI/MTWAPA/4702 and in doing so circumvented or just ignored the dictates of the law under Order 22 Rule 18 by failure to take out a Notice to show cause when the decree was more than one year old. For that reason, the appellant contends that he stands to suffer substantial loss incapable of reparation by an award of damages.

2. When served, the respondent, through his son and a done of Power of Attorney, opposed the application by the Replying Affidavit sworn and filed in court on the 15/5/2019. He asserts that the appeal to the Court of Appeal is invalid having been filed overly out of time and without leave being sought nor granted and that no security for the due performance of the decree had been offered. The respondent thus contended that without a valid appeal and in the absence of security duly offered, the court's discretion had not been properly sought and should not be exercised in favour of the applicant. It was contended that even the security earlier given had been outstripped by the decretal sum and thus not sufficient.

3. It was then averred that the attached property having been given as security was validly attached because with the dismissal of the appeal the security in it had crystalized.

4. Finally the deponent of the Replying Affidavit complained that the matter had been in court since 2002, a period of over 16 years, during which time the respondent who is elderly has had his health deteriorate and now wished to enjoy the fruits of his litigation and that the application was brought after an undue unexplained delay spanning from the 19/10/2018 when the judgment was delivered on a date given in the presence of the advocate for the applicant till the 4/4/2019 when the application was filed. On the decretal sum alleged to be inflated, the respondent reminded the court that the decretal sum was subject to the application of interests.

5. On the 28/11/2019, the counsel for the parties agreed to have the matter written canvassed by way of written submission. Pursuant to such agreement, the applicant filed his submissions on the 15/01/20 while those by the respondent were filed on the 31/01/2020 after which the parties opted not to highlight the same.

Submissions by the parties

6. In their submission, the applicant recognizes the principles that must be fulfilled to justify the court granting the orders of stay pending appeal to include the existence of an appeal and the proof of substantial loss which renders the outcome of the appeal nugatory unless stay be granted. The counsel then added that the intended appeal is arguable and bases that submission on a draft memorandum of appeal which is however not annexed or exhibited in the application. In contending that the appeal is arguable to merit stay the applicant relied on the

decisions in *Co-operative Bank of Kenya Ltd vs Banking Insurance & Finance Union (K) Ltd [2015] eKLR* and *Transjuba International Ltd vs ZEP RE (PTA Reinsurance Co. [2015] eKLR* both by the Court of Appeal and applying the Rule 5(2)b of the Court of Appeal Rules.

7. There was further reliance in the decision of *Kalonde Mbusya vs Martin Kimwele Kikoi [2005] eKLR* also by the Court of Appeal also applying Rule 5(2)b which granted stay on the grounds that if the suit land was sold and the appeal subsequently succeeded, the land would have been put beyond the applicant's reach by eviction and sale and the appeal would be rendered nugatory. The parting shot was that the warrant of attachment and sale were given contrary to the dictates of the rules.

8. For the respondent submissions were offered to the effect that the Decisions cited by the applicant were based on Rule 5 (2) b of the Court of Appeal Rules which are indeed applicable before the Court of Appeal but not before this court. It was emphasized that this court ought to be guided by *Order 42 Rule 6 and Masisi Mwita vs Damaris Wanjiku Njeri [2016] eKLR* was cited for the proposition of the law that the court ought not be obsessed with the protection of the appellant to the disregard of the respondents as a successful party because such obsession amounts to flirting with one party and shedding crocodile tears for the other.

9. The point was taken and stressed that an applicant must prove that there prevail factors that would deconstruct the very essence and purpose of the litigation as to render its results merely academic. On the facts of this case, the respondent points out that it is not the applicant's position that the respondent is impecunious and would be unable to affect a respond if the appeal succeeds subsequent the execution being concluded and that the only reason execution has been sought was the inability of the applicant to settle the decretal sum. In this case, it was averred, the attached property was offered by the applicant as a way of security and it cannot be said that the sale of such security by way of lawful execution can lead to an irreparable loss.

10. On the need to timeously approach the court for stay, the respondent took the positions that the applicant here is guilty of undue and inordinate delay stretching from 19/10/2018 to 4/4/2019 despite the fact that many processes were undertaken in between including the taxation of costs. Counsel cited to court the decision in *Collin Bett vs Silas Kabisa [2016] eKLR* for the finding that a delay of two (2) months was inordinate and disentitled the applicant to the remedy of stay pending appeal.

11. On the demand for security the counsel submitted that the security provided pending the dismissed appeal had been outstripped by application of interest and was at present not sufficient as such security. It was lastly submitted that the challenge on execution was due before the court executing the decree and not this court and Section 34(1) of the Civil Procedure was invoked. To the applicant, the decree was due for execution by the trial court and not this court and therefore how the warrants of attachment and sale were issued can only be questioned before that court.

Analysis and determination

12. Even though the parties have gone at great length to swear long and detailed affidavits and equally lengthy submissions, the issue for discussion is to me very narrow and straight forward. It is merely whether or not the pre-requisite for grant of stay pending appeal have been established. I understand that the guideline for this court must be the Civil Procedure Act and its Rules and not the Court of Appeal Rules. With that appreciation, I note that I am not expected to reconsider my decision so as to find that the appeal is arguable or not. That is a consideration before the Court of Appeal and not here.

13. In this matter, I follow the learning that an appellant must demonstrate the following:-

- A pending appeal
- The threat of substantial loss if stay is refused.
- That a security sufficient to meet the decree has been offered.
- That the application was presented with promptitude and not after undue delay.

14. Pendency of the appeal in all applications of this nature must be the very first stone to be laid even before one speaks and thinks of a cornerstone. Without an appeal one cannot purport to grant stay pending appeal unless one was to seek excellence in anomaly.

15. The Rule indeed provide that for purposes of an appeal to the Court of Appeal, the filing of a Notice of Appeal evidences an appeal. I do consider that it is in fulfilment of that prerequisite that the applicant has annexed the Notice of appeal dated and filed on 4/4/2019 and said to challenge the decision made way back on the 19/10/2018.

16. Even though it is not before me to question the validity of the Notice of Appeal, facts when applied to the law cannot be wished away. The fact that the law demands that a Notice of Appeal be filed within 14 days and a Record of Appeal within sixty days thereafter are obstinate and grounded position which one cannot choose to turn a blind eye to. I make no finding on the propriety of the Notice of Appeal but I note that even on the date the matter came up for highlighting of submissions no attempt was made to show that any application for extension of time had been made or even that a Record of Appeal had been filed. Such facts when juxtaposed and given due regard to the provisions of Rule 83 Court of Appeal Rules, leads me to pose the question whether a Notice of appeal filed contrary to the Rules and which the law deems abandoned ought to be regarded as an evidence of a pending appeal.

17. I have said that I am not called upon to make a determination on the validity of the appeal but it is enough to say that I doubt if Such a notice of appeal can in honesty be the only evidence of a pending appeal.

18. The rest of requirements are trite requiring no rehearsal nor citation of any decided case but it is enough to say that in deciding an application for stay pending appeal, a court has the duty to strike a balance between the undoubted right to access court for purpose of an appeal unhindered against the right of a decree-holder in the property in the decree. The right to access court services is as constitutionally

grounded as the right against arbitrary deprivation of property.

19. In the matter before me, it is not that the applicant is seeking to be heard in the first instance at trial or on a first appeal. No. He has been heard twice, before the Magistracy and before this court. The dispute is soon celebrating its second decade in court. It started from a cordial relationship, a joint exertion of Sinergy towards the running of a school. A whole 12 years was employed to have the matter heard before the trial court on top of which another five years have since lapse with the matter being handled on appeal.

20. During the pendency of the appeal, the applicant voluntarily offered two titles as security for the due performance of the decree in the event of the appeal being unsuccessful. That event came to pass and the respondent has not sought to attach any other asset but just one of the securities given. It is that act the applicant consider to portend invitation of a substantial loss. The question one may pose is, what did the applicant expect and anticipate would happen to the security in the event of the appeal not turning out successful! I do not doubt that the applicant was well appraised and advised by counsel that the said property would be called upon to answer the decree. If he had such anticipation and counsel then it cannot now be termed a recipe for the visit of a substantial loss.

21. Secondly, the property was valued at the instance of the applicant and a monetary value placed and equated to it. In the event that the second appeal were to succeed any loss to the appellant would be readily ascertainable either from the valuation provided by the applicant or from the proceeds of sale whose returns would have to be filed in court. Such a loss would not be substantial because such sum can be recovered by a legal process known in law. It would be a different scenario if it was the subject land that was the subject of litigation. It is not. The dispute as filed in court was and remains a pure liquidated monetary claim.

22. I have said this much to demonstrate that there is no substantial loss that await being visited upon the appellant if stay is not granted. Rather, I do find that it would be unjust to keep the respondent away from his property in the decree on an appeal whose pendency is doubtful. Granting stay on the facts and substances of this case would, in my view, visit more harm than benefit on both sides. The decretal sum keeps bludgeoning by application of interest to the additional burden of the appellant while the respondent is kept away from a legal entitlement and gazing at the security provided get eroded by application of interests.

23. There being doubt as to the pendency of an appeal and it having been found that no threat of substantial loss exists, the other requirements become of less gravity but mere baksheesh. It is just enough to say that whether security is necessary only become relevant when there exist appeal whose substratum would be lost unless a stay be granted. But even then the application does not offer any security when it is the duty of the applicant to make that offer. My finding is that none of the threshold facets of grant of stay pending appeal have been met and in such event there is no discretion to be exercised. A discretion by court can only be exercised in conformity with the law and not against it. I find no merit in the application, which I therefore order, dismissed with costs.

24. Before I conclude however, there is a last point taken and which I must comment upon. It concerns the challenge that the warrants of attachment and sale were issued contrary to the law. I have looked at the papers exhibited to evidence the process of execution and note that all were issued by the trial court as the court executing the decree. That process is not due for challenge in a forum other than the court executing the decree. The appeal having not been on the mode of execution and its propriety, this court has no mandate to interrogate that process and would be overstepping the mandate in this appeal unless and until otherwise lawfully moved.

Dated and Delivered at Mombasa this 22nd day of May 2020.

P.J.O. OTIENO

JUDGE