



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL.39 OF 2019

(Appeal Originating from Nyahururu CM's Court Civil.83 Of 2015 by: Hon. S. Mwangi – S.R.M.)

RUTH WANJIKU MWANGI.....APPELLANT/APPLICANT

VERSUS

NANCY MUTHONI NYARUAI.....RESPONDENT

RULING

By the Notice of Motion dated 8/10/2019, Ruth Wanjiku Mwangi seeks an order of stay of execution of the decree in Nyahururu CMC.83/2015 pending the hearing and determination of Civil Appeal No.39 of 2019.

The applicant/appellant was the defendant in the CMC.83/2015 where by the plaintiff/respondent filed a suit claiming Kshs.30,000/= plus interest at Kshs.3,000/= per week from 11/3/2015 and Kshs.600/= per day from 11/3/2015 till payment in full from the applicant; that though the applicant filed a defence, she was not served with a hearing notice and the matter proceeded ex-parte and judgment was entered against her for Kshs.1,078,025/=; that she was not aware of the decree till 14/3/2020 when she was arrested and committed to Civil Jail; that her application to set aside the judgment was dismissed on 17/9/2019 and that prompted the filing of this appeal; that the respondent is likely to execute the judgment because of the warrant of arrest dated 8/3/2019 for Kshs.1,117,387/=.

The applicant also filed a supporting affidavit dated 8/10/2019 in which she reiterates that she was never served with hearing notice in the trial court and since her application for stay was dismissed, she is likely to be arrested again and put to Civil Jail; that the decretal sum includes illegal and exorbitant and unlawful interest which has made the sum to rise to Kshs.1,117,387/= as at 8/3/2019; that the application was brought in good faith and without unreasonable delay; that the respondent will not suffer any prejudice because most of the decretal sum is illegal interest.

The respondent opposed the application through grounds of opposition dated 5/11/2019 to the effect the application is incompetent and an abuse of the court process; that no security has been offered for the due performance of the decree in Nya.CMCC.83/2015 and the appeal does not have high chances of success; that the applicant has not complied with orders of 9/10/2019 and her hands are tainted; that the applicant has not demonstrated that the respondent is impecunious hence unable to refund the decretal sum if stay is not granted and lastly that the application is an afterthought and a delaying tactic.

Applicant's submissions;

Mr. Nderitu, the applicant's counsel filed written submissions on 15/11/2019. Counsel submitted that the applicant has deposited half the decretal sum in court as ordered by the court satisfying the principle that he will suffer substantial loss and has provided security; that the applicant was a guarantor for one Eunice who was granted a friendly loan by the respondent but she defaulted hence the suit against her and the said Eunice; that the applicant challenged the issue of service and the trial court acknowledged that there was no affidavit of service but went ahead to presume that the applicant was served; that she was condemned unheard which is a breach of the rules of natural justice; that since the applicant has shown the intention to defend the suit, she should have been allowed to ventilate her case.

Counsel relied on the decisions:

1. Burhani Decorators & Contractors v Morning Foods Ltd & Another (2014) eKLR;
2. Wachira Karani v Bildad Wachira (2016) eKLR;
3. James Moenga Nyakweba & 2 others v Jairo Atinya Asitiba (2012) eKLR
4. CMC Holding Ltd v James Mumo Nzioki (2004) eKLR

where the courts emphasized the need for courts to ensure that the right of a party to be heard was not violated and the need to hear both sides or that disputes be determined on the merits.

Counsel also submitted that the applicant had filed a defence that raised triable issues of whether the respondent had legal capacity to lend money on commercial terms and further that she only guaranteed Kshs.30,000/=. Counsel therefore submitted that the defence raised triable issues that should have been considered. He relied on the decisions in:

1. *Remco Ltd v Mistry Jadva Parbat & Co. Ltd (2002) EA 227*;

2. *Leposo Ola Koila & another v Isaack Kireu (2018) eKLR*

Where the court's held that it is only banking institutions that are authorized to lend money and charge interest.

Counsel's submission is therefore that the appeal has high chances of success.

Counsel urged that the interest on Kshs.30,000/= is so high that it totaled Kshs.1,117,387/= and resulted in the arrest of the applicant which she was not able to raise and if stay is not granted she is likely to be arrested again and committed to Civil Jail for 6 months as she has no assets that can be attached; that if stay is not granted, the applicant is likely to suffer great loss and suffering.

Respondent submissions:

Mr. Waichungo, the respondent's counsel, filed submissions on 21/5/2020. He submitted that Order 42 Rule 6 of the Civil Procedure Rules sets out the conditions to be satisfied for a grant of stay pending appeal which are that the applicant must demonstrate that:

1. *Substantial loss may result to the applicant unless an order of stay is made;*

2. *The application has been made without unreasonable delay;*

3. *Such security as the court orders for the due performance of the decree or an order as may ultimately be binding on the applicant has been given by the court.*

Counsel relied on the case of *Pamela Akinyi Opundo v Barclays Bank Ltd (2011) eKLR*.

Counsel submitted that the applicant's counsel had dwelt on the fact that the appeal has high chances of success which is not one of the requirements for grant of stay under Order 42 Rule 6 of the Civil Procedure Rules.

Relying on Pamela Akinyi's case, he submitted that it was held in *Carter & Sons Ltd v Deposit Protection Fund Board and 2 others C.A.291/1997* that the fact that there are strong grounds of appeal does not justify an order of stay.

Counsel argued that nowhere has the applicant pleaded that she will suffer substantial loss if the decretal sum is paid to the respondent and that the respondent would not be able to repay in the event that the appeal succeeds; that since the same was not pleaded, the respondent did not need to demonstrate that she is a woman of straw and unable to repay the decretal sum.

Counsel argued that inability to pay the decretal sum and committal to Civil Jail does not amount to substantial loss because it is a lawful mode of execution as was held in the case of *Karunguru Estate Ltd v Beatrice Wamele Karanja (2012) eKLR* where J. Odunga observed that mere poverty of the judgment debtor does not justify the denial of a successful litigant the right to enjoy the fruits of his judgment but one has to prove substantial loss.

In *Pamela Akinyi (Supra)*, the court said that one had to show that the respondent could not be trusted with the money in question.

Analysis and determination:

I have duly considered the application and the rival arguments. The grant of an order of stay pending appeal is discretionary and the court has to act judiciously within the principles set out in Order 42 Rule 6 CPR, that is:

(1) *That substantial loss may result to the applicant unless the order of stay is made;*

(2) *That the application has been made without unreasonable delay; and*

(3) *That the applicant has provided security for the due performance of the decree in the lower court.*

The applicant deponed that he was not served with a hearing notice in the trial court and only came to learn of the judgment and decree on 14/3/2019 when she was arrested and placed in Civil Jail for failure to pay the decretal sum.

The applicant moved with alacrity and filed the notice of motion dated 14/3/2019 seeking to stay the execution of the judgment before the trial court but by the court's ruling of 17/9/2019 the court declined to grant stay. Thereafter, the applicant with haste filed this appeal on

1/10/2019 while this application was filed on 9/10/2019. No doubt, this application was filed without unreasonable delay.

As respects security, though the applicant did not specifically allude to provision of security, when the applicant's counsel filed this application on 9/10/2019, the court ordered that a temporary stay of execution would issue on condition that the applicant deposited ½ the decretal sum in court. The court has learnt that the applicant only deposited Kshs.15,000/= in court. Half the decretal sum would have been about Kshs.550,000/=. Having failed to comply with the court's order, the applicant has not offered any security nor was any provided for in terms of the court's order.

On whether the applicant will suffer substantial loss if the order of stay is not granted, Mr. Nderitu dwelt at length on trying to demonstrate that the appeal has high chances of success.

In the case of *James Wangalwa and another v Agnes Naliaka (2012) eKLR*, the court held in part:

"...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory.

The only admonition however, is that the High Court should not base the exercise of its discretion under Order 42 Rule 6 of the Civil Procedure Rules only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above."

In *Kenya Shell Ltd v Kibiru Platt J.A.* stated as follows about substantial loss:

"It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules (now Order 42 Rule 6) 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 corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without evidence it is difficult to see why the respondents should be kept out of their money."

In the above case, the court held that in monetary decree, the appeal cannot be rendered nugatory.

In *Karunguru Estate Ltd case (Supra) Odunga J.* states as follows:

"On the application of stay, I am not inclined to grant the same in the absence of evidence of substantial loss that the applicant stands to suffer. Mere poverty of the judgment debtor, it has been held does not justify the denial of a successful litigant's right to enjoy the fruits of the judgment. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted since by granting stay would mean that the status quo should remain as it were before the judgment and that you be denying a successful litigant the fruits of his judgment which should not be done if the applicant has not given the court sufficient material to enable it to exercise its discretion in granting the order of stay."

In its submissions the applicant contends that since the respondent has not addressed the issue of her financial means in case the appeal succeeds, it is most probable that she will not be able to refund the amount. It must be remembered that the burden in this kind of application is on the applicant to show the substantial loss it stands to suffer. It is not on the respondent to show that she will refund the money since she already has judgment in her favour. The applicant cannot be said to have satisfied the onus on it by mere allegations as the applicant in this application has done."

The applicant did not attempt to demonstrate that she is likely to suffer substantial loss if stay is not granted or that the substratum being money, will be destroyed and that if the same is paid to the respondent, that she is a lady of straw and cannot be able to refund it to the applicant.

In *Pamela Akinyi Opundo's case*, the court held, *"unless there is evidence to show that the respondent cannot be trusted with money in question and that he/she is likely to squander the same before the appeal is heard and determined, thereby rendering the appeal nugatory, there is no reason why a litigant should be denied the fruits of his litigation."*

An appeal cannot be rendered nugatory in a monetary decree if payment is made and it is not just to deny a successful party the benefit of judgment merely because he is poor."

Since the applicant never demonstrated that the respondent was a person of straw, the respondent would not be expected to refute that assertion. The fact that the applicant may be thrown into Civil jail because she cannot pay the decretal sum does not amount to substantial loss because committing one to Civil Jail is part of the lawful execution process. The applicant has failed to show that she will suffer any loss or that the appeal will be rendered nugatory if stay is not granted.

In the end, I find that the applicant has failed to meet the threshold for the grant of an order of stay under Order 42 Rule 6 of the Civil Procedure Rules. The application for stay is hereby dismissed with costs to the respondent.

Dated, Signed and Delivered at Nyahururu this 23rd day of July, 2020.

.....

R.V.P Wendoh

JUDGE

Present:

Both counsel – absent

Eric – court assistant