



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVILCASE NO.17 OF 2015

EUNICE CHEPKOECH BETT

(Suing as administrator and/or personal representative of

JOSEPH MALAKWEN BETT - deceased).....PLAINTIFF

VERSUS

CHARLES NGENY.....DEFENDANT

RULING

1. The Application coming for consideration in this ruling is the one dated 22/6/2020 filed under certificate of urgency seeking the following orders:

i) THAT the Application be certified urgent and heard Exparte in the first place (SPENT)

ii) THAT pending the hearing and determination of the Application, there be a stay of execution of the decree herein and or sale of the Applicant's proclaimed property.

iii) THAT the decree upon which Execution was levied against the Applicant be recalled, reviewed and or set aside and attachment of the Applicant's good be lifted.

iv) THAT a declaration do issue that for a decree to be valid

it must be drawn in accordance with Order 21 rule 8 of

the Civil Procedure Rules.

v) THAT stay of execution be granted pending the hearing and determination of an Appeal lodged in the Court of Appeal.

vi) THAT a declaration do issue that the Execution is unlawful, unprocedural, illegal, void ab initio, unmaintainable and an abuse of the court proceeds.

vii) THAT a declaration do issue that no execution can be levied before the taxation of costs in accordance with section 94 of the Civil Procedure Act.

2. The Application is supported by the Affidavit of the Defendant/Applicant CHARLES NGENY in which it is deposed as follows:

i) THAT judgment in this matter was entered on 29/5/2020 by email and a copy was sent to his Advocate.

ii) THAT the court gave judgment against him sum of 3,490,000 and apportioned liability against him in favour of the Respondent at the ration of 70 : 30%.

iii) THAT the Appellant's counsel sent a notice of Appeal for filing on 11/6/2020.

iv) THAT on 19/6/2020 he was served with the proclamation of his various movable properties yet the bill of costs has not yet been served upon his lawyer and no valid decree drawn in this case before execution can be levied.

3. The Respondent filed a Replying Affidavit in which she has deposed as follows:

i) THAT the Application dated 22/6/2020 has been filed with unclean hands, is bad in faith and is meant to delay the award in the judgment delivered on 29/5/2020.

ii) THAT the Appellants Advocate never asked for a stay when the judgment was delivered on 29/5/2020 until the Auctioneers proclaimed.

iii) THAT the Auctioneers followed the law in proclaiming the property of the Appellant and further that a decree was drawn.

iv) THAT the Respondents goods have already been attached and therefore the Application dated 22/6/2020 court be granted and it should be dismissed.

4. The Applicant filed written submissions dated 2/7/2020 while the Respondents written submissions are dated 8/7/2020. I have considered the rival submissions and I find that it is not in dispute that the judgment herein was delivered on 29/5/2020 by email.

5. The Appellants are seeking stay of execution to enable them pursue an appeal in the court of Appeal. This is an application that invokes the discretionary powers of the court. Of course discretionary powers must be exercised judiciously. It is brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 which empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the Rule 6(2) as follows:

“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.”

6. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

7. In the current case, I grant stay of execution pending appeal on the following conditions:

i) THAT half the decretal sum be deposited in an interest earning account held by the two counsels for the parties.

ii) THAT the said account to be opened within 30 days of this date.

iii) THAT the attachment and sale of the proclaimed property be and is hereby lifted.

iv) THAT the costs of this Application to be borne by the Applicant.

Delivered, dated and signed at Kericho this 22nd day of July 2020.

A. N. ONGERI

JUDGE