



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 51 OF 2019

MICHAEL OBARE TAGO.....APPELLANT/APPLICANT

VERSUS

FREDRICK AMBROSE ODUOR OTIENO.....RESPONDENT

RULING

1. This ruling determines the Notice of motion dated 2nd day of July 2020 filed by the appellant/applicant **Michael Obare Tago** through his counsel **Wycliffe Okutta** seeking for orders for stay of execution of decree in Ukwala SRM Civil Suit No 24 of 2009 pending the hearing and determination of this appeal filed on 29th November, 2019. The applicant also prays for an injunction restraining the Respondent, his agents, servants or those claiming through him from advertising for sale, selling and or disposing of land parcel **No. North Ugenya/Doho/778 measuring 0.261 Ha** in execution of the *aforsaid* decree. He further prayed for conservatory orders pending hearing and determination of the application interpartes.
2. The application was certified urgent and directions given for disposal of the same expeditiously hence no conservatory orders were issued by the court.
3. The Respondent, Fredrick Ambrose Oduor Otieno opposed the application through his grounds of opposition dated 14th July 2020 and filed in court on 15th July 2020.
4. The application is premised on the grounds that the Respondent decree holder threatens to execute decree for Kshs 1,625,000 inclusive of principal and interest; that the applicant was never invited for the taxation of costs and that copy of warrant is patently erroneous; that the property intended to be attached is what the Respondent was denied purchase and now he wants to acquire it; that the judgment of the lower court has been appealed against it and that it is arguable; that the applicant will suffer irreparable loss if execution of decree is allowed and stay is not granted. Finally, the applicant claims that despite applying for copies of proceedings he has not been supplied with the same.
5. The application is further anchored on the supporting affidavit sworn by the applicant reiterating the grounds and annexing copy of the impugned judgment dated 30th October 2019, the Memorandum of appeal and Notice to show Cause why execution by way of sale of the applicant's land to recover the decretal sum and costs together with interest cannot issue, and a prohibitory order.
6. It is the Applicant's position that the appeal has overwhelming chances of success and that he is ready able and willing to abide by any conditions that this court may give and that he is also ready to move with speed to have issues on appeal determined in good time. Further, he deposes that the respondent shall not be prejudiced in any way.
7. The Respondent in opposition to the application, averred in his grounds of opposition that the application for stay is an afterthought having come 8 months after the judgment was delivered on 30th October 2019 that the motion is an abuse of court process as there is a similar application pending at Ukwala Magistrate's Court. That the motion ought to have been made to the court that made the judgement and only come to this court as an appeal. That no offers as to security for the due performance of decree have been made, that there has been inordinate delay in filing the application for stay and that the appeal as filed is incompetent lastly that the appellant shall not suffer any prejudice known in law if the notice to show cause proceeds.
8. The appeal was canvassed by way of oral submissions with Mr. Outta advocate appearing for the applicant physically in court whereas Mr. Agina advocate appeared virtually on skype.
9. The Applicant's counsel submitted and urged the court to exercise its discretion in its favour and wholly relied on the grounds, affidavit in support and annexures. Counsel Mr. Okutta emphasized that the applicant is willing to deposit the decretal sum of Kshs 30,000 and to fast track the hearing and determination of the appeal herein as the respondent is executing for an amount in excess of one million.

10. On the part of the respondent, it was submitted reiterating the grounds of opposition and contending by Mr. Agina Advocate that the application is an afterthought, it was brought too late after 8 months of judgment delivery,, that there is no demonstration of substantial loss or irreparable loss or hardship the applicant will suffer, that the applicant is abusing court process as there is a similar application pending before Ukwala Law Courts, that there is no evidence that if the Respondent who is a public health officer is paid the decretal sum and the appeal is successful then he will not be in a position to refund the same. Counsel urged this court to dismiss the application by the appellant.

11. In a rejoinder, Mr. Okutta submitted that the applicant was rightfully before this court and that no prejudice would be occasioned to the respondent as the claim was settled and that his client was ready to deposit Kshs 30,000 even with interest as all that they want is justice.

Determination

12. I have considered the application by the appellant and the opposition thereto as argued by the parties 'respective counsel. None of the parties relied on any cited case law to advance their positions but the application is cited to be brought under the provisions of Order 42 Rule 5 and 6 of the Civil Procedure Rules , Sections 3, 3A of the Civil Procedure Act , Article 159 (2) of the Constitution and all other enabling provisions of the law.

13. In my humble view, the main issue for determination in this application is whether the applicant is entitled to the orders sought.

14. The power to grant stay of execution of decree pending appeal is discretionary. As stated by the Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** that discretion ought to be exercised in a manner that would not prevent an appeal, if successful be rendered nugatory.

15. The purpose of stay of execution pending appeal is to preserve the subject matter so that the right of appeal can be exercised without prejudicing the applicant as the appeal would be rendered nugatory if there is no stay.

16. According to the Applicant, substantial loss would occur if its appeal succeeds and the Respondent is unable to refund the decretal sum.

17. The conditions to be met before stay is granted are provided for in Order 42 Rule 6(2)of the Civil Procedure Rules as follows:

20. In the case at hand, the Respondent claims through submissions by his counsel and not on oath that he is a Public Health Officer and if paid the money he would refund. However, the applicant has deposed that the decretal sum was settled and that even if the same was outstanding inclusive of interest and taxed costs, it would not be in Millions as is contained in the Notice to show cause annexed. The applicant even offers to deposit Kshs 30,000 with interest which he asserts cannot amount to over 1, 625, 000 claimed by the Respondent in a money decree of Kshs 30,000 which is denied.

21. In my humble view, the Applicant has established that he will suffer substantial loss if the intended execution is not stayed. The execution of decree impugned involves sale of land and to reverse that sale should the appeal which I find not frivolous succeed, the applicant will suffer substantial loss to reclaim the land from third party purchasers. It also follows that if the Respondent executes the judgement and the Applicant's appeal succeeds, then not only will the Applicant suffer substantial loss but the appeal will also be rendered nugatory and the appellant will be a mere pious explorer in the judicial process.

22. On whether the application filed without unreasonable delay, it is not denied that the application has been filed about 8 months from date of judgment in October 2019 but the Respondent asserted that there is a similar application pending before the lower court and that therefore this application is an abuse of court process. He however did not state so on oath and neither did he annex any copy of such application pending in the lower court to demonstrate when the said application for stay was lodged. Nonetheless, whether there is another application pending before the lower court, or not, this court has jurisdiction to hear and determine an application for stay and such application can be considered whether there is another pending application in the lower court or not, or whether such application in the lower court if any, was considered on merit and dismissed. The appellant applicant is not required by any law to appeal against a refusal to stay decree but can move to the court appealed to consider a similar application for stay of execution pending appeal. This is the spirit and letter of the provisions of Order 42 Rule 6 of the Civil Procedure Rules. I therefore find that the respondent's counsel's submission that the appellant can only appeal against the ruling of the lower court misconceived.

23. I however note that the appeal was filed on 29th November 2019 within 30 days of delivery of judgment in the lower court on 30th October 2019 and that the period 16th March to July 2020 has been an uncertain period due to the covid 19 pandemic wherein all executions of decrees were stayed automatically by administrative directives to prevent hardships to parties who would otherwise be prevented from approaching the courts for stay or where execution of decree itself would be impossible or risky in view of the novel pandemic. I therefore find that albeit there has been delay in filing the application for stay before this court, justice can still be served.

24. On whether the applicant has furnished the court with security for the due performance of decree, the Applicant has indicated his readiness to furnish security for the due performance of the decree. He is willing to deposit the whole decretal amount with interest but asserts that the over Kshs 1.625 million being claimed in the notice to show cause is unjustified and unreasonable.

25. I have perused the judgment of the lower court. It is for interest at court rates on refund of Kshs 30,000 from 27/8/2008 till payment in full. Even if this amount was due and payable, interest at court rates on Kshs 30,000 from the stated date to date would be nothing but just in the range of Kshs 50,000 and adding that to the costs assessed, would not be anywhere near Kshs 1,625,000. The question therefore is whether the respondent should be allowed to execute decree of just about 100,000 but claimed to be over 1.6 million. The answer is a NO. It would be unfair unjust and unconscionable to allow such decree executed by way of sale of land as the appeal if successful would be rendered superfluous and an academic exercise. As it is not clear how the respondent arrived at over 1.6 million, this is a clear case where discretion must be exercised in favour of the applicant/ appellant in order to protect and preserve the subject matter of the appeal and to avoid hardship.

26. As the appeal is likely to be heard and determined in the next term, I find no reason to order for depositing of the decretal sum which is highly contested in terms of how much would be due.

27. In the end, I allow the application as presented and order for stay of execution of decree in Ukwala SRM CC No. 24 of 2009 and I further stay the Notice to show cause issued against the applicant seeking for sale of his parcel of land, **North Ugenya/Doho/778** pending hearing and determination of this appeal.

28. The appellant is hereby directed to prepare, file and serve a complete record of appeal within 21 days of today. Mention for directions shall be 17th September 2020.

29. Costs shall be in the cause.

Orders accordingly.

Dated, Signed and Delivered at Siaya this 22nd day of July 2020

R.E. ABURILI

JUDGE