



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL & TAX DIVISION

HIGH CIVIL CASE NO 1490 OF 1999

PH OGOLLA- ONYANGO T/A

PITT CONSULT ENGINEERS.....PLAINTIFF

VERSUS

DANIEL GITHEGI T/A QUANTALYSIS.....DEFENDANT

RULING

APPLICANT'S CASE

By Chamber Summons filed on 11th September 2019, the Defendant/Applicant sought stay of execution of the judgment delivered by Hon L J Farah S. M. Amin on 21st June 2019 and the decree issued pursuant thereto hearing and determination of this application and the intended appeal.

The Applicant is apprehensive of execution of the judgment, that the Plaintiff/Respondent prepared draft decree of Ksh 1,075,464 ordered as payable in the impugned judgment, interest at commercial rates and costs totalling to Ksh 4,154,535.20/-

The Applicant is aggrieved by the said judgment and intends to appeal the same in the Court of Appeal and sought the stay as in all likelihood, the Decree-holder would commence execution process before the Applicant exhausts avenues of/to appeal.

The Applicant filed Notice of Appeal marked **JNM2** and wrote to the Court to provide certified proceedings on 29th August 2019, vide letter marked **JNM1**.

The Applicant filed Further Affidavit on 25th October 2019 and proposed that due to financial hardships he was willing to deposit an alternative security in terms of title deed Title Number **Kabete /Nyathuna/3959** with copy of search and Valuation report in due performance for stay pending appeal.

The Applicant relied on the case of ***John Nginyi Muchiri vs John Kamunya Mutahi & 4 Others [2005]eKLR***.

RESPONDENT'S CASE

By Replying Affidavit filed on 25th September 2019 objected to the Applicant's application; that mere filing of Notice of Appeal does not automatically stay execution of the judgment.

The Respondent averred that the judgment of 21st June 2019 by Hon. L.J. Farah was properly rendered and therefore the Respondent is entitled to execute judgment and decree.

The Respondent asserted that the Applicant failed to demonstrate an arguable appeal and failed to file memorandum of appeal. Instead the issues/grounds raised in the affidavit are imprecise, tenuous, speculative and unfounded.

The Respondent raised issue with the fact that the Applicant had not proved that if the stay of execution was not granted the appeal would be rendered nugatory. The Respondent is a professional Engineer working in Nairobi for gain. He has suffered since 1999 from being deprived of money lawfully and meritoriously owed.

The grant of stay of execution would deprive the Respondent as the successful party to enjoy fruits of his judgment. There must be an end to litigation.

In the alternative, without prejudice, the Court may grant stay of execution pending appeal if the entire decretal amount is deposited in a joint interest earning account opened in the names of parties or their representatives.

The Respondent by Supplementary Affidavit filed on 6th November 2019 and objected to deposit of title deed instead money/funds in form of security in due performance of a money decree.

The deposit of title deed is not in the decree holder's name and neither does it give him an overriding interest and the decree will not attract any interest.

DETERMINATION

The issue for determination is whether stay of execution pending appeal ought to be granted or not.

APPLICANT'S SUBMISSIONS

The Applicant relied on the case of **Butt vs Rent Tribunal [1982] KLR 417** where Madan JA quoted with approval the views of Brett L.J. in **Wilson vs Church (No 2) 12 Ch D [1872] 454** laid down grounds for stay of execution as follows;

- i) 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.*
- ii) 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.*
- iii) 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.*
- iv) The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.*

The Applicant cited **Elena D.Korir vs Kenyatta University [2014] eKLR** on rendering an appeal nugatory if stay of execution is not granted. The Court considered;

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another vs Thornton & Turpin Ltd, where the Court of Appeal (Gicheru J. A, Chesoni & Cockar Ag J A) held that, “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- sufficient cause, substantial loss would ensue from a refusal to grant stay. The applicant must furnish security, the application must be made without unreasonable delay.

RESPONDENT'S SUBMISSIONS

The Respondent relied on the case of **Congress Rental South Africa vs Kenyatta International Conference Centre, Cooperative Bank Of Kenya (Garnishee) [2019] eKLR** where the Court deemed an application for stay of execution filed 1 month later, was dismissed for inordinate/unreasonable delay.

The Respondent also referred to the case of **Joseph Gachie T/A Joska Metal Works vs Simon Ndeti Muema [2012] eKLR**, the Trial Court dismissed a similar application as the Applicant failed to establish substantial loss and to prove that the Respondent was incapable of refunding the decretal sum. The Trial Court observed as follows;

“It is not sufficient to merely state that the decretal sum is a lot of money and the applicant would sufferer loss if the money is paid. 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 would be denying a successful litigant of the fruits of his judgment which should not be done if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay.

See also **Congress Rental South Africa vs Kenyatta International Conference Centre, Cooperative Bank of Kenya (Garnishee) [2019] eKLR** supra on the same point of proving substantial loss.

“In dealing with the issue of irreparable loss in the application for stay of execution, the court in the case of Machira T/A Machira & Co. Advocates vs East Africa Standard (No. 2 [2002] 2 KLR 63, the Honourable Kuloba J. (as he was then) held as follows;

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court

will not grant a stay...

The Respondent reiterated that it is trite law that the security for a money decree should be in form of money, to be deposited in Court or in a joint interest earning account. The case of Onesmus Mburu Njuguna vs Samson Kitire Kuna [2007]eKLR where the Court stated;

“The judgment against the appellant is a money decree. In the circumstances, it would be fair and just that the security to be deposited should be in form of money and not a title deed of a parcel of land. I think it would be unjust to the respondent if this court were to accept the proposal by the appellant that he deposits a title deed instead of cash as security pending the hearing and determination of the Appeal. The purpose of security is to secure the interests of a respondent pending the hearing of the appeal. In the instant application, the respondent was awarded a money decree. The security should therefore be in form of money. I therefore hold that the security offered by the appellant is not appropriate for the circumstances of this case.”

See also Peter Mugane Karomo [2015] eKLR & Arun C. Sharma vs Ashana Raikundalia T/A Raikundalia & Co Advocates & 2 Others [2014] eKLR on the same point money deposited as security of a money decree.

The Respondent objected to the Applicant relying on the case of John Nginyi Muchiri vs John Kamunya Mutahi & 4 Others [2005]eKLR where the Court granted the Applicant to deposit a title deed for a security for stay of execution pending appeal. In that case, the subject matter was land and not a money decree, therefore depositing the title deed as security was proper but it is not applicable in this case.

The Respondent claimed the Applicant did not establish an arguable appeal as he did not file draft of/or memorandum of appeal. In the case of Benedict Ojou Juma & 10 Others vs A.J. Pereira & Sons Ltd [2016] eKLR, the Court held;

“24. The applicant must first satisfy the court that appeal or intended Appeal is not frivolous, that is to say, that it has an arguable Appeal.

25. Second, the Court must be satisfied that if stay is denied, and the Appeal is successful, the result would be rendered nugatory.

26. The Court of Appeal emphasized in order that the Applicant may succeed, he must demonstrate both limbs. Demonstrating one limb, and failing in demonstrating the other would lead to failure of the Application.”.....

30.The draft Memorandum of Appeal serves to establish if there is an arguable Appeal. The applicant has the right of Appeal. In order to stay execution pending the exercise of that right however, the court seized of the judgment must be satisfied the principles laid down in the case of Rosebell Wambui Muthee are all satisfied. It must be satisfied there is an arguable Appeal. There is no way of assessing if there is an arguable appeal, without the court having the benefit of a draft Memorandum of Appeal.....”

ANALYSIS

The application for stay of execution is premised on Order 42 Rule 6 (1) (2) & (3) CPR 2010 R 6 (2) which provides;

(2) 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.

On the issue of filing the application for stay pending appeal after unreasonable delay, the Applicant filed the instant application on 11th September 2019. The Ruling was delivered on 21st June 2019. The Notice of Appeal was/is filed 5th July 2019, 2 weeks after the Ruling was delivered. On 28th August 2019, the Applicant wrote to Deputy Registrar to provide certified typed proceedings and Ruling of the Court. The circumstances and events outlined do not constitute inordinate delay because, the Applicant filed Notice of Appeal 2 weeks thereafter, later sought proceedings and thereafter filed the instant application 2 months later. Where timelines are not spelt out, each case is determined by its specific circumstances. In this case, the Applicant did not go to sleep after the delivery of the Ruling but was active in filing notice of appeal, letter asking for proceedings and then the application. The Applicant deposed that he was applied and was granted 30 days stay of execution after delivery of the Ruling. He deposed that he was served with draft decree and filed instant application on 11th September 2019.

On whether, there is an arguable appeal, the Applicant failed to file draft or memorandum of appeal which would serve to confirm if there is an arguable appeal. However, the Applicant vide the Supporting Affidavit of Daniel Githegi at paragraph 9 outlines various grounds with regard to the intended appeal that merit consideration. An appeal is a legal right, I am persuaded by the dicta of Madan JA in Butt vs Rent Restriction Tribunal supra; that,

“if there is no other overwhelming hindrance, a stay ought to be granted so that an appeal is not rendered nugatory.”

The other consideration relates to whether the Appellant and Respondent will suffer substantial loss if stay of execution is not granted. Case-law cited by both parties confirms that execution of a money decree is a lawful process, there must be other factors that may cause irreparable effect to the Applicant and/or negate Respondent’s right to enjoy fruits of its judgment.

The Applicant deposed that due to financial hardships he proposed deposit of an alternative security, Title of **Kabete/Nyathuna/3959** whose value far exceeds the decretal amount and there is a real possibility that it may not recover the value of the said alternative security if surrendered to the Respondent. On the other hand, he also submitted that save for Respondent's averments that he is a Practising Engineer, there is no evidence of financial worth or ability to reimburse the judgment.

This Court recognizes the right of the Applicant to appeal the decision of this Court but in compliance with standards set out in **Order 42 Rule 6 CPR**. Although the Applicant is desirous to pursue the appeal, the Applicant cites financial hardship as substantial loss. Without further details financial loss by and of itself cannot be the basis of substantial loss.

However, the Court is aware of the current unprecedented situation worldwide of the adverse impact of Corona Virus pandemic which may exacerbate any persons financial prospects and that as an unforeseen event may cause substantial loss.

With regard to the requirement that the Applicant avails the security for the due performance of the money decree. Am guided by cited authorities that suggest that deposit of title documents cannot suffice where there is a money decree.

The Applicant cited the case of ***John Nginyi Muchiri vs John Kamunya Mutahi & 4 Others [2005]eKLR***; the dispute revolved on land and the Appellant resided on the said land with her 7 children and had nowhere else to move to. It is in those circumstances the Court granted stay of execution to appeal its decision and allowed the Appellant to continue staying/living on the land as there was no prejudice or substantial loss to the Appellant, it was the same land subject of dispute and appeal.

In the instant case, the judgment is of a money decree; the title document is not sufficient security. It would be deposited in court and the Respondent has no access or knowledge of it. The same if allowed would be deposited with Deputy Registrar and the Respondent would have no access and security to it. It is not sufficient security even if the appeal is heard and determined, the title document cannot be transferred to any party, sold or disposed of.

As earlier stated, the Applicant claimed financial hardships which he did not elaborate on. We must uphold a party's legal right to appeal albeit in compliance with the legal conditions set by law.

DISPOSITION

1. In order to enforce the overriding objective to do justice to all parties and with the circumstances at hand, this Court is inclined to grant stay of execution pending appeal of the Ruling of this Court on condition;

- a) That the Applicant deposits Ksh 500,000/- ½ decretal sum of the judgment sum in a joint interest earning account held by the advocates on record for the parties.**
- b) Due the Corona pandemic adverse effect, the Applicant has 90 days from the date of the Ruling to comply with deposit of ½ the judgment amount pending appeal.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 28TH AUGUST 2020. (VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. MUTHOMI FOR THE APPLICANT

OKWACH & CO. ADVOCATES FOR THE RESPONDENT- N/A

COURT ASSISTANT - TUPET