



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 8 OF 2019

NANCY WAKUTHII KAGO.....APPELLANT/APPLICANT

VERSUS

JULIA MUTHONI KIURA.....RESPONDENT

RULING

A. Introduction

1. The applicant herein moved this court vide an application dated 20/01/2020 seeking for the following orders: -

a) Stay of execution of the ruling and orders herein and HC Civil Appeal No. 5 of 2019 both issued on 26/06/2019 and any other subsequent orders, pending hearing and determination of this Appeal;

b) Leave to deposit the documents ownership of the accident vehicle KCE 200T in court as security in lieu of the said orders of 26/06/2019 pending hearing and determination of this Appeal.

2. The application was premised on the grounds that the applicant was unable to raise the amount of Kshs. 4,107,157.50 required as security was in this appeal but was willing to deposit the documents of ownership of the accident motor vehicle being KCE 200T in court as security. That she was a house wife and sick and suffering from post-delivery complications and could not afford to deposit the security as ordered by the court. She further stated that since the respondent had commenced the process of execution, she sought the orders herein. It was her deposition that the respondent would not suffer any prejudice.

3. The application was opposed vide a replying affidavit sworn by the respondent herein and where the Respondent in urging the court to dismiss the same with costs. It was deposed that the application was unmerited, misconceived, bad in law and meant to hoodwink the court into issuing orders and the same having been filed after unreasonable delay and before the applicant could comply with the conditions earlier set for stay and which conditions the applicant never expressed her dissatisfaction with by either appealing or reviewing the same.

4. The respondent argued that the applicant herein had in an earlier application for stay undertaken to comply with any condition set by the court and as such it was preposterous for the applicant to bring documents in court and which were never in the trial court so as to defeat the course of justice. Further that litigation ought to come to an end and the Respondent be allowed to enjoy the fruits of her judgment which was more than two years old and allowing this application would be prejudicial to her. Further that the application was brought after unreasonable delay and which was not explained.

5. The application was canvassed by way of written submissions and wherein the applicant invited this court to invoke its inherent jurisdiction and grant the orders sought herein. This is despite the fact that similar orders were granted in the application dated 25/02/2019 in the ruling delivered on 17/09/2019 where the applicant was granted a conditional stay and was directed to deposit half of the decretal amount within 30 days. She sought to be allowed reasonable opportunity to present her appeal and thus preventing an injustice. The applicant further submitted that despite the fact that litigation must come to an end, finality of litigation is a cardinal principle of law which needs to be balanced against party's constitutional right to access justice. Reliance was made on the Court of Appeal's decision in **Kivanga Estates Ltd -vs- National Bank of Kenya Ltd (2017) eKLR** (on the need for this balance).

6. The respondent on her part reiterated the contents of her supporting affidavit and while relying on Order 42 rule 6(2) on the conditions for grant or orders of stay of execution, she submitted that the instant application was brought after unreasonable delay and which delay was never explained. Further that the applicant never appealed or reviewed the earlier orders made by this court as required by law. Further that the applicant did not make a case for interference with its own decision. It was her submissions that the applicant undertook to comply with any conditions which would be set by the court in the earlier application and as such the instant application was meant to defeat justice. She relied on the case of **Express Kenya Ltd & another -vs- Charles Kipkoech Letting [2006] eKLR** to the effects that the conditions set by the court were reasonable and further submitted that the applicant ought to allow her enjoy the fruits of her judgment.

B. Issues for determination

7. I have considered the application herein, the reply by the Respondent and the rival submissions filed herein and it is my opinion that the main issue for determination is the merit or otherwise of the application.

C. Applicable law and determination of the issues

8. The applicant sought for stay of execution of the ruling of this court in this appeal No. 8 of 2018 and in HC Civil Appeal No. 4 and 5 of 2019 of the same series both issued on 26/06/2019 and any other subsequent orders, pending hearing and determination of this appeal. The grounds are that the applicant cannot raise the security which she was earlier ordered to deposit as a condition for stay of the execution in an earlier application. I have perused the court records and I note that the orders which the applicant seeks stay were made on 17/09/2019 and not 26/06/2019 as deposed by the applicant. There were no adverse orders which were made on the said 26/06/2019.

9. However, I note that the applicant refers to the orders of 26/06/2019 made in HC Civil Appeal Nos. 4 and 5 of 2019 and wherein she deposed that there were pending applications in the said files. It is my opinion that since the said files were never consolidated with this instant file, the ruling this court makes in this application will serve in the other files. As such, I will proceed to determine this application on the premises that the orders the applicant seeks stay of are the ones made on 17/09/2020 in HCA No. 8 of 2019.

10. The orders of 17/09/2020 were made pursuant to an application by the applicant herein dated 25/02/2019 wherein the applicant sought stay of execution of the ex-parte judgment delivered on 20/02/2018 in Embu CMCC No. 146 of 2017. In its ruling delivered on 17/09/2019, this court allowed the said application of stay on conditions that the applicant herein deposits half of the decretal sum in an interest earning account in the joint names of the counsels on record within 30 days. It is not correct therefore that the applicant was ordered to deposit the whole decretal amount as he put it in this application.

11. The principles upon which the court may stay the execution of orders appealed from are settled. The Applicant must approach the court timeously and demonstrate the likelihood that he will suffer substantial loss if the order is denied. He must also furnish security for the performance of the decree in the event the appeal does not succeed. These are the requirements stipulated in Order 42 Rule 6(2) of the Civil Procedure Rules 2010. However, it is trite that such orders can only be made where there is pending appeal. That is why Order 42 Rule 6's heading reads "stay in case of appeal". The operating words therefore are "*pending appeal*."

12. It is not in dispute that the applicant has not lodged any appeal against the orders of this court made on 17/09/2019. The applicant having obtained the orders for stay was required to comply with the conditions given by the court in its ruling and in default, the orders for stay were to lapse within the thirty (30) days period. The said period ended on 16/10/2019. As such there are no stay orders in this appeal that the applicant can validly seek to stay in my view.

13. The applicant herein was represented by a firm of advocates. With due respect to the learned counsel for the applicant, it is my opinion that the prayer seeking orders for stay of execution of the orders of 17/09/2019 is incompetent and misconceived. This court having stayed execution pending hearing of the said appeal, it is bereft with jurisdiction to issue other orders of same nature for it would amount to duplicity of litigation and a waste of precious judicial time. The doctrine of res judicata ought to apply in this scenario as provided for under Section 7 of the **Civil Procedure Act** and which was explained by the Supreme Court in **Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR**.

14. The applicant further sought for leave to deposit the documents ownership of the accident vehicle KCE 200T in court as security in lieu of the said orders of 26/06/2019 pending hearing and determination of this Appeal (prayer 6). As I have opined above, there were no adverse orders made on the said 26/06/2019 in this file. The orders which the applicant seems to be referring to are the ones of 17/09/2019.

15. My understanding of this prayer is that the applicant is seeking review of the said orders in that she wants the order for deposit of half the decretal sum to be substituted with the ownership documents to the accident vehicle KCE 200T. The reason for this was that she was not able to raise the amount she was ordered to deposit as security and states she is now invoking the court's inherent powers substitute the amount with the logbook of her vehicle. It should be noted that this application ought to have been brought under the provisions of Order 45 of the Civil Procedure Rules (See **Edward Mungai Waweru vs. Samson Ochieng Kagunda & Another [2018] eKLR** and **Mwaura Karuga v/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others [2015] eKLR**). However, I will proceed and determine on the said prayer regardless of the form in the spirit of the provisions of Article 159 (2)(d) of the Constitution of Kenya and further Order 51 Rule 10 of the Civil Procedure Rules 2010.

16. The legal basis for security in stay of execution application is provided for under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 and which is one of the requirements for stay of execution pending appeal. However, the amount to be ordered to be deposited as security is at the discretion of the court. In **Butt vs. Rent Restriction Tribunal [1982] KLR 417**, the Court of Appeal held as thus: -

".....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."

17. The conditions under which a court can allow an application for review are provided for under Order 45 (1) of the Civil Procedure Rules 2010. The Court of Appeal in **Pancras T. Swai vs. Kenya Breweries Limited (2014) eKLR** reiterated the conditions set by Order 45 and held that for an applicant to succeed in an application for review, he must establish to the satisfaction of the court any one of the following three main grounds: -

i. That there is discovery of new and important evidence which was not available to the applicant when the judgment or order was passed despite having exercised due diligence; or

ii. *That there was a mistake or error apparent on the face of the record; or*

iii. *That sufficient reasons exist to warrant the review sought.*

iv. *In addition to proving the existence of the above grounds, the applicant must also demonstrate that the application was filed without unreasonable delay.*

18. From the above conditions, it is clear that the prayer for review in the instant application is not premised on the first two conditions but on the third condition being “any other sufficient reason”. However, it is clear from the provisions of Order 45 that an application for review must be brought without unreasonable delay. The orders for deposit of security in this file were made on 17/09/2019 and the applicant given 30 days within which to deposit half of the decretal amount. However, the applicant filed the instant application on 20/01/2020 which was over four (4) months from the date of the court’s ruling. The applicant as I have said earlier was required to have deposited the security within 30 days of the said orders which she failed to do. The applicant further annexed to her application a letter from Juja Road Hospital dated 25/07/2018 to support her averment that she had post-delivery medical complications. She also annexed a bank statement to buttress her averment that she had no money indicating that her bank balance as at 30/07/2019 was Kshs. 20,713.37.

19. It is noted that while the orders of the court were made on 17/09/20019, the applicant has produced medical records of 2018, one year before the ruling of the court. There was no current medical record to mitigate this application. This raises doubt as to the authenticity of the said medical records. The bank balance is in my view not convincing of the applicant’s financial position. A person could be the holder of several bank accounts with different balances. No affidavit was sworn to establish that the applicant holds only one bank account with the balance she has presented.

20. However, the applicant fully aware of the orders of this court for depositing of the security and further fully aware of her medical and financial condition and the fact that she was a house wife and unemployed, she ought to have sought for review of the orders soonest possible so as to salvage the situation and not after the lapse of the conditional period. Even if it was after the conditional period, it ought not to be too late from the said date. Equity dictates that he who ought to be aided by it must be vigilant. In *Jaber Mohsen Ali & Another vs. Priscillah Boit & Another E&L No. 200 of 2012[2014] eKLR* the court held that *what is unreasonable delay is dependent on the surrounding circumstances of each case and that even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.*

21. In my opinion, the instant application was made too late in the day was made as an afterthought with the sole purpose of day and buying time and delaying justice for the respondent who cannot enjoy the fruits of her judgment.

22. The applicant did not attach the logbook or the official search of the vehicle that she intended to substitute as security. A motor vehicle is an asset that may change ownership any time and within a short period. Further, there is no evidence that the said vehicle is still registered in her name.

23. Further the applicant did not attach any valuation as to the value of the vehicle to establish whether it is equal to the security she was ordered to deposit. The purpose of the security under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant as once judgement is passed upon a person, he or she becomes a judgment debtor in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. The security must be one which can serve that purpose. In *Visram Ravji Halai & Anor. vs. Thorntorn & Tupin [1963] Ltd Civil App. No. NAI 15 of 1990*, the Court of Appeal held that in making orders for security the court ought not to place the plaintiff in a position in which should the appeal fail, it would be difficult for plaintiff to realize the fruits of his litigation due to the inadequacy of the security ordered.

24. Further even with the valuation having been done, the same would not have been a guarantee that there would be due performance of the decree. If such a fluid security was to be accepted, there is no certainty that by the time the appeal is heard and determined the motor vehicle would be of the same value it is today. Nor is there any guarantee that the said vehicle will still be in the hands of the applicant. Since the said motor vehicle is still under the applicant’s control and use, a lot of water may pass under the bridge before the appeal is determined. I am persuaded by the High Court’s decisions in *Lochab Brothers Ltd vs. Lilian Munabi Nganga & 2 Others [2007] eKLR* and *Esri Star Ltd & Another -vs. Sila Oweshiwani [2018] eKLR* that the security offered herein is not satisfactory due to its uncertainty.

25. It is my humble opinion that the applicant herein has failed to provide sufficient reason to substitute the security ordered by this court and as such the application for review must fail. The applicant has not shown any sufficient reason to justify the grant of the orders.

26. As for the orders for stay of execution pending appeal, the court expressed itself on 17/09/2019 that the prayer is *res judicata* and should not be entertained. Furthermore, this is a court of justice and ought to balance between the rights of both the judgment debtor and those of the decree holder. The interest of justice dictates that the respondent enjoys her judgment and that litigation must come to an end for the interests of both parties.

27. I find this application unmerited and it is hereby dismissed with costs.

28. It is hereby so ordered.

DATED AND SIGNED AT EMBU THIS 17TH DAY OF AUGUST 2020. (To be sent to the parties through email).

F. MUCHEMI

JUDGE