



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAHURURU**

**CIVIL APPEAL NO. 73 OF 2018**

**ANASTACIA KAGOKO CHOGI }**

**KAMENDE FRANCIS MWANGI.....}APPLICANTS(DEFENDANTS)**

**-VERSUS-**

**JAMES WACHIRA KAGEMA &**

**ANNE WANJIKU KINUTHIA (suing as the legal respondent**

**of the late Elijah Karimi Kagema).....RESPONDENTS(PLAINTIFFS)**

**RULING**

The defendant/applicant namely Anastacia Kagoko Chogi and Kamende Francis Mwangi filed the Notice of motion dated 30.08.2019 against the plaintiff/respondent James Wachira and Anne Wanjiku Kinuthia (legal representatives of the estate of Elijah Karimi Kagema). The application is brought under Order 22 R 22(i) Order 51 Rule 1 & 13(2), Rule 16 of the Civil Procedure Rules and section 1A,1B and 3A of the Civil Procedure Act.

The applicants seek the following orders;

- 1) .....Spent;
- 2) *That this honourable court be pleased to order stay of execution and all consequential orders emanating there from pending inter partes hearing hereof and final disposal of this application;*
- 3) *That this honourable court be pleased to set aside the warrants of sale, proclamation of attachment and notification of sale by Direct "O" Auctioneers together with all consequential orders herein;*
- 4) *That pending the hearing and determination of the application or further orders of the court, the honourable court be pleased to issue an order for the release of Motor Vehicle Registration Number KAS 874J, KBA 747A and KCH 381E to the defendant/applicant;*
- 5) *That this honourable court be pleased to extend/enlarge time within which to file and serve a memorandum of appeal out of the prescribed time and the annexed memorandum of appeal be deemed properly filed upon payment of court filing fees.*
- 6) *That costs of this application be in the cause.*

The application is premised on grounds found in the body of the application and the supporting affidavit sworn by Anastacia Kagoko dated 30.08.2010. The applicants contend that the warrants of sale, proclamation and attachment and notification of sale by Direct "O" Auctioneers were never served on them and yet the applicants have been dispossessed of their vehicles; that if stay is not granted the applicants will suffer irreparable loss and damage as execution is imminent as evidenced by proclamation (AKC1), warrant of attachment (AKC2) and notification of sale (AKC3); that the applicants have an arguable case that raises triable issues And thus the need the for the appeal to be heard on merit because if the execution proceeds, the appeal will be rendered nugatory.

The application was opposed through the replying affidavit of James Wachira Kagema where he contends that the application is bad in law, made in bad faith, and lacks merit and is an after thought. He deponed that the trial court delivered its judgment on 4th December 2018 and the applicants were granted 30 days stay of execution (JWK2) the judgement; that the applicant's counsel Mr Omagwe requested for indulgence as they arranged to pay but instead of satisfying the judgment, they filed the application dated 10.01.2019 seeking stay of execution and extension of time within which to file an appeal.

The court heard the application and dismissed it on 6/8/2019 and the applicant's counsel did nothing till the respondent instructed an Auctioneer to proclaim and attach the applicant's property; that the applicants failed to disclose that a similar application had been dismissed and therefore the applicant has not come to this court with clean hands and wants to deny the respondents an opportunity to enjoy the fruits of their judgment. The respondents further deposed that the applicants have not given any reason as to why the memorandum of appeal was not filed and served within the prescribed time nor have any reasonable grounds been given as to justify the orders; that no reason has been given as to why the Respondents should be denied the fruits of their judgment in favour of the stay order. He urged the court to dismiss the application.

#### Applicants submissions

The applicant's Counsel submitted that under Order 42 Rule 6, (2) Civil Procedure Rules stay may be granted if the court is;

1. Satisfied that substantial loss may result to the applicant unless the order is made;
2. That the application has been made without unreasonable delay;
3. That the applicant has provided such security as the court will order for the due performance of the decree or order as may ultimately be binding on him has been given by the applicant.

Counsel relied on the decision of Carter & sons ltd Vs Deposit Protection Fund Board and two others CA no. 291 of 1997 where the court urged that the above stated ingredients must be established. Counsel also relied on Butt Vs Rent Restriction Tribunal Nairobi C.App no.6 of 1979. Counsel also relied on the decision of Silverstein Vs Chesoni(2002)eKLR 867 where the court held that substantial loss is what has to be prevented by preserving the status quo because the loss would render the appeal nugatory. Counsel added that the respondent is a man of straw and will not be able to repay the decretal sum if the appeal succeeds and hence the applicant will suffer irreparably and that in the affidavit dated 19.08.2019 in which she indicated that she was ready to deposit half the decretal amount

It was also submitted that the applicant has an arguable appeal and not frivolous For that submission, counsel relied on Nairobi CA no. 74/2015 Housing Finance Co. of Kenya Vs Sharok Kher Mohamed Ali Hirji which referred to the holding in Reliance Bank Ltd(in liquidation) Vs Norlake Investments Ltd civil application No. Nairobi 93/02

#### The Respondent's Submissions:

The respondent on their part filed their submissions on 05.03.2020 whereby they submitted on three issues;

Whether the applicant has satisfied the conditions precedent to filing an appeal out of time; Counsel submitted that one of the grounds was discussed in Paul Musili Wambua vs Attorney General and 2 others(2015)eKLR where the court held that whether or not to extend time is an exercise of the court's unfettered discretion but the court has to take into account the length of the delay, reason for the delay and chances of the appeal succeeding and degree of prejudice to the respondent.

As regards the length of time taken to file the application, it was argued that the applicants did not take any steps in the 30 days allowed and it is now a year since their application for stay was dismissed by the lower court and there has been no explanation for the delay and should not be allowed to benefit from their own indolence

As to the chances of success, it was submitted that the proposed memorandum of appeal was not annexed to the application for the court to determine the nature of the appeal and whether it is arguable or not. According to the respondent, this application is only meant to delay the respondent's enjoyment of the fruits of his judgment and the respondent will be greatly prejudiced if the application is granted. The respondent urged the court to deny the applicant leave to lodge an appeal.

The second issue is whether the appellants have met the conditions for grant of an order of stay pending appeal. It was argued that the applicant has not met the three requirements that they will suffer irreparable loss if the order is not given.

That the decretal amount is khs.674,712/= and they have not demonstrated that the respondents are people of straw and are not able to refund it in the event the appeal succeeds.

Counsel relied on Equity Bank Ltd Vs Taiga Adams Company limited Civil appeal No. 722 of 2000 where the court held that one had to establish whether if the sums were paid, the respondent would not be able to repay. That the applicants have not shown how they will suffer loss.

As to the offer of security it was also argued that the applicants have not offered any security.

As to whether the warrants of sale and proclamation should be set aside, it was submitted that the applicants were duly served with the documents and that the copy of the proclamation (AKC1) indicates that the 1st applicant was served but refused to sign that having been duly served they are not entitled to the orders sought.

The issues for consideration are as follows;

1. Whether the applicants have satisfied the conditions for grant of leave to file appeal out of time.

2. Whether the applicant have met all the conditions for grant of an order of stay pending appeal.

On the first issue, the court aptly stated what the applicant seeking leave to appeal out of time must establish. In Paul Musili Wambua (supra) where the court stated that;

*“It is now well settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal, the judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general, the matters which a court takes into account in deciding whether to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”*

Nowhere in the applicant’s affidavit dated 20.08.2019 it is stated how the delay came about, the reason for the delay and the chances of the appeal succeeding if the application is granted. The judgment was delivered on 04.12.2018 and the applicants were given 30 days stay but they did not pay up or appeal the court’s said order. The applicants were application for stay in the trial court was denied on 06.08.2019. It is after that dismissal that the applicants moved this court by their application on 30.08.2020. It is upto applicants to explain the eight months delay but not leave the court to speculate or presume. Having failed to explain the delay, this court has no basis for exercising its discretion to aid an indolent party.

As to whether the appeal has high chances of success, although the applicants did not annex the draft memorandum of appeal to the application, I have seen one on the file. It was the duty of the applicants to point out from the memorandum of appeal why they believe their appeal has high chances of success which they did not do. The court cannot be left to speculate.

Whether the applicants have met the conditions for granting of stay order pending appeal;

Order 42 Rule 6(2) Civil Procedure Act provides for the conditions precedent to grant of an order of stay. It reads;

*‘No order for stay of execution shall be made under sub rule (i) unless;*

*a) The court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay.*

*b) Such security as the court orders for due performance of such decree or order as may ultimately be binding on him has been given by the applicant(s).....”*

These conditions were discussed in Carter & sons Limited (supra) where the court said *“...The mere fact there are strong grounds of appeal would not in itself justify an order for stay... the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay, and thirdly the applicant must furnish security, and the application must of course be made without unreasonable delay”*

In Butt’s case(supra) the court said as follows:

*“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.”*

In Equity Bank Limited(supra) the court said :

*“In the application before me, the applicant has not shown or established the substantial loss that would be suffered if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent – that if execution is carried out – in the event the appeal succeeds, the respondent would not be in a position to pay – reimbursement as he/it is a person of no means. Here,, no such allegation is made much less established by the Appellant/Applicant”*

The first condition to establish is that the applicant will suffer substantial loss if an order of stay is not granted. As discussed in Equity Bank Ltd case, the applicant can only prove that substantial loss will result if he can demonstrate that if the decretal sum is paid to the respondent, the respondent will not be able to refund it in the event the appeal succeeds. In the instant case, the applicants did not in any way try to demonstrate the respondents are persons of no means. It is not enough to allege. They must have shown that the respondent is a man of straw and cannot repay.

The second requirement is that the application must have been brought without unreasonable delay. As observed earlier in this ruling, the applicants never explained why they delayed in filing the application. The delay of about 9 months remains unexplained.

The third requirement is that the applicants must be willing to furnish security for due performance of the decree. In Locus Woods (k) Ltd vs Patrick Amugune Kamadi (2016) eKLR the court stated *“..... of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought... Let me conclude by stressing that all the four, not one of or some, must be met before this court can grant an order of stay...”* Which principle was also emphasized in Carter & Sons Limited Vs Deposit Protection Fund Board & 3 others, CA Nairobi 291/1997”

The applicant's affidavit never made any reference to security. However, in the submissions, counsel referred to an affidavit dated 19.08.2019 where the applicant allegedly made an offer for security. I have seen the said affidavit which is part of an application dated 20.08.2019. The said application is not for consideration before me. It seems the applicants filed the said application but abandoned it.

The application for consideration before me is the one dated 30.08.2019. The court cannot therefore refer to an affidavit which was filed in an application that is pending and is not for consideration by this court.

In the end, I find that the applicants have not satisfied the conditions necessary for the exercise of the court's discretion in their favour to grant leave to file an appeal out of time or grant an order of stay.

The application is unmerited and it is hereby disallowed. This means that the stay that was granted by the court on 11.09.2020 automatically lapses. The applicant will bear the costs of this application.

**Dated, Signed and Delivered at NYAHURURU this 29th day of September, 2020.**

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**R.P.V. Wendoh**

JUDGE

PRESENT:

Mr Omanga for the Applicant

Henry - Court Assistant