



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT KAJIADO

CIVIL APPEAL NO. 27 OF 2020

KENYA NATIONAL HIGHWAYS AUTHORITY.....APPLICANT

VERSUS

AHMEDNASIR MAALIM ABDULLAHI.....RESPONDENT

RULING

1. The applicant took out a motion on notice dated 19th August, 2020 and filed on 20th August, 2020 seeking stay of execution pending appeal. The motion was brought under sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, and Orders 42 Rule 6 and 51 Rule 1 of the Civil Procedure rules, 2010.
2. The motion was based on grounds on its face and the applicant's affidavit sworn by Engineer Fredrick Oyugah Onyango on 18th August, 2020. The grounds and affidavit state, in the main, that the applicant is aggrieved with the judgment of the trial court and has already lodged an appeal to this court. It however apprehensive that the respondent may execute the judgment before its appeal is heard and determined.
3. According to the applicant, it holds property for the benefit of the public; the appeal has high chances of success; there was no evidence that an accident occurred and interests of justice demand that stay of execution be granted.
4. The respondent filed a replying affidavit sworn on 3rd September, and filed on 4th September, 2020. He deposed that the applicant cannot hide under public interest to avoid liability from a regular judgment; the judgment is a money decree and the amount of the decree will not cause prejudice to the applicant if paid; he is able to refund the decretal sum if the appeal was to succeed and as a successful litigant, he should not be denied the fruits of his judgment. The respondent further deposed that the applicant has not shown that it will suffer substantial loss if stay is not granted.
5. The applicant filed a further affidavit sworn on 4th September, 2020 and filed on 7th September, 2020 in response to the respondent's replying affidavit. It was deposed that the applicant's appeal hinges on section 93(1) of the Traffic Act which confers immunity to the applicant; the judgment exposes the applicant to numerous more cases and that there is no evidence that the respondent is a man of means and will be able to refund the decretal sum execution proceeds and the appeal eventually succeeds. It was further stated that Order 42 Rule 8 bars the government or its organs from furnishing security.
6. During the hearing, Mr. Ochieng appearing for the applicant, moved the motion and urged the court to allow it. He submitted that the applicant has an arguable appeal; that it will suffer irreparable or substantial loss and that section 93(1) of the Act cushions it from liability due to conditions of a road.
7. He argued that if execution is allowed to proceed, it will be against the law. He also argued that the respondent will not be able to refund the money if payment is made. Counsel relied on a Privy Council decision of *Commissioner of Gibraltar v Orjala & others* (25th June, 1980) page 13 para. 2. He also relied on *George Mike Wanjohi v Steven Kariuki & 2 others* [2014] eKLR for the submission that public interest is equally a consideration for granting stay of execution. He urged the court to allow the motion.
8. Mr. Abdullahi, S.C, opposed the motion. He contended that the applicant has not established that it will suffer substantial loss if stay is not granted. According to Senior Counsel, the court must be satisfied that an applicant will suffer substantial loss if execution is allowed to proceed. He submitted that the decretal sum can be refunded if the appeal succeeded and relied on paragraph 6 of the replying affidavit to that effect.
9. In contending that stay of execution cannot be granted unless substantial loss will be suffered. He relied on *Kenya Pipeline Co. Ltd v Zakhem International Construction Ltd* (Civil Application No. E029 of 2020) to argue that money decree should not ordinarily be stayed unless an appeal will be rendered nugatory. He argued in respect to this application that if the decretal sum is paid, it will be refunded as soon as the appeal succeeds.

10. Mr. Abdullahi also relied on James Titus Kisia v Said Masid Said [2015] eKLR on what is meant by nugatory. Further the reliance was placed on Kenya Shell v Benjamin Karuga Kibiru & Another [1986] eKLR to urge that an applicant should show the damage it will suffer if the decretal amount is paid. He again relied on National Industrial Credit Bank v Aquinas Francis Wasike [2006] eKLR for the submission that where there are competing claims and respondent states that he can refund the money, if not disputed, the court should believe the respondent. He prayed that the application be dismissed.

11. I have considered the application, the response and submissions by parties. I have also considered the authorities relied on. This being an application for stay of execution, the principles upon which it should be granted or denied are well settled.

12. Order 42 rule 6 provides:

“1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

2. No order of stay shall be made under sub rule (1) 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; 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”(emphasis).

13. The rule requires timely filing of an application for stay. This is however not in contention given that the motion was filed timeously. The rule, however, also requires an applicant to show to the satisfaction of the court, that it will suffer substantial loss and that it has offered security for the due performance of the decree as the court may deem fit.

14. While considering the grounds for granting stay pending appeal, the Court of Appeal stated in Butt v Rent Restriction Tribunal (Civil App No. NAI 6 of 1979) ***that the power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should however be exercised in such a way as not to prevent an appeal. The court added that in exercising its discretion whether to grant or refuse an application for stay it will consider the special circumstances of the case and its unique requirements.***

15. What is clear from Order 42 rule 6 as well as the above decision is that in an application for stay the court exercises judicial discretion and like any other discretion, it should act judicially. Whether to grant stay or not, the Court has also to consider the circumstances of each case.

16. From the wording of Order 42 rule 6, the guiding principle is that an applicant should show that he will suffer substantial loss if stay is not granted. As to what substantial loss is, this has been the subject of consideration by courts. In James Wangalwa & another v Agnes Naliaka Cheseto [2012]eKLR, the court stated;

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal....The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”

17. In Equity Bank Ltd v Taiga Adams Company Ltd [2006] eKLR, the Court again stated that *the only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent, that is; execution proceeds or is carried out, in the event the appeal succeeds, the respondent would not be in a position to pay or reimburse because he has no means of doing so.*

18. The court was again clear in Machira T/A Machira & Co Advocates v East African Standard (No 2) [2002] 2 KLR 63, that in attempting to demonstrate to court that substantial loss is likely to be suffered, the applicant is under a duty to do more than merely repeating words of the relevant statutory provision or rule or general words used in some judgment or ruling in a decided case cited as a judicial precedent for guidance. The court emphasized that; ***“it is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do.”***

19. I have carefully read through the application and the supporting affidavit. The applicant spent some precious time arguing that it has an arguable appeal and that section 93(1) of the Traffic Act cushions it from liability due to the condition of the road. It made no effort to demonstrate the substantial loss it will suffer if stay is not granted. The applicant has only made a sweeping statement in its further affidavit that it will suffer substantial loss and that the respondent has not shown through evidence that he will be able to refund the decretal sum.

20. The respondent deposed in his replying affidavit that he is a practicing advocate of many years and that he will refund the decretal sum immediately the appeal succeeds. The applicant did not dispute that deposition. It did not even allege that the respondent is not a person of means so that if the appeal does eventually succeed, he will not be able to refund the decretal sum. In other words, the applicant has merely

alleged that the appeal will be in vain. That is not the meaning of substantial loss as contemplated by Order 42 rule 6 and decided cases. The applicant was required to do much more than merely asserting that there will be substantial loss.

21. It must be clear to an applicant seeking stay of execution that the law places a duty on him to demonstrate to the satisfaction of the court that he will suffer something special and that he may not be put back to the original position he was in before execution and, therefore, deserves exercise of the court's discretion in his favour.

22. As **Platt, Ag JA**, put it in *Kenya Shell Ltd v Benjamin Karuga Kibiru & Others* (supra):

“...It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made. The affidavit in support has not set out any information to show that the appeal will be nugatory. It is loud in its claim that the appeal will fail. But no reasons are given why the appeal will be rendered nugatory. The court inquired into the respondent's circumstances, but the information that was forthcoming did not confirm the applicant's misgivings.

It is usually a good rule to see if order XLI rule 4 (now order 42 rule 6) of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”

23. **Hancox, J A** agreed and stated:

“[H]aving considered the matter to the full, and with anxious care, there is in my judgment no justification whatsoever for holding that there is likelihood that the respondents will not repay the decretal sum if the appeal is successful and that appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects.”(Emphasis).

24. In a more recent decision by the Court of Appeal in *Kenya Pipeline Co. Ltd v Zakhem International Construction Ltd* (supra), the Court reiterated that as execution is in regard to a liquidated amount, there is no way the appeal if successful will be rendered nugatory.

25. It is plain to this court that the applicant failed to meet the test by demonstrating that it will suffer substantial loss if stay is not granted in its favour.

26. The applicant further argued that the law cushions it from liability arising from the condition of the road. As what is before court is an interlocutory application for stay, this court will refrain from commenting on that argument since the appeal is yet to be heard, save to state that that alone without more, is not proof of substantial loss.

27. The court considering an application for stay has to balance interests of the applicant and those of the successful respondent who has a judgment in his favour. A decree holder who has gone through litigation and obtained judgment in his favour requires protection just like the applicant who wishes to exercise his right of appeal against that decree. In that regard, the duty is on the applicant to satisfy the court that without stay, it will suffer substantial loss. It is not a question of apprehension but must be real loss.

28. The Court stated as much in *Machira T/A Machira & Co Advocates v East African Standard (No 2)* [(supra) that courts should not be obsessed with the protection of an appellant or intending appellant in total disregard of the so far successful opposite party and added:

“The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

29. Taking into account the facts disclosed in the application, the depositions in the supporting affidavit and the response, and on the strength of the authorities cited, I am not satisfied that the applicant has met the threshold for grant of stay of execution. In the premise, the application dated 19th August 2020, is declined and dismissed with costs.

Dated, signed and delivered at Kajiado this 25th day of September, 2020.

E.C. MWITA

JUDGE