



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 89 OF 2020

JAMES KIIRU MWANGI.....APPELLANT/APPLICANT

VERSUS

GIBSON KIMANI MWANGI.....1ST RESPONDENT

CHRIS GANSURE.....2ND RESPONDENT

RULING

1. The appellant/applicant herein lodged the Notice of Motion dated 2nd March, 2020. The Motion is supported by both the grounds laid out on the body thereof and the facts stated in the sworn affidavit of the applicant, who sought for the substantive order for stay of execution of the judgment and decree issued by the trial court on 31st January, 2019 in CMCC NO. 5977 of 2015 pending the hearing and determination of an appeal against the ruling consequently delivered by the trial court on 30th January, 2020. The applicant equally sought for an order that the cost of the Motion be in the cause.
2. The application stands opposed by way of the Grounds of Opposition dated 11th March, 2020 and the replying affidavit sworn by the 1st respondent on 19th June, 2020. The record shows that the 2nd respondent did not participate at the hearing of the Motion.
3. When the Motion came up for interpartes hearing, this court directed the parties to put in written submissions. This court has seen both the submissions of the applicant and the 1st respondent.
4. On his part, the applicant argues that he has moved this court within a reasonable period and that there has been no inordinate delay in bringing the Motion.
5. The applicant further argues that unless an order for stay of execution is granted by this court, he stands to suffer substantial and irreparable loss since the 1st respondent has already commenced the execution process.
6. It is also the submission of the applicant that the 1st respondent's financial abilities are unknown and hence there is no guarantee that once the decretal sum is paid to him, he will be in a position to refund the same should the appeal succeed. The applicant referred this court to the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** in which the Court of Appeal held thus:

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”
7. The applicant also contends that the appeal raises arguable issues and has high chances of success.
8. The 1st respondent in reply submits that the Motion is incompetent for the reason that it has been brought under the wrong legal provisions, namely Order 10 of the Civil Procedure Rules which deals with the consequence of non-appearance and default of defence, *inter alia*, while Rule 11 of the said order concerns itself with the setting aside or varying of a judgment entered under the Order. The 1st respondent went on to argue that the supporting affidavit to the application relates to the lower court matter.
9. The 1st respondent further submits that the application is an abuse of the court process for the reason, among others, that the applicant had been granted an order for stay of execution in the lower court.

10. On the merits of the Motion, the 1st respondent is of the view that there has been an inordinate delay in bringing the Motion thereby negating the remaining two (2) conditions for the granting of an order for a stay of execution. The 1st respondent relied on the case of **Magnate Ventures v Simon Mutua Muatha & another [2018] eKLR** where the court held the following in respect to the conditions for a stay of execution:

“Order 46 Rule 6 (2) of the Civil Procedure Rules, therefore provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following:-

- 1. Substantial loss may result to the applicant unless the order was made;***
- 2. The application was made without unreasonable delay; and***
- 3. 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.***

Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously.”

11. In closing, the 1st respondent argues that he is entitled to the fruits of his judgment and there is no basis for granting the order for stay of execution sought, and quoted the following reasoning by the High Court in the case of **Abraham Lenauia Lenkeu v Charles Katekeyo Nkaru [2016] eKLR**:

“...the motive by the applicant was to stop the execution and drag the respondent to a further litigation on appeal unjustifiably. The respondent had obtained a valid judgement of the court. By virtue of the decree he was entitled to the fruits of his judgement. The applicant on learning of the execution proceedings did not seize the opportunity to avail himself before the lower court to first ventilate any issue at that forum. There is no evidence that the trial court had shut the door for a redress for the applicant to seek intervention of the high court.”

12. I have considered the grounds set out in the body of the Motion the facts deponed in the affidavit supporting it and the contending submissions, while noting the absence of the Grounds of Opposition and a replying affidavit of the 1st respondent as aforementioned.

13. Before I delve into the merits of the Motion; however; I consider it necessary to address the preliminary issues which were raised by the respondent concerning the competency of the Motion.

14. On the issue touching on reliance of wrong legal provisions, I note that the Motion was brought under the provisions of Order 10, rule 11, Order 22, Order 51 of the Civil Procedure Rules. Upon considering that the Motion concerns itself with the subject of a stay of execution provided for under Order 42, Rule 6(2) of the Civil Procedure Rules, it is apparent that the applicant has not come under the applicable provision. That notwithstanding, I am of the opinion that this is merely a procedural issue which does not necessarily affect the substance of the Motion and which can easily be remedied by way of an amendment. Moreover, courts are urged to consider substantive justice without undue regard to procedural technicalities.

15. Concerning the competency of the supporting affidavit, upon my perusal of the same, I note that whereas it was filed in the High Court, its contents relate to the notice to show cause which was issued by the lower court; it does not contain any statements that make particular reference to the application at hand. In the premises, I am convinced that the supporting affidavit is improper and it is therefore struck out and expunged from the record.

16. The proviso of **Order 51, Rule 4** of the **Civil Procedure Rules** reads as follows:

“Every notice of motion shall state in general terms the grounds of the applications, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.”

17. In the present Motion, I note that the applicant opted to support his application with an affidavit. Consequently, in the absence of a competent affidavit, the Motion will lack the essential and relevant evidence required to clearly establish the facts on which the application is founded.

18. From the foregoing, it is clear that in the absence of an affidavit or competent one for that matter, the application has no legs on which to support itself.

19. The upshot therefore is that the Motion lacks merit. It is dismissed with no order as to costs.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 24th day of September, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the 1st Respondent

..... for the 2nd Respondent