



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 616 OF 2019

GABRIEL G. WAWERU.....APPELLANT/APPLICANT

-VERSUS-

SALOME GRACE MUNJIRU NJUGUNA.....1ST RESPONDENT

PAUL OLE YIALE T/A NASIOKI AUCTIONEERS.....2ND RESPONDENT

RULING

1. The subject matter of this ruling is the Notice of Motion dated 18th November, 2019 brought by the appellant/applicant herein and supported by the grounds set out on its body and the facts stated in the affidavit of the applicant. The applicant sought for the orders hereunder:

i. Spent.

ii. THAT pending the hearing and determination of the appeal filed herein there be a stay of execution of the ruling delivered on 15th October, 2019 by the Hon. E. Wanjala.

iii. Spent.

iv. THAT NAISOKI AUCTIONEERS be ordered to account for the household goods attached on 28th June, 2018.

v. THAT the costs of the application be in the cause.

2. In his affidavit, the applicant averred *inter alia*, that the impugned ruling was pursuant to a notice to show cause where the 1st respondent sought for an order for the arrest and committal to civil jail of the applicant for failure to settle an award in a decree that has been rendered stale with time.

3. The applicant averred that though the decree was issued on 20th July, 2006 it was executed by the 2nd respondent on 28th June, 2018 which is more than 12 year later, and that the judgment was delivered ex parte.

4. It was the assertion of the applicant that the 2nd respondent irregularly attached his goods in a bid to execute the decree and that it has not accounted for the proceeds of sale of the goods attached.

5. To oppose the Motion, the 1st respondent put in a replying affidavit and stated *inter alia*, that the delay in executing the decree of 20th July, 2006 was occasioned by her inability to trace the auctioneers, namely Elan Traders Auctioneers, whom she had entrusted with the duty of executing the decree.

6. The 1st respondent further stated that the applicant had an opportunity to apply for an order for a stay of execution before the lower court but that he failed to do so.

7. The 2nd respondent who had been enjoined in the instant appeal upon the request of the applicant and pursuant to the order made by this court on 18th December, 2019 similarly put in a replying affidavit and asserted that he received the warrants of sale and attachment from the court and that upon their expiry, he applied for re-issuance of the same on 18th December, 2017.

8. The 2nd respondent also asserted that the attachment and sale of the applicant's goods was lawfully and regularly done.
9. The applicant rejoined with two (2) supplementary affidavits in which he essentially restated that the proclamation of his goods by the 2nd respondent was irregular and was based on a decree that had long lapsed.
10. When the Motion came up for interparties hearing before this court, the parties were directed to put in written submissions. Going by the record, only the submissions of the applicant and the 1st respondent were made available to this court.
11. On his part, the applicant submitted that owing to the impugned ruling, it is clear that his freedom is at risk since he stands to be committed to civil jail should an order for a stay of execution be denied, thereby rendering the appeal nugatory. That in this sense, he stands to suffer substantial loss.
12. The applicant further submitted that given his advanced age, his health is equally likely to suffer should he be committed to civil jail.
13. In reply, the 1st respondent argued that the applicant has not satisfied the principles for granting an order for a stay of execution. The 1st respondent particularly stated that the applicant has not shown the substantial loss he stands to suffer, in the manner stated by the court in the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** hereunder:

“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.”

14. The 1st respondent went on to submit that the applicant has not brought any material or evidence to show that she is a person of straw and hence unable to repay the decretal sum upon payment to her, in the event that the appeal succeeds. The 1st respondent made reference to the case of **Equity Bank Limited v Taiga Adams Company Limited [2006] eKLR** where the court held that:

“In the application before me, the applicant has not shown or established the substantial loss that would ensue 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 is execution is carried out – in the event the appeal succeeds, the Respondent would not be in a position to pay- reimburse – as he/it is a person of no means. Here, no such allegation is made, much less established, by the appellants/applicant.”

15. The 1st respondent is of the view that the committal of the applicant to civil jail would be founded on the legal process and hence there is no fundamental right of the applicant that is at stake here. The 1st respondent is also of the view that the applicant herein is a person of means and hence well able to satisfy the decree.
16. I have considered the grounds laid out on the body of the Motion, the facts deposed in the affidavits supporting and opposing the Motion and the contending submissions and authorities cited.
17. On whether the applicant's appeal is arguable, Order 42 Rule 6(2) does not make it a condition for stay of execution for Appeal from the Lower Court to High Court. It is also my observation that the issues raised in the Motion concerning the validity of the decree giving rise to the proclamation of the applicant's goods constitute grounds of appeal in the memorandum of appeal. It therefore follows that it would be premature for this court to consider those issues at this stage since they will properly be ventilated at the hearing of the substantive appeal.
18. On the merits of the Motion, the guiding provision in considering an application seeking an order for stay of execution is **Order 42, Rule 6(2)** of the **Civil Procedure Rules** which sets out the following conditions in determining an application for stay.
19. The first condition is that the application must have been made without unreasonable delay. From my study of the record, I note that the impugned ruling was delivered on 15th October, 2019 whereas the instant Motion was filed on 18th November, 2019. In my view, the period of close to one (1) month that passed does not amount to inordinate delay.
20. Under the second condition, the applicant must show to this court's satisfaction the substantial loss it would suffer if the order for stay is denied.
21. The courts have unanimously held that substantial loss which constitutes the cornerstone of an application for stay ought to be demonstrated. The courts have also unanimously determined that imminent execution is not in itself a ground on which a party can rely to argue substantial loss. The reason for this is that execution is a lawful process and no successful litigant should be denied the fruits of his or her judgment save where sufficient reason(s) have been given.
22. The above position was reaffirmed by the Court of Appeal in the case of **Halai & another v Thornton & Turpin (1963) Ltd [1990] eKLR** when it rendered that in order for an application for a stay of execution to succeed, a party must demonstrate inter alia, that he or she will suffer substantial loss.
23. Furthermore, in the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** cited in the 1st respondent's submissions, the court held that:

“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. This is what substantial loss would entail...”

24. I note from the record that the applicant’s main apprehension is that unless an order for a stay of execution is granted, his liberty will be at stake as he will be committed to civil jail and that his health will deteriorate as a result, thereby rendering the appeal nugatory. It is clear that the constitutional rights and freedoms of a person, once infringed upon, cannot be easily redeemed or compensated. In this instance, it is the liberty of the applicant that is at risk.

25. On those grounds, I am convinced that the applicant has shown the substantial loss he stands to suffer should this court decline to grant an order for stay of execution, thereby plausibly rendering his appeal nugatory if successful.

26. In respect to the final condition which is the provision of security for the due performance of such decree or order, none of the parties specifically addressed me on this subject, though I note that the execution process undertaken by the 2nd respondent in satisfying the decree constitutes a ground of appeal in the memorandum of appeal and cannot address this issue at this stage. Be that as it may, I appreciate that the provision of security for the due performance of the decree is a pre-requisite to the granting of an order for a stay of execution.

27. Concerning order (iv) of the Motion, upon considering the averments made by the respective parties, I am of the view that the 2nd respondent annexed documentation to his replying affidavit to indicate and account for the proceeds of sale of the applicant’s goods pursuant to the proclamation notice of 28th June, 2018. With regard to this, the applicant is at liberty to challenge the same before the Auctioneers Licencing Board.

28. In the end, the Motion dated 18th March, 2019 succeeds in terms of prayer (ii) and an order for a stay of execution pending the hearing and determination of the appeal is granted on the condition that the applicant deposit ½ the judgment sum in an interest earning account in the joint names of the parties’ advocates/firm of advocates within 45 days of this day, failing which the stay order shall lapse. Costs of the application to abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 22nd day of October, 2020.

.....

L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the 1st Respondent

..... for the 2nd Respondent