REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 78 OF 2020

SHADRACK AYIERA MOSOTI .....APPELLANT

VERSUS

DANIEL NDEKE GATUMU .....RESPONDENT

RULING

1. In this unusual Application, the Applicant seeks unconditional stay of execution of the judgment entered in the Lower Court in ***Nakuru Chief Magistrate's CMCC No. 322 of 2018***. Indeed, the Application is doubly unusual because the Applicant had approached the Lower Court on a similar application and had, largely, been successful: the Lower Court granted the stay of execution on the conditions that the Applicant pays half the decretal sum to the Respondent and pays the other half to the decretal sum into a joint interest bearing account within 45 days of the ruling. Ruling of the Lower Court was delivered on 04/08/2020.

2. The Applicant is unhappy about the conditions given for that stay. He wants this Court to issue a new stay of execution – and to do so unconditionally.

3. Can an Applicant who has been partly successful in an application for a stay of execution in the Lower Court bring the self-same Application in the High Court hoping to get better terms?

4. In **Sana Industries & Another v Robert Ayunga & Another** ***[2017] eKLR***, I answered this question in the following forthright terms:

> While I agree that any appellant has a right to approach this Court for a stay of execution pending an appeal, I must state that it is improper for an appellant who has been successful on such an application in the lower Court to approach the High Court for a similar order. Indeed, the level of impropriety rises very close to an abuse of the process of the Court. It verges on shopping for a forum that will give the litigant the orders it seeks.
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> To its credit, the 1st Appellant did disclose to this Court that a similar application had been made in the lower Court and orders granted. But this disclosure does not cure the impropriety. The appropriate course of action, in my view, would have been for the 1st Appellant to go back to the same Court to seek variation of the orders due to changed circumstances if it realized after the order was given that it was unable to comply with it. Coming to this Court an attempting to get a more favourable order is improper. This would be enough reason for me to dismiss this Application.

5. Suppose the Court concluded that it is not an abuse of the process of the Court and considered the Application on its merits? This is what we will find. The parties are in agreement on the factors that the Court takes into account when considering an application for stay pending appeal. They are derived from the wording in Order 42 Rule 6 and our decisional law. They are:

> a. The appeal filed is arguable;
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> b. The Applicant is likely to suffer substantial loss unless the order is made. Differently put, the Applicant must demonstrate that the appeal will be rendered nugatory if the stay is not granted;
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> c. The application was made without unreasonable delay; and
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> d. The Applicant has given or is willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on him.

6. Again, the parties are united that there is an arguable appeal on record. In any event, it would be awkward to ask this Court to find otherwise in the face of the Lower Court ruling granting stay and in the absence of an appeal against that ruling.

7. What substantial loss would the Applicant suffer if the stay is not granted or if stay was granted in the same terms as were given by the Lower Court? The Applicant says that the substantial loss is that his property will be attached and sold if stay is not granted. The Applicant does not claim that the Respondent would be unable to reimburse the amounts paid. He does not even claim that the decretal amount would so prejudicially affect him financially as to negatively affect the quality of his life. Instead, the Applicant says that in the event that stay is not given and he does not satisfy the decree, his property would be sold!

8. Suffice it to say such tenuous logic does not satisfy the requirement for a showing of demonstration of substantial loss if stay is not granted. An appeal is only rendered nugatory where the act of execution itself would make it impossible or impracticable for the Appellant, if successful, to be returned to the *status quo ante*. An appeal is not rendered nugatory because of what could happen if the appellant decided not to satisfy the decree.

9. The Applicant would also fail on the final condition – to demonstrate that he has given or is willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on him. Here, the Applicant says that stay should be granted unconditionally. There may be exceptional situations when stay of execution is granted unconditionally – but the circumstances which make this case exceptional have not been explained.

10. The long and short of it all is that the Application herein must fail. It is hereby dismissed with costs. In the interests of justice, the Court will reinstate the stay of execution in the same terms as the Lower Court granted in its ruling dated 04/08/2020. The conditions to be satisfied within fifteen (15) days of the date hereof or execution to proceed.

11. Orders accordingly.

Dated and delivered at Nakuru this 26th day of November, 2020.

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.