



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 4 OF 2019

STANBIC BANK.....1ST APPELLANT/RESPONDENT

LEAKEY AUCTIONEERS.....2ND APPELLANT/RESPONDENT

-VERSUS-

MARTIN TUMAINI NGALA.....RESPONDENT/APPLICANT

Coram: Justice Reuben Nyakundi

Katsoleh & Co. Advocates for the Applicant

Mulanya & Maondo Advocates for the Respondents

RULING

The Applicant, Martin Tumaini Ngala brings an application founded on Order 1A, 2A and 3A and other enabling provisions seeking a stay of execution of the Judgment delivered on the 27th April 2020 pending the containment of COVID-19 and the as well as pending hearing and determination of the intended appeal. He also seeks that costs be in the cause.

The application is based on the supporting affidavit of Martin Tumaini Ngala, the applicant. He avers that this Honourable Court delivered its Judgment on the 10th April 2020 which Judgment he is dissatisfied with and intends to appeal against. He contends that he is apprehensive that the appellant may proceed to execute and attach his motor vehicle KCL 728H, which is his only source livelihood, unless the Court issues a stay of execution.

He further avers that even prior to COVID-19, the economy of this county was on its knees and the transport industry was completely paralyzed by various government directives banning logging and transportation of charcoal rendering him unable to service the loan. He avers that it would be unfair to impound his motor vehicle in the middle of an unforeseen pandemic.

The Applicant deposes that parliament has recently passed legislation and amended the Contract Act to have the pandemic be construed as force majeure. That his intended appeal has high chances of success and if the appellant proceeded with execution then the intended appeal would be rendered nugatory.

It is contended that the court is enjoined to assist citizens mitigate the effect of COVID-19 and it is in the interest of justice that the Orders sought are granted.

The Respondents'/Appellants' answer to the application is given by Peter Wafula Simiyu, Advocate, who contends that he has been in conduct of the matter all through on behalf of the Respondents. He avers that on 10th April, 2020, this Court sitting as an appellate court delivered a Judgement setting aside the ruling by the trial Court dated 16th October, 2018 and dismissed the Applicant's application dated 17th May, 2018 with costs. He points to this Court's Judgement dated 17th May, 2018 where sitting as an appellate Court it dismissed with costs a similar application by the Applicant dated 12th September, 2017. He further points put that therefore, the Court has dismissed two similar applications between the same parties over the suit motor vehicle and seeking the same Injunctive reliefs.

It is contended that the present application offends the provisions of Rules 5 (2) (b) and 75 of the Court of Appeal Rules which require a party who is desirous of lodging an appeal to the Court of Appeal to file and serve a notice of appeal within 14 days of the date of the decision to be appealed against. It is deposed that no such notice was filed and served, leaving the present application fundamentally and fatally defective that it cannot be cured by Article 159 (2) (d) of the Constitution. It is contended that a party cannot apply for stay of execution pending an appeal if that party has not commenced that appeal.

The deponent avers that he adopts and reiterates the averments made in the replying affidavit deposed by Suba Hamilton dated 28th May 2018 together with the annexures therein especially with regards to the Hire Purchase Facility advanced to the Applicant, the nature of that facility, and the status of the loan account which he contends is still in arrears. This he avers, forms pages 33-36 of the Record of Appeal dated 10th May, 2019.

It is contended that the 1st Respondent advanced to the Applicant a cumulative sum of Kenya Shillings Six Million, Nine Hundred and Forty-five Thousand, Seven Hundred and Sixty-Eight Shillings (Kshs. 6,945,768.00). It is further contended that the facility was secured by joint registration of the assets obtained under the Hire Purchase agreement namely: Motor Vehicle Registration Numbers KCL 728H a Mitsubishi FH 215 truck and Tractor Registration Number KTCB 419P.

The deponent asserts that it is the purview of the Court of Appeal to determine the seriousness or otherwise of the issues raised in the intended appeal and that this Court has already determined twice that the Applicant's applications at the trial Court were not merited. The deponent states that the intended appeal cannot operate as a stay of execution or proceedings under a decree. That further under order 42 rule 6 of the Civil Procedure Rules, the granting of the stay of execution pending appeal is not automatic but predicated upon the Applicant exhibiting the existence of sufficient cause and further sufficiently demonstrating that he will suffer substantial loss if the stay sought is denied

It is also contended that the dealings between the parties were contractual in nature and the repayment terms of the facility was never pegged on the Applicant's business thriving or the flourishing of the transport industry. That where one offers a security for a financial advancement to a financial institution, he puts it at risk of realization where he or she defaults and the realization of the security has nothing to do with the Applicant's business thriving or not.

The deponent's contention is that the Applicant started defaulting before 12th September 2017 when he filed his first application at the trial Court that sought injunctive relief against the Respondent herein. That to date the Applicant has not regularised the Hire Purchase Accounts which have been in arrears ever since. Therefore, it is averred, he cannot now blame the Covid-19 pandemic, which was first reported in Kenya on or about 16th March, 2020, for his financial woes.

The existence of any amendment to the Law Contract Act declaring the Covid-19 a Force Majeure is denied. It is averred that the Applicant's intention is to delay justice and to unnecessarily protract the matter all in an attempt to thwart and frustrate the Respondent's exercise of its contractual remedies.

It is contended that the present application is therefore an abuse of the process of this Honourable Court as the said application is bad in law and unmeritorious and ought to be struck out with costs. It is averred that in the alternative and without prejudice to the foregoing, should the Court be inclined to grant the orders sought, it should, in the spirit of Order 42. Rule 6 (2) (b) of the Civil Procedure Rules, not hesitate to order the Applicant to deposit into a joint bank account the total outstanding balance owed to the Respondent which as at 28th May 2018 stood at Ksh. 7,679,725.66/=

The Submissions

In his submissions, the Applicant's advocate invites the court to take judicial notice of the COVID-19 pandemic. He submits that the applicant's source of income in the transport industry has been affected tremendously by the banning of logging and charcoal trade. He submits that COVID-19 has been declared force majeure by parliament which he submits has recently passed legislation to this effect and invites the Court to suspend the terms of the contract until COVID-19 is contained. This argument is supported by **Ryde vs Bushell & Another (1967) EA 817**.

It is submitted that the intended appeal is arguable and has a very high chances of success and that should the orders sought not be granted, the appeal will be rendered nugatory. This argument is made on the basis that the Learned Judge misapprehended the facts by failing to reconcile the accounts and find that the purported arrears owed to the appellant was caused by the appellant reconciling two distinct accounts. Reliance is placed on **Ivan Kalo Ingali vs HFCK (2014) eKLR; Reuben & 9 others vs Nderitu & Another (1989) KLR 459; Transouth Conveyors Ltd vs Kenya Revenue Authority & Another-Civil Application No 37 of 2007 and Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union Civil Application Nai. No. 72 of 2001**.

Learned Counsel in conduct of the matter on behalf of the Respondent identifies three issues for determination, viz:

- a) Whether the application for stay is merited? -Amendment to the law of contract act.***
- b) Whether this is a suitable case for court to exercise its inherent powers?***
- c) Whether the present application is properly before this Honourable Court? Security under Order 42, Rule 6 (2) (b) of the Civil Procedure Rules.***

For the first issue, it is submitted that Order 42 rule 6 makes provision for the stay of execution or proceedings pending appeal against a decree or order. That the granting of such stay is not automatic but predicated upon the Applicant exhibiting the existence of sufficient cause and further sufficiently demonstrating that they will suffer substantial loss if the stay sought is denied. Further, it is submitted that the Applicant must furnish a security for the due performance of decree or order as may ultimately be binding on it. In advancing this argument, Counsel refers the Court to **Jeny Luesby vs Standard Group Ltd (2014) eKLR** cited with authority in **Medula Academy v Jacklyne Atieno Otieno & another [2018] KLR**. Further reference is made to **Masisi Mwita v Damaris Wanjiku Njeri (2016) EKLR** and **Magnate Ventures v Simon Mutua Muatha & another [2018] EKLR**.

It is submitted that since the Applicant knew from the outset the consequences of breaching the Hire Purchase Agreement and the Chattel Mortgage, other unsupported extraneous and unconnected excuses offered by the Applicant should be ignored. Further, that the Respondent is in fact the party that risks being immensely prejudiced as it has been unable to recover the monies it lent out to the Applicant since 2017 when the Applicant first defaulted. It is submitted that an impending execution of a decree would not in itself amount to substantial loss.

The advocate for the Respondent makes the argument that no sufficient cause has been advanced in support of the orders sought. Accordingly, the application should fail.

Referring to the alleged amendments to the Law of Contract Act, it is submitted that any amendment to the law can only be effected by the National Assembly and that the Applicant has been in default since before 12th September, 2017 when he filed his first application at the trial Court that sought injunctive relief against the Respondent herein. To date the Applicant has not regularised the Hire Purchase Accounts therefore he cannot blame the Covid-19 pandemic, which was first reported in Kenya on or about 16th March, 2020, for his financial woes.

As to whether the Court ought to exercise its inherent powers, reference is made to **Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints [2016] KLR** for the submission that it is clear that the Applicant seeks to frustrate the Respondent from enforcing its contractual remedies of repossessing the suit motor vehicle which right was activated by the Applicant's blatant breach of the Hire Purchase Agreement and the Chattel Mortgage. As such, it is submitted the present application is unmerited and brought in bad faith and is thus an abuse of the court process. The matter emanated from a contractual arrangement between the parties herein and this Honourable Court has on two (2) occasions rendered Judgment in favour of the Respondent and the instant application should be dismissed with costs.

Regarding whether the present application is properly before this court, Counsel submits that it offends the provisions of Rules 5 (2) (b) and 75 of the Court of Appeal Rules which requires a party who is desirous of lodging an appeal to the Court of Appeal to file and serve a notice of appeal within 14 days of the date of the decision to be appealed against. It is submitted that since no such notice was filed and served, the application is fundamentally and fatally defective and cannot even be cured by the article 159 (2) (d) of the constitution.

It is further submitted that a party cannot apply for stay of execution pending an appeal if that party has not initiated that appeal. That since no notice of appeal has been filed, the appeal has not commenced and therefore the application is speculative, premature, and unnecessary and should be dismissed with costs.

In closing, it is submitted that should this Court be inclined to grant the orders sought, it should, in the spirit of Order 42, Rule 6 (2) (b) of the Civil Procedure Rules, not hesitate to order the Applicant to deposit into a joint bank account the total outstanding balance owed to the Respondent which as at 28th May, 2018 stood at Ksh. 7,679,725.66.

The Law, Analysis and Determinations

I have considered the Respondent's application for stay of execution pending appeal as well as the Appellant's response and the respective advocates submissions on the matter. The operative law in this instance is **Order 42 Rule 6 of the Civil Procedure Rules** which provides as follows:

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 to 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 for stay of execution 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 that 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.

In persuading a Court to grant an Order for stay of execution pending appeal, there must be sufficient cause shown by the Applicants, a threat of substantial loss if the order is not granted; the application must have been brought without unreasonable delay and there must be security. Even with the foregoing, the grant of stay remains a discretionary order that must also take into account the fact that the Court ought not to make a practice of denying a successful litigant the fruits of their Judgement. See **Stephen Wanjohi vs Central Glass Industries Ltd Nairobi HCCC 6726 of 1991; Vishram Ravji Halai vs Thornton and Turpin Nairobi Civil Application No. 15 of 1990 [1991] LLR 7220 CAK KLR 365 and Siquera vs Siquera [1933] 15 LRK 34.**

The principles governing the exercise of the court's discretion when considering an application for stay of execution are well settled. In **Butt v Rent Restriction Tribunal [1982] KLR 417** it was stated:

1. 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.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted

so that an appeal may not be rendered nugatory should that appeal court reverse the Judge's discretion.

3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

The Supreme Court in **Gatirau Peter Munya v Diskson Mwenda Kithinji & 2 Others (2014) eKLR** expressed the views, to which I wholly associate, that:-

"87] The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

(i) the appeal or intended appeal is arguable and not frivolous; and that

(ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

[88] These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:

(iii) that it is in the public interest that the order of stay be granted.

[89] This third condition is dictated by the expanded scope of the Bill of Rights, and the public-spiritedness that run through the Constitution."

Having laid out the authorities that will guide me in reaching a final determination, I now turn to the facts at hand. The synopsis of the Applicant's claim is that he has been rendered unable to service the loan owed to the 1st Respondent due to the current COVID-19 pandemic, which the Court is asked to take judicial notice of, and a decline in fortunes in the logging and transportation of charcoal occasioned by a government ban. He avers that the motor vehicle subject to execution, registration number KCL 728H, is his only source livelihood. That Parliament has passed legislation and amended the Contract Act to have the pandemic be construed as force majeure. That his intended appeal has high chances of success and if the appellant proceeded with execution then the intended appeal would be rendered nugatory.

The 1st Respondent asserts that the Court has dismissed two similar applications between the same parties over the suit motor vehicle and seeking the same Injunctive reliefs. That the present application offends the provisions of Rules 5 (2) (b) and 75 of the Court of Appeal Rules as no notice of appeal has been filed and served. That a party cannot apply for stay of execution pending an appeal if that party has not commenced that appeal.

It is averred that the 1st Respondent advanced to the Applicant a cumulative sum of Kenya Shillings Six Million, Nine Hundred and Forty-five Thousand, Seven Hundred and Sixty-Eight Shillings (Kshs. 6,945,768.00) which secured by joint registration of the assets obtained under a Hire Purchase agreement one of them being Motor Vehicle Registration Number KCL 728H a Mitsubishi FH 215 truck.

It is contended that the Applicant started defaulting before 12th September 2017 when he filed his first application at the trial Court that sought injunctive relief against the Respondent herein. Since then up to date, the Hire Purchase Accounts are still in arrears. As such, the Applicant cannot use the Covid-19 pandemic as a shield. The existence of any amendment to the Law Contract Act declaring the Covid-19 a Force Majeure is denied.

According to Counsel however, should the Court be inclined to grant the orders sought, it should, in the spirit of Order 42. Rule 6 (2) (b) of the Civil Procedure Rules, not hesitate to order the Applicant to deposit into a joint bank account the total outstanding balance owed to the Respondent which as at 28th May 2018 stood at Ksh. 7,679,725.66/=

By the foregoing facts, the substantial loss that would be incurred by the Applicant should the Court fail to accede to his plea is the loss of his Motor Vehicle, which he claims to be his only source of livelihood. However, it is this same vehicle whose acquisition was facilitated by the loan facilities extended to the Applicant by the 1st Respondent. The Applicant's position that his failure to pay is partly occasioned by the Covid-19 pandemic is not convincing in the face of the current circumstances seeing as the loan was due and owing as early as the year 2017, way before the pandemic. A clear picture of what would amount to substantial loss is painted by my colleague PJ Otieno J in **Doshi Iron Mongers Limited v Kenya Revenue Authority & another [2020] eKLR** where while quoting from **Kenya Shell Ltd vs Kibiru [1986] eKLR** he holds:

“17. Substantial loss has been defined to be the kind that make the entire litigation worthless or merely academic. For a monetary decree like in this case, an appeal is deemed to be rendered nugatory where there are indication that the decretal sum if paid out would be irrecoverable. In **Kenya Shell Ltd vs Kibiru [1986] eKLR** the Court of Appeal said:-

“Having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age.

Accordingly, while I have considerable sympathy for Kenya Shell on this application, I consider there is no other course consistent with the material on record, and with the justice of the case, than to refuse the application for a stay made before this court.

It is usually a good rule to see if order XLI rule 4 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”.

18. I understand the law to be that irrecoverability of the decretal sum once paid out is proved once there is demonstration that the decree-holder is a person of the straw or just incapable of effecting refund without undue hardship to the judgment debtor once it succeeds on appeal...”

My task is to balance the competing interests of the decree holder as against that of the judgement debtor lest I deny the Respondent of the fruits of their judgement on the one hand, or hinder the Appellant’s right of appeal on the other. Whilst I take the view that should the intended appeal be successful, the decree holder would not suffer any undue hardship to refund the sum owed to the Applicant, it is only fair that if I am to grant the stay as prayed by the Applicant, then the Applicant ought to furnish security.

Disposition

In this regard therefore, I hold that the Application dated 19th May 2020 is allowed in terms of the prayer (3) that this Court be pleased to stay the execution of the judgement delivered on 27th April 2020 pending the hearing and determination of the intended appeal. However, this prayer is **conditional** on the Applicant depositing with the Court security in the sum of Ksh. 7,679,725.66/= within 45 days from the date of this Ruling.

For avoidance of doubt, should the Applicant fail to deposit the decretal sum of Ksh. 7,679,725.66/=, upon the lapse of 45 days, this order shall lapse and the 1st Respondent shall be at liberty to execute.

It is so ordered.

Judgment delivered, dated and signed at Malindi this 18th day of December, 2020.

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R. NYAKUNDI

JUDGE