



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
CONSTITUTION AND JUDICIAL REVIEW DIVISION

PETITION NO 2 OF 2014

HENRY BELSOI T/A SANGWAN HOLDING LTD.....1ST PETITIONER

YASANGWAN HOLDINGS LTD.....2ND PETITIONER

VS

SOLOLO INVESTMENT LTD.....1ST RESPONDENT

DR. DAVY KOECH.....2ND RESPONDENT

AND

THE REGISTRAR OF COMPANIES.....1ST INTERESTED PARTY

TEA HOTEL LTD.....2ND INTERESTED PARTY

WILLIAM KIPKEMOI KETIENY.....3RD INTERESTED PARTY

WILLIAM KIMUTAL.....4TH INTERESED PARTY

RULING No. 2

1. In a ruling dated 15th November 2017, I dismissed an application by the petitioners/applicants dated 3rd May 2016 in which they sought inter alia, orders of stay of execution against them, and an order that an application dated 3rd March 2015 which had been heard and determined by Ong'udi J heard *de novo*. In her ruling dated 23rd October 2015, Ong'udi J had dismissed the petitioners' application dated 3rd May 2015.

2. On 3rd January 2018, the petitioner filed yet another application dated 21st December 2017, brought under section 1A, 1B 3 & 3A, 63(e) order 22(1) order 42 Rule 6 and order 43 of the Civil Procedure Code. They sought the following orders in the application:

- 1. That this matter be certified as urgent and that the same be heard and orders given ex parte in the first instance.**
- 2. That pending inter partes hearing of this application there be a stay of execution against the Applicants.**
- 3. That there be a stay of execution against the applicants pending the hearing and determination of the appeal preferred against the orders/ruling of this honorable court that was delivered on 15/11/2017.**
- 4. That costs of this application be provided.**

3. The application was supported by an affidavit sworn by the 1st petitioner Henry Belsoi on 18th December 2017. Mr Belsoi deposes that he applied for copies of the typed proceedings on 21st November 2017. That he had also lodged a notice of appeal and the notice had been served on 18th December 2017. The 1st petitioner argues that they have a good appeal as the court has on more than one occasion referred in

its ruling to what the Taxing Master referred to as “**Article J Schedule 7**” which his Advocate informs him does not exist. He argues that if the orders of stay that he seeks are not granted, his appeal shall be rendered nugatory as the respondents are seeking to enrich themselves. No draft memorandum of appeal is annexed to the application.

4. On 4th January 2018, the applicants appeared before R Korir J sitting in Nakuru. They were granted orders of stay of execution pending *inter partes* hearing of the application on condition that they deposit half the decretal sum in the High Court in Kericho within 7 days of that date.

5. Though the matter was placed before me on 23rd January 2018 and directions given for hearing on 12th March 2018, the matter was not listed as schedule, the applicants took no further action to prosecute their application, and the file fell off the radar. It was next placed before the court, it appears on the initiative of the respondents, on 23rd October 2018 when the parties were directed to file written submissions on the applications, which they did.

6. In the submissions filed on behalf of the applicants, Learned Counsel, Mr. Siele Sigira, argues that the applicants have met the conditions for grant of orders of stay pending appeal. He submits that the notice of appeal was filed on 15th November 2017 and the application for stay was filed on 15th December 2018, which confirms that there was no undue delay. He argues, secondly that he has established that the applicants have an arguable appeal. While they had not attached a memorandum of appeal, they had in his view satisfied the provisions of order 42 Rule 5(4) of the Civil Procedure Act.

7. The third ground raised by the applicants in support of their application is that the petition had been brought on a public interest litigation platform. That the costs awarded are not based on any legal provisions and are exploitative; and further, that there is no such scale as Article J Schedule 7 in the Advocate’s Remuneration Order, and that no costs were awarded to the interested party.

8. Finally, the applicants argue that they deposited security for costs as they had deposited Kshs 260,592 in court and were asking the court to continue holding the amount as security for costs until the determination of their appeal.

9. The applicants rely on the decision in **National Transport and Safety Authority v Aloice Ochieng Olal Kericho Civil Appeal No 18 of 2017**; **Superior Homes (Kenya Ltd v Musango Kithome Machakos Civil Appeal No 91 of 2017**; **Kenya Hotel Properties Ltd v Willsden Investments Ltd & 6 Others Nairobi Civil Application No 24 of 2012** and **Kenya Posts & Telecommunication Corporation v Paul Gachanja Ndarua Nairobi Civil Application No 367 of 2001**.

10. The respondent opposed the application and filed an affidavit sworn by Mr. Musa Kiptoo Koech on 8th March 2018. He deposes that the respondents had secured a warrant of attachment against one of the applicant’s property. The warrants had been executed and the present application has therefore been overtaken by events. They further aver that the 1st applicants had used a false and backdated affidavit to deceive the court and obtain orders of stay.

11. Mr. Koech further argues that the applicants, upon proclamation being done, had threatened the auctioneer with dire consequences if he did not stop the attachment. They contend that the applicants have not shown that the respondents are not able to repay the decretal amount should the appeal succeed. They observe that since 2014, the applicants have been giving notices of appeal whenever a ruling is made against them but to date, no appeal has been preferred. They also rush to court every time the respondent commences execution for the taxed costs.

12. In the submissions filed on 21st November 2018, Learned Counsel for the respondents, Mr. Migiro, reiterates the averments in the affidavit of Mr. Koech that the present application has been overtaken by events as it was filed on 21st December 2017, a day after attachment had taken place. By their own attachment (HBL (D) the applicants are aware that execution had taken place, but they used a false and backdated affidavit in support of their application.

13. The respondents further argue that the applicants were guilty of non-disclosure. That they had sworn a false affidavit, and that their Counsel on record had sent a threatening letter to the auctioneers. The respondents submitted therefore that the applicants’ actions disentitle them to the orders that they seek. The respondents cite the case of **Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others Civil Appeal No 36 of 1996** in support. It was their submissions that the applicants came to court with unclean hands and do not deserve the orders that they seek.

14. On whether the applicants have an arguable appeal, the respondents submit that the appeal is aimed at challenging the decision of the taxing master Hon. L. Kiniale dated 18th February 2016. They had not sought to deal with their grievance as contemplated under paragraph 11 of the Advocates Remuneration (Amendment) order 2017, not having moved the court by way of reference as provided.

15. The respondents noted that while the applicants allege that they have a good appeal, they do not detail the merits of the appeal and only display the notice of appeal lodged on 30th November 2017 and a letter applying for the proceedings dated 15th November 2017. They have not filed an application to file an appeal out of time or filed a record of appeal.

16. The respondents argue that the applicants had brought a constitutional petition which was dismissed by Serگون J on 16th May 2014. They did not appeal and their grievance has been the taxed costs.

17. The respondents submit finally that stay of execution cannot be granted in respect of costs. They cite the Court of Appeal decision of Omollo, J in **Francis Kabaa v Nancy Wambui & Jane Wanjao (1996) eKLR** in which the court stated:

“Before us the applicant says that what he wants is stay of an order that he should pay costs. In any case if they were 20, the appellant if he succeeds in his appeal, would be refunded his costs. Furthermore, we do not think that stay can be granted in

respect to costs. The appellant has also not given any reason why he should be granted stay.”

18. They urge the court to dismiss the application with costs.

19. I have read and considered the application before me, the affidavit in support and in opposition, as well as the submissions and authorities of the parties. As I observed in the ruling dated 15th November 2017 in this matter that the applicants seek to appeal against, at the core of this and all the other applications preceding it are the costs awarded to the respondents in the petition. The costs had been taxed by Hon. Kiniale at Kshs 521,659 following the dismissal of the applicants’ petition. They made the same arguments before me as they did before Ong’udi J, and as they make now. They now seek an order of stay pending appeal against the ruling dated 15th November 2017.

20. What are the principles on the basis of which a court can grant orders of stay pending appeal? Order 42 Rule 6 governs the grant of orders of stay pending appeal and provide 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 subrule (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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

21. The law with respect to the grant of orders of stay pending appeal has been succinctly pronounced in a number of decisions and I need cite only a few. In **Kenya Shell Limited vs Karuga & Another (1982-1988) I KAR 1018** the Court of Appeal set out what a court should consider in determining whether or not to grant stay in a money decree pending appeal. In his judgment in that case, Hancox JA stated as follows:

“...I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

22. In the same decision, Platt Ag. J observed as follows:

“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...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. The applicant has referred the court to among others, the decision in **Kenya Hotel Properties Limited vs Willesden Properties Limited Civil Application Nai. No. 322 of 2006 (UR 178/06)** cited by the Court of Appeal in **Housing Finance Co. of Kenya Ltd vs Sharok Kher Mohamed Ali Hirji & another (supra)** in which the court had stated as follows:

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree”.
(Emphasis added)

24. In the present case, the decree is in respect of costs of Kshs 521,659. The applicants have not shown that the respondents would be unable, should their appeal succeed, to repay this amount. I can find no reason therefore to stay execution in this matter pending appeal.

25. I note, also that the applicants have not annexed to their application a memorandum of appeal to demonstrate that they have an arguable appeal. While what they allege that they wish to appeal against is the ruling of this court dated 15th November 2017, what they really target is

the ruling of the taxing master, and her reference to ‘Article J Schedule 7.’ Whether this amounts to an arguable appeal I will not venture to comment on at this point. Suffice to say that I can find nothing before me to justify the grant of orders of stay pending appeal.

26. The applicants argue that they have satisfied the provisions of Order 42 Rule 5(4) of the Civil Procedure Act. This rule provides that an appeal to the Court of Appeal shall be deemed to have been filed when, under the Rules of that Court, notice of appeal has been given. This however, does not in my view entitle the applicants to orders of stay pending appeal.

27. They also submit that they have deposited security for costs as provided under Order 42(2)(b). What I believe the applicants deposited in court is half the decretal sum in accordance with the order of Korir J issued in their favour on 4th January 2018. They have not satisfied this court that they have an arguable appeal, or that they will suffer substantial loss if the orders of stay are not granted. The amount in contention is a fairly modest sum of Kshs 521,659 awarded as costs five years ago. In my view, the interests of justice militate against the grant of the orders sought by the applicants.

28. I accordingly decline to grant the orders sought in the application dated 21st December 2017. It is hereby dismissed with costs to the respondents and the interested party.

Dated and Signed this 10th day of May 2019

MUMBI NGUGI

JUDGE

Dated Delivered and Signed at Kericho this 29th day of May 2019

GEORGE DULU

JUDGE