



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 4 OF 2019

NANCY WAKUTHII KAGO.....APPELLANT/APPLICANT

VERSUS

NTHULE KITUU.....RESPONDENT

RULING

A. Introduction

1. This is a ruling on the application dated 8th February 2019 seeking for stay of execution of the judgment and orders in Embu CMCC No. 84 of 2017 and the ruling made on the 5th February 2019 dismissing an application seeking to set aside ex-parte judgement and any other subsequent orders.

2. The parties disposed of the application by way of written submissions.

B. Applicant's Submission

3. The applicant submits that the application for stay was filed timeously as the decision she seeks to stay was made on 5th February 2019 while this application was filed on 11th February 2019.

4. On substantial loss, it is submitted that the respondent has a correlative duty to show that he can refund the decretal sum if the same is granted to him which duty the respondent has not demonstrated as he admits in his affidavit dated 11th March 2019 that he is a man of straw.

5. The applicant relies on the case of **Amal Hauliers Limited v Abdunnassir Abukar Hassan [2017] eKLR** and that of **Andrew Okoko v John Waweru Ngatia** where the court held that all an applicant is expected to do is swear upon reasonable grounds that the respondent will not be able to refund the decretal sum in case the appeal is successful after which the burden shifts to the respondent to disprove the same.

6. The applicant further submitted that the question of security does not arise in an application predicated on the setting aside of interlocutory judgement as was opposed to judgement on merit and where the decree is not grounded on a full hearing on merits the issue of security does not arise, as was held in the case of **Diamond Systems Limited v Josatronic Data Systems Limited [2017] eKLR**.

7. The applicant further called on the court to call upon Article 159 of the Constitution as well as the overriding objectives in arriving at their decision. She relied on the cases of **Nicholas Kiptoo arap Korir Salaat v IEBC & 7 Others [2013] eKLR** and that of **Coast Development Authority v Adam Kazungu Mzamba 49 Others [2016] eKLR** where the courts held that it has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision in regard to security for judgment.

C. Respondent's Submissions

8. The respondent opposed the application on the grounds that the applicant has failed to satisfy the requirements of **Order 42 rule 6 of the Civil Procedure Rules 2010**.

9. He submits that the applicant has failed to demonstrate that she will suffer substantial loss and that her appeal will be rendered nugatory if the application is not granted. The court in the case of **Masisi Mwita v Damaris Wanjiku Njeri Muranga HCCA No. 107 of 2015** held that the twin principles of suffering substantial loss and negating the appeal must be proved by the applicant for an application for stay of execution to succeed.

10. He further submits that the application was not filed timeously as it was filed on the 11th February 2019 and it seeks stay of orders granted on the 12th June 2018. He further submits that the applicant's failure and/or unwillingness to offer security if stay is granted

disqualifies her from benefiting from the discretion of the court to grant the stay as this requirement for security is mandatory.

D. Analysis & Determination

11. This application is brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 which empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from hearing pending and determination of the appeal. The conditions to be met before stay is granted are provided by the Rule 6(2) as follows:

a. "No order for stay of execution shall be made under subrule (1) unless—

b. 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

c. 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."

12. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

"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."

13. The above cited case captures the applicable principles in deciding whether or not to grant a stay of execution pending appeal.

14. In the Court of Appeal decision in the case of **Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited v Aquinas Francis Wasike & another (UR)** as cited by the High Court in **Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa [2016] eKLR** it was held that:

"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 lack of them. Once an applicant expresses 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."

15. The respondent's argument is that the applicant has failed to establish that he will be in a position to reimburse her if she pays the decretal amount in the event that the appeal is successful. I find this argument contrary to the decision of **Stanley Karanja Wainaina (supra)** where the court held that it is upon the respondent to prove that he can reimburse the applicant if the decretal sum is paid and the appeal is successful. The applicant has thus established that it will suffer substantial loss if the intended execution is not stayed. It also follows that if the respondent executes the judgement and the applicant's appeal succeeds, then not only will the applicant suffer substantial loss but the appeal will also be rendered nugatory.

16. On the issue as to whether the instant application was filed without unreasonable delay, it is evident from the record that the applicant seeks stay of the orders in Embu CMCC No. 84 of 2017 made on the 5th February 2019. The applicant states that she filed this application on the 11th February 2019 which is supported by the record.

17. The applicant also seeks stay of execution the ex-parte judgement entered on 12th June 2018. The correct position is that the ruling delivered on 5th February 2019 was in regard to an application to set aside the ex-parte judgement delivered on the 12th June 2018 where the trial court declined to set aside ex-parte judgement. Consequently, it is my view that the application for stay of execution was filed only seven (7) days after the ruling delivered on 5th February 2019 and as such there was no delay on part of the applicant.

18. The applicant submits that Article 159 of the Constitution as well as the Overriding Objectives of the Civil Procedure impose a duty upon this court to make its decision with regard to the best interest of justice in regard to the requirement for security which the applicant has failed to offer. The respondent to the contrary submits that the application for stay of execution ought to be denied as the requirement for

provision of security is mandatory.

19. 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.

20. However, taking into consideration that the provisions of Article 159 of the Constitution as well as the Overriding Objectives of the Civil Procedure that impose upon this court to exercise its discretion with the best interest of justice. I am persuaded that there was omission to provide security in this instance is not fatal to the present application. However, the court may give orders in regard to security where no offer has been made.

21. It is trite law that where a final judgment has not been made, the issue of providing security does not arise. I fully associate myself with the observation in the case of **Diamond Systems (supra)** relied on by the applicant which upheld the said principle.

22. However, in this matter, a final judgment has already been delivered which is admitted by the applicant in his certificate of urgency as being “a colossal sum of Kshs. 1,538,839/=”. If this final judgment is stayed by orders granted herein, the respondent may have to wait for a long time before enjoying the fruits of her judgment. I am of the considered view that security is a requirement herein and that the necessary orders ought to be made.

23. I find this application merited and allow it in the following terms:

a) That the orders for stay of execution pending appeal are hereby granted.

b) That the applicant deposits Kshs. 750,000/= being half of the decretal amount in an interest earning account in the joint names of the advocates for the parties within thirty (30) days and in default, the orders for stay will be automatically vacated.

c) That the costs of this application will be in the cause.

24. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF JUNE 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Ondigi for Githinji for the appellant

Respondent in person