



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 121 OF 2018**

**ERICK JOHNSTONE ESHIRERA.....APPLICANT/APPELLANT**

**VERSUS**

**JIMMY NANDWA.....1<sup>ST</sup> RESPONDENT**

**VINCENT AHONO.....2<sup>ND</sup> RESPONDENT**

***( Being an appeal from the order of learned magistrate C. Obulutsa CM***

***in Eldoret CMCC NO. 478 of 2017)***

**RULING**

1. The appellant filed this application under a notice of motion dated 3/4/2018 in which the main order sought is that:-

i. Pending the hearing and determination of this application and of the applicant's appeal, there be a stay of execution of the court's decree appealed from.

2. The application is based on the grounds that the appellant has an arguable appeal, he stands to suffer substantial harm if stay is not granted and lastly that he is willing to provide reasonable security for the payment of the decretal sum.

3. The application is supported by an application sworn by Erick Johnstone Eshirera and the grounds that the decree of the court is of Kshs. 2,017,337

4. That his aunt one Amina Muyonga Kedogo has offered to pledge her parcel of land known as Butsoso/Shikoti/6407 situated in Kakamega county and valued at Kshs. 4,200,000 as security for due performance of the decree.

5. That he is a public servant employed by Kibabii University as a deputy senior clinical officer, which is his only income at the moment.

6. That presently, he is staying in his matrimonial home built on LR. NO. BUTSOTSO/SHIKOTI/14363 registered in his wife's name. The same is on mortgage with Kenya Commercial Bank.

7. Finally, that he stands to suffer financial ruin and irreparable harm if the decree is executed against him. That the preferred mode of execution is committal to civil jail and thus is at risk of losing his job since he is a public servant.

8. The respondents oppose the application on the grounds that the present application was filed on 3<sup>rd</sup> April, 2019 immediately after the applicant was served with the notice to show cause scheduled for 17<sup>th</sup> April, 2019.

9. The orders that the applicant is seeking for stay are against the ruling that was delivered way back on 14/9/2018 and thus there has been inordinate delay in filing the application.

10. That the ruling by the trial court was delivered on 14/9/2018 hence the applicant had until 14/10/2018 to file a memorandum of appeal and in failing to do so, there is no appeal in place and thus the applicant won't suffer any substantial loss in the event that the application is dismissed.

11. That applicant has been given several opportunities to settle the debt but has been evasive and cunning hence the Notice to Show Cause was served upon him.

12. The application is an afterthought and is solely aimed at delaying the conclusion of this matter which is against the public policy that litigation must come to an end.

13. In their submissions, the appellant submitted that the memorandum of appeal was duly filed in court on 3/4/2019. Later they requested for typed proceedings which were delayed and as a result, they were unable to list the appeal for directions within 30 days.

14. Secondly, that the delay in service of the memorandum of appeal was as result of change of location of the respondents advocates offices.

15. The applicant has willingly in his application indicated that he will abide by the orders of this court including an order for depositing security for costs.

16. Lastly, that the applicant has made several requests to the respondents to have the payments in instalments but the attempts have been rendered futile.

17. The respondents on their part submitted that the trial court's ruling was delivered on 14/9/2018 as aforesaid and no application for stay was made in the lower court. An application for stay of execution with an attached draft memorandum of appeal ought to have been filed first.

18. The memorandum of appeal annexed to the supporting affidavit faults the trial court for finding that the defence was unmeritorious.

19. The agreement in question was between the respondents and the applicant in their individual capacity. The claim is for a liquidated sum and that the applicant having annexed a defective defence, the judgment entered against him should stand.

20. That no security for costs has been offered or any proposal on how to settle the respondent's claim and no amount has been paid since the delivery of the ruling on 14/9/2018.

21. Lastly, the applicant has a burden of proving that he stands to suffer substantial loss and no evidence has been produced. The applicant has not demonstrated the nature of loss that he stands to suffer and neither has he demonstrated that if stay is not granted, he will not be able to recover his money if paid since the respondent can't raise the amount.

22. The respondent has exhausted all other less restrictive remedies under section 38 of the Civil Procedure Act for enforcement of a monetary decree of the court.

23. Order 42 Rule 6 (1) & (2) 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 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 of stay 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 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***

24. The policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out.

25. However, it is necessary to consider the laid down legal grounds for granting application for stay pending hearing and determination of an appeal.

26. The Court of appeal in the case of *Butt vs Rent Restriction Tribunal (Madan, Miller and Porter JJA)* while considering an application of this nature had this to say:-

***i. 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.***

***ii. The general principal 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.***

iii. 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.

iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

27. It is clear from the wording of Order 42 Rule 6 (1), that for an applicant to succeed in an application of this nature, he must satisfy the following conditions:-

(a) Substantial loss may result to the applicant unless the order is made;

(b) The application has been made without undue delay;

(c) Such security as to costs has been given by the applicant.

28. The corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted. What constitutes substantial loss was broadly discussed by **Gikonyo J** in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* where it was held *inter alia* that:-

**“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.**

**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, a question that was aptly discussed in the case of *Silverstein vs. Chesoni*,.....the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”**

29. In *Elena D.Korir vs Kenyatta University*, Justice Nzioki wa Makau had this to say:-

**“the application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & another vs Thornton & Turpin Ltd* where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must be made without unreasonable delay.**

**In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo vs Straman EA Ltd (2013)* as follows:-**

**“In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”.**

30. In the case of *Equity Bank Ltd vs Taiga Adams Company Ltd* it was held that:-

**“.....of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought.....let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...”** which principle was also emphasized in *Carter & Sons Ltd vs Deposit Protection Fund Board & 3 others*

31. The importance of complying with the said requirement was well emphasised in *Machira T/A Machira & Co Advocates vs. East African Standard* where it was held that:-

**“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.**

Given the foregoing considerations, it is vivid that there has been inordinate delay in filing the application; the applicant has failed to establish that he stands to suffer substantial loss should the application fail and no reliable security for costs has been offered by him. I therefore find the application in want of merit and is dismissed with costs to the Respondents.

**DATED SIGNED AND DELIVERED AT ELDORET THIS 30<sup>TH</sup> JULY, 2019.**

**S. M. GITHINJI**

**JUDGE**

**30/07/2019**

In the presence of:-

Mr. Mitei holding brief for Mr. Ouma for the Applicant

Mrs. Achaya for the Respondents