



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 25 OF 2016

MBURIA NGARI.....PLAINTIFF

VERSUS

PETER NYAGA GICHERU.....DEFENDANT

RULING

1. The application pending before this court is dated 25.9.2017 and seeks an order of stay of execution of the decree issued on 21.4.2016. The application is based on the following grounds:-

- a) **THAT the Applicant had filed a suit in the lower court claiming transfer of land parcel number Kabare/Njiku/1392 from the Defendant himself.**
- b) **THAT the lower court made its judgement which the Applicant was not satisfied with it hence he filed an appeal.**
- c) **THAT the Defendant has threatened to remove the names of the Plaintiff from the title deed which they are registered jointly.**
- d) **THAT is only fair and just the stay of execution be issued to await the hearing and determination of the appeal.**

2. The application is supported by the affidavit of the applicant Mburia Ngari sworn on 25.9.2017.

3. The respondent opposed the application and filed a replying affidavit. He depones that the application is bad in law. That there was inordinate delay as the judgement was delivered on 21.4.16 and the application is brought nearly two years later. That the memorandum of appeal was stamped on 16.4.16, is dated 10.5.16 and he was served on 17.5.16.

4. That the current advocate is not properly on record. The appeal was filed by Maguta Kimemia Associates Advocates. That the decree was not annexed. The application was not first filed in the lower court and is therefore incompetent. The respondent prays that the application be dismissed.

5. The respondent also filed grounds of objection dated 25.1.2018.

6. The counsel for the applicant filed submissions and states that the appeal has overwhelming chances of success and that the applicant stands to suffer irreparable loss if his names are removed from the register before the appeal is heard.

I have considered the application.

Issues arising:

1. Advocates wrongly on record

The appellant was being represented by Maguta Kimemia & Company Advocates before judgment was delivered during the trial. The firm of J. Ndana & Company Advocates proceeded to file a Notice of change of advocates on 13/09/2017.

Order 9, rule 9 of the Civil Procedure Rules

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

a) Upon application with notice to all parties; or

b) Upon consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

I will consider the case law of the issue.

In Isaac Kaesa Mwangangi & another v Jacob Kipchumba & Another [2014] eKLR

The Plaintiff objected to the application by the 2nd Defendant since the said Notice of Motion was filed by an Advocate who was not previously on record for the 2nd Defendant and that since judgment had been entered had failed to obtain leave to represent the 2nd Defendant. Mary Kasango J, in ordering the Notice of Motion be stayed until leave is sought as per Order 9 Rule 9, stated;

I am of the view that the mischief that was being addressed by Order 9 Rule 9 was two-folds. Firstly it was to notify the Advocate who is on record that another one was taking over the conduct of the case. The purpose of that in my view is to inform the previous Advocate to whom the clients file should be forwarded and it was also to enable the previous Advocate to have addressed his or her legal fees earned to that date. Secondly it was intended to notify all the other advocates on record or parties acting in person that the party was changing advocates and consequently that the address of service would henceforth change.

Since that is the mischief and the purpose in my view for which Order 9 Rule 9 is in place I do find that there is no prejudice that will be suffered by the Plaintiff that cannot be compensated by an award of cost if the Notice of Motion is stayed pending leave being granted by the Court.

In Lalji Bhimji Sanghani Builders & Contractors V City Council of Nairobi [2012] eKLR

Odunga J, struck out the application since the defendant had not complied with **Order 9 Rule 9 of the Civil Procedure Rules** stating;

A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the rules of the procedure the Court may well be entitled to conclude that the failure to comply therewith was deliberate.

He quoted with approval the holding of Sitati J, in *Monica Moraa versus Kenindia Assurance Co. Ltd. [2010] eKLR*;

...there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the applicant's advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate.

In my view the firm of M/s Kibichiy & Co. Advocates should have sought this courts leave to come on record as acting for the applicant.... The firm of M/s Kibichiy & Co. Advocates as not complied with the rules and instead, have just gone ahead and filed a Notice of Appointment without following the laid down procedures. The issue of representation is a vital component of the civil practice and the courts cannot turn a blind eye to situations where the rules are flagrantly breached....

Order 9 Rule 9 of the Civil Procedure Rules is applicable as long as judgment has been entered. The appellant's advocates did not follow the procedure laid down for change of advocates. In the premises, the application before court was incompetent. I find that the proper procedure is to strike out as to stay the application will lead to unreasonable delay. An application which is not properly before court is incompetent and where no explanation for none compliance, the application out to be struck out.

7. However, if the application was properly before the court, the issues arising can be determined as hereunder:

2. Failure to attach decree

A copy of the decree issued on 11/05/2016 is in the file but the appellant failed to attach the same to their application therefore the same is not fatal. The respondent has annexed the copy. There is no prejudice.

3. Stay of Execution pending appeal

The principles of granting stay of execution in High Court are provided for under **Order 42, rule 6 of the Civil Procedure Rules.**

Order 42, rule 6.

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.

8. The appellants need to satisfy the court on the following conditions before they can be granted the stay orders:

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

b) The application has been made without unreasonable delay, and

c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

In Socfinac Company Limited V Nelphat Kimotho Muturi [2013] eKLR

G V Odunga, Judge held that in the absence of evidence that the appellant stands to suffer substantial loss coupled with the fact that the respondent has a judgement in his favour there would be a much larger risk of injustice if the court found in favour of the appellant. He stated as follows;

In *Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365*, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the and that in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions.

9. The appellant needs to satisfy the court on the following conditions before they can be granted the stay orders:

a) Substantial loss occurring.

The decision of the court on whether substantial loss will occur will depend on the balancing act between the rights of the parties; the applicant's right to his appeal and the right of the respondent to the fruits of his judgment. The onus of proving that substantial loss would occur unless stay is issued rests upon and must be discharged accordingly by the applicant. It is not enough to merely state that loss will be suffered, the applicant ought to show the substantial loss that it will suffer in the event the orders sought are not given.

In Charles Wahome Gethi v Angela Wairimu Gethi [2008] eKLR

The Court of Appeal held the following view on the issue of substantial loss;

The applicant does not claim that the respondent intends to sell the portion of land in dispute and that it will not be in existence by the time the appeal is determined..... In the circumstances of this case, the applicant would suffer substantial loss rendering the appeal, if successful nugatory only if the suit land is disposed of before the appeal is determined. The applicant does not claim that the suit land would be disposed of. The applicant has not in our view, established that unless stay is granted, he will suffer substantial loss and that the appeal, if successful would be rendered nugatory.

In James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR

The Court held;

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 N. Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

"...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."

10. The appellant had filed a case against the respondent seeking transfer of L.R No. Kabare/Njiku/1392 or alternative refund of Kshs. 300,000/= plus interest at the rate of 35% p.a calculated from the sale agreement dated 13/11/2013. The judgment of the court was that the sale agreement was null and void by dint of provisions of the Land Control Act Cap. 302 since no consent was obtained. That the appellant

proceeded to register his name on the title without the respondent's authority and without due procedure. Therefore, the suit was dismissed and title restored to the respondent and the name of the appellant was removed from the register of records.

11. In the present application, the appellant claims that the respondent has started the process of removing his names from the said title deed and if his names are removed, he will suffer substantial loss since he had already paid the respondent almost all the purchase price.

b) Requisite security

The appellant has not given option of security but it is appreciated that the court also has discretion to order the kind of security they should give.

c) Was there undue delay?

The appellant being aggrieved with the judgment of the trial court delivered on 21/04/2016 proceeded to file memorandum of appeal on 16/04/2016 (however, this seems to be an error since the receipt is dated 16/05/2016). The appellant filed an application for stay of execution on 25/09/2017. The appellant filed his memorandum of appeal timeously and without delay but the application was filed more than 1 year thereafter. A delay of nearly two years is no doubt inordinate.

12. There was inordinate delay in filing this application. Though the appeal was filed in good time. This application appears to be an afterthought. The issue of substantial loss is fundamental and a party seeking an order for stay of execution must have established it on a balance of probabilities. The applicant has failed to prove that he will suffer substantial loss.

IN CONCLUSION:

13. The application is incompetent as it has been filed by an advocate who is not properly on record and without leave of the court.

14. The application for stay of execution lacks merits.

15. The application is struck out with costs.

Dated at Kerugoya this 24th day of July 2019

L.W. GITARI

JUDGE