



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 74 OF 2017

DAVID NJERU GICHOYA.....APPELLANT

VERSUS

JEREMIAH NJUE NAMU.....RESPONDENT

R U L I N G

A. Introduction

1. This ruling is for the application for stay of execution dated 30th July 2018 pending the hearing and determination of the appeal herein.
2. It is the applicant's case that he will suffer prejudice if the orders sought herein are not granted and further that his appeal will be rendered nugatory whereas it has overwhelming chances of success.
3. The respondent in rejoinder filed a replying affidavit 10th August 2018 opposing the application on the grounds that the application was brought ten (10) months after the judgement which was inordinate delay. Further to this the respondent stated that the applicant had not offered any security to warrant stay orders.
4. The respondent further stated that the application had been drawn by an advocate not properly on record.

B. Applicant's Submissions

5. The applicant submitted that he has demonstrated to the court that there is an existing decree which may be executed pending the hearing and determination of this appeal. The applicant further submitted that he did not sleep on his rights as he had previously filed an application in the lower court which was dismissed necessitating he current application.
6. The applicant further submits that due to his insurer denying liability, he is not able to post the sum of Kshs. 529,942.40 as security as proposed by the respondent. He thus submits that his application is meritorious and the orders therein be allowed.

C. Respondent's Submissions

7. It is the respondent's submission that the application has been brought with inordinate delay as judgement in the lower court matter was delivered on the 27th November 2017 and the current application was filed 10 months later on the 30th July 2018.
8. The respondent further submits that the applicant has not undertaken to offer any security to warrant stay orders and that the mere fact that the applicant has filed a memorandum of appeal does not justify an order for stay.
9. The respondent further submits that he is not privy to the contract between the applicant and his insurer and should thus not be dragged into the same. Finally, the respondent submits that the applicant's current advocate on record did not seek leave to come on record contrary to provisions of Order 9 Rule 5 of the Civil Procedure Rules.

D. Analysis & Determination

10. My starting point will be to address the alleged objection by the respondent regarding the provisions of Order 9 Rule 5 of the Civil Procedure Rules, 2010. The said provision provides for change of Advocates as follows: -

“A Party suing or defending by an Advocate shall be at liberty to change his Advocate in any cause or matter, without an order

for that purpose, but unless and until notice of any change of Advocate is filed in Court in which such cause or matter is proceedings and served in accordance with Rule 5, the former Advocate shall, subject to rules 12 and 13 be considered the Advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

11. Unless and until a notice of change of Advocate is filed and duly served an Advocate on record for a party remains the Advocate for that party subject to removal from record at the instance of another party under Rule 12 of the same Order or withdrawal of the Advocate under Rule 13 of the same Order. I do note that the advocate for the applicant duly filed their Notice of Change of Advocates on record on the 3rd July 2018 and is therefore properly on record.

12. In the cases of **Kiplagat Kotut vs Rose Jebor Kipngok [2015] eKLR, Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR** and **Kenya Shell Limited vs Benjamin Karuga Kibiru [1986] KLR 410**, the common thread was that a stay of execution will not be granted unless the conditions in Order 42 Rule 6 of the Civil Procedure Rules are satisfied.

13. **Order 46 Rule 6 (2) of the Civil Procedure Rules, 2010** provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following: -

1. Substantial loss may result to the applicant unless the order was made;

2. The application was made without unreasonable delay; and

3. 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.

14. 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.

15. It was the considered view of this court that substantial loss does not have to be a lot of money. It is sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.

16. As can be seen hereinabove, there was no affidavit evidence by the Respondents on the court record. This therefore left the court in a quagmire especially as regards the ability of the Respondents to pay back the decretal sum in the event the Appellant was successful in his Appeal herein. In the absence of proof of their ability to pay back the said sum, this court was satisfied that the Appellant would suffer substantial loss. He had thus satisfied the first condition of being granted a stay of execution pending appeal.

17. In that regard, this court has come to the conclusion that the Applicant has satisfied the condition of demonstrating that he would suffer substantial loss if the order for stay of execution pending appeal was not granted.

18. Turning to the second issue, this court finds period of ten (10) months for filing the present application was too long. The applicant has explained that the delay in bringing forth the current application is because following the judgement by the trial court delivered on the 27th November 2017, he filed an application dated 9/03/2018 in the lower court for stay of execution but the same was dismissed on the 6th July 2018. The current application was filed on the 30th July 2018. This is not inordinate delay in my considered opinion. Notably, delay must not only be inordinate, it must also cause prejudice to the opposing party. The current filing by the applicant does not cause the Respondent to suffer prejudice or injustice.

19. This court came to the aforesaid conclusion because there is no evidence that was adduced before this court to demonstrate that the Respondent has obtained the Certificate of Costs and Decree or made an application for execution of the decree that would have been thwarted midstream by the filing of the present application.

20. On the issue of security, the applicant has not demonstrated his willingness to furnish security. There is no affidavit evidence pointing to the fact that he was willing to furnish security. On the contrary, he is clear that he cannot afford to furnish security. This in my view would prejudice the respondent should the appeal be dismissed especially considering that the appeal is grounded mainly on the fact that the trial court used the wrong multiplicand.

21. In cases where the applicant does not offer security, the court in the interests of justice may direct him/her to provide reasonable security. The decretal amount herein was Kshs. 529,000/= at the time of filing this application and the court will give a reasonable amount for the due performance of the decree.

22. It is my finding that the applicant has satisfied the conditions set out under Order 42 Rule 6 of the Civil Procedure Code.

23. I find the application merited and I hereby grant the orders sought in the following terms: -

a) That orders for stay pending appeal do hereby issue.

b) That the applicant do deposit Kshs. 260,000/=being half of the decretal amount in an interest earning account in the names of the advocates on record for the parties within thirty (30) days and in default the orders for stay shall be vacated.

c) That the costs be in the cause.

24. It is hereby so ordered.

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

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriuki for Muthoni for Applicant

Mr. Eddie Njiru for Mugambi for Respondent