



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 24 OF 2018**

**SAID ADAM KAZUNGU.....APPLICANT**

**VERSUS**

**KIBOKONI PROPERTIES LTD..... RESPONDENT**

(Being an Appeal arising from the Ruling and Orders of the Chief Magistrate

Hon. Dr. Julie Oseko given on 11<sup>th</sup> April 2018 in Malindi CMCC No. 459 of 2010)

**CORAM: Hon. Justice R. Nyakundi**

**Mr. Atiang for the Appellant**

**T. O. K'opere for the Respondent**

**RULING**

In a notice of motion dated **26.10.2018** the applicant asked the court to stay execution of the orders emanating from the ruling by **Hon. Dr. Julie Oseko** dated **11.4.2018** pending hearing and determination of the appeal. The applicant's case and grounds in support of the motion are contained in an affidavit sworn and filed in court on **26.10.2018**. It was stressed in his affidavit that whereas there is a valid Judgment, the position taken by the trial court to order for installment payment of Kshs.30,000/= in default a sanction for committal civil jail be enforced is unconscionable. The applicant further informed the court that he is currently unemployed and incapable of raising the requisite ordered monthly instalments of Kshs.30,000/=.

In dealing with the application, the respondent filed grounds of opposition couched in the following manner:

- 1. That the application is an abuse of the court process.***
- 2. There is already a valid court Judgement in favor of the respondent which ought to be settled by the applicant.***
- 3. That the committal of jail is a default clause in the event the applicant fails to remit any one instalment.***
- 4. That since the delivery of the ruling there has been inordinate delay on the part of the applicant.***
- 5. That the complaint raised in the motion amounts to vexatious litigation.***

At the hearing of the application both counsels filed written submissions and annexures to support the position taken on the matter. The facts in this case are not in dispute. **The issue is whether or not on these facts in civil suit no. 459 of 2010 the applicant has satisfied the criteria laid down under Order 42 Rule 6 of the Civil Procedure Rule for grant of stay of execution.**

**The Laws, analysis and Resolution**

I have considered the application, respective affidavit, grounds of opposition and written submissions, the application as brought is grounded in terms of Order 42 Rule 6 of the Civil Procedure Rules to grant or decline the orders for stay of execution. The laws has laid down the following threshold conditions.

*(a). That the application has been filed without undue delay.*

*(b). That the application for stay, an applicant must demonstrate substantial loss to be suffered.*

*(c). That in any event not limited to the above security for due performance of the decree be provided for.*

It is trite that the discretion under Order 42 Rule 6 is unfiltered save that the court has to take into account a number of factors depended upon the peculiar facts of each case. The courts however, have laid down for themselves principles for interpretation for Order 42 Rule 6 of the Civil Procedure Rules. Thus within the four corners of Order 42 Rule 6 a stay of execution is an order of the court which on being granted temporarily halts or suspends any execution proceedings pending the determination of an intended or already lodged appeal to a superior court. It prevents the Judgment creditor from putting into force the machinery of the Law to enforce the decree.

The essential principles that warrant stay of execution are as contained in the Judgement by the supreme court of Nigeria in the case of **SPDC –v- Amadi 8 Others 2011 (MJSC)** one where the court laid down special circumstances to warrant stay or denial of the order to comprise inter alia

*(a). “Destroy the subject matter of the proceedings.*

*(b). Foist upon the court arbitration of complete helplessness.*

*(c). Render nugatory any order or orders of the appeal court.*

*(d). Paralyze, in one way or the other, the execution by the Litigant of his constitutional right of appeal.*

*(e). Provide a situation in which even if the appellants succeed in his appeal there could be no return to the status quo.*

On the other hand, as stated by the same court in **TSA Ind v Kema Inue Ltd 200 6 3 MJSC**, the court held that the stay of execution being an equitable remedy must be exercised bearing in mind the following:

*(a) “Competing interests of the parties.*

*(a) A stay is never used as a subject for obtaining the Judgement which a trial court has denied a party. A court will not grant a stay for purposes of enabling a party to obtain the very relief which he has not in the action leading to the Judgement for which an appeal has been lodged. In other words, the court will provide adequate protection to the Judgement given to a successful litigant.*

*(b) An appeal court can re-order recovery of possession where on appeal in respect of possession of property – succeeds.”*

The statutory anchorage if the discretion to grant stay of execution under Order 42 Rule 6 of the Civil Procedure Rules courts have clarified the test to be applied in determining whether an applicant has satisfied the threshold.

I note that timeliness of filing the application and demonstrating substantial loss likely to be suffered remains to be the cornerstone upon which the court exercises discretion for grant of stay of execution pending appeal. The issue of security for due performance of the decree is at the tail end of the three tier approach on this equitable relief.

Given the prominence on substantial loss with regard to the present application the pertinent issues which lie on this ground ought to be delved into in more details. The very question featured in the case of **Kenya Shell Ltd –v- Kibiru and Another [1986] KLR 410** where the court held as follows:

*“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rule (Order 42 (6)) can be substantiated. 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 jurisdiction 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.”*

*“It is not sufficient by merely stating that the sum of Shs.20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before Judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his Judgement.”*

Further the threshold of proof of the principle is expressly stated in the case of **Joseph Gachie T/A Joska Metal Works –v- Simon Ndetu 2012 EKLK** the court held:

*“It is not sufficient merely to state that the decretal amount is a lot of money and the applicant would suffer if the money is paid. In an application of this nature the applicant should show the damages it will suffer if the order for stay is not granted. Since by granting stay would mean that status quo should remain as it went before Judgement and that would be denying a successful litigant of such fruits of Judgement which should not be done if the applicant has not given to the court sufficient cause to*

*enable its exercise in granting the order of stay.”*

These are the distinct features attendant on the exercise of the court’s discretion to grant stay of execution. Whether as a result of the impugned Judgment or Ruling the applicant will suffer a substantial loss is an evidential burden to be discharged on a balance of probabilities. The applicant being aggrieved by the decision cannot purport to rely on his inability to settle the terms of the decree as a ground of substantial loss to stay execution. The import of the applicant’s motion even when tested in line with the principles in the Seychelles persuasive case of **MacDonald Pool –v- Despirhay William Civil Case No. 244 of 1993** it fails the litmus test for the making of an order of stay of execution as clearly expressed in the following passage:

**“That in granting stay of execution of Judgement pending appeal the following evidences have to be met by the applicant:**

- (1). The applicant would suffer loss which would not be compensated in damages.**
- (2). Where special circumstances of the case so requires.**
- (3). There is proof of substantial loss that may otherwise result.**
- (4). There is a substantial question of Law to be adjudicated upon at the reasoning of the appeal.**

**Does the instant application meet this test?**

The applicant’s argue in his affidavit that he is unable to satisfy the monthly decretal amount of Ksh.30,000/= to satisfy the decree as ordered by the trial court while the applicant does not seem to challenge the validity and legality of the Judgement. The complaint he raises in his application is inability to meet the monthly instalments. He also asked this court to consider the effect of the default clause which will render him committed to civil jail.

On the first issue his affidavit sworn and stated to be to the best of his information and belief has not disclosed the amount of instalment he is capable of raising to satisfy the decree. His impecunious is not prove of substantial loss that may otherwise result. As a general rule the mere fact that a Judgment debtor is to be committed to civil jail prima facie is not unconstitutional.

Taking all of these legal provisions in terms of Order 42 rule 6 into considerations, affidavit evidence and the guiding principles the applicant has failed to establish that his case has merit to satisfy the grant for an order of stay of execution of the Judgment of the trial court pending an appeal.

For the above reasons the notice of motion dated 26<sup>th</sup> October 2018 is disallowed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 25<sup>th</sup> DAY OF SEPTEMBER 2019.**

**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Mr. Ogeto for T. O. K’opere for the respondent