



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 94 OF 2018

EC (a minor suing through her next friend and father)

MKR.....APPELLANT/APPLICANT

VERSUS

CHANNAN AGRICULTURAL CONTRACTORS.....RESPONDENT

RULING

[1] The Notice of Motion dated **22 March 2019** was filed herein by the **Appellant/Applicant** under **Sections 3 & 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya; Order 22 Rule 22 and Order 42 Rules 6** of the **Civil Procedure Rules, 2010** for orders that:

[a] Spent

[b] There be stay of assessment of the Respondent's Bill of Costs dated **14 July 2018** pending the hearing and determination of this application *inter partes* and thereafter pending the hearing of the appeal;

[c] That the costs of the application be provided for.

[2] The Application was premised on the grounds that the Appellant's suit against the Respondent was dismissed with costs on **10 July 2018**; and that whereas an appeal has been preferred in respect of the decision, the Respondent filed a Bill of Costs which was scheduled for assessment on **16 August 2018**. That, in the circumstances, it would be just and expedient that the assessment be stayed pending the hearing and determination of the application and thereafter the appeal; as otherwise, the Appellant stands to suffer irreparable loss and damage.

[3] These grounds were explicated in the Supporting Affidavit of **Alfred Kipkirui arap Chepkwony**, Advocate, sworn on **22 March 2019** wherein it was reiterated that the Respondent is the legal owner of **Motor Vehicle Registration No. KBF 632N ZB 1083** Holland Tractor which caused the accident in question; and was therefore rightfully sued in **Eldoret CMCC No. 293 of 2016**. It was further averred by Counsel that the Appellant may suffer great prejudice should she be forced to pay costs and yet she had an arguable appeal with high chances of success.

[4] The Respondent opposed the application and prayed for its dismissal with costs on the basis of the Grounds of Opposition dated **2 April 2019**. The Respondent's contention was that:

[a] The application is *res judicata*;

[b] The application lacks merit, is frivolous, vexatious and an abuse of the court process;

[c] That the application is incompetent, misconceived and fatally defective;

[5] The application was canvassed by way of written submissions, pursuant to the directions made herein on **2 April 2019**. Consequently, Counsel for the Appellant filed written submissions on **26 April 2019** reiterating the stance taken by the Appellant in the Supporting Affidavit. He fashioned the issues for determination pursuant to the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules**, and urged the Court to find that a good case has been made by the Appellant for the issuance of stay as prayed. Counsel relied on **Esther Wanjiru vs. Jackline Arege [2014] eKLR** and **Mukuma vs. Abuoga [1988] eKLR** to buttress his argument that the Appellant will suffer hardship and loss if the Respondent's Bill of Costs is assessed as proposed and payment made before the hearing and determination of her appeal; which in his submission, raises weighty issues. He pointed out that the application was made without unreasonable delay and that the Applicant is

willing to furnish security for the performance of the decree.

[6] On behalf of the Respondent it was submitted that, since a similar application had been filed by the Appellant before the subordinate court in **Eldoret CMCC No. 293 of 2016** and was dismissed after a merit hearing, the instant application is *res judicata*. Counsel relied on **Section 7 of the Civil Procedure Rules** and the **Independent Electoral and Boundaries Commission vs. Maina Kiai & 3 Others [2017] eKLR** to support his argument. He consequently urged the Court to find that the Appellant ought to have come by way of an appeal from the lower court decision instead of filing a similar application for stay; as otherwise, there would be no end to litigation.

[7] It was also argued, on behalf of the Respondent, that the application is frivolous and vexatious, and is otherwise an abuse of the process of the court from the standpoint of **Order 2 Rule 15 of the Civil Procedure Rules**. Counsel pointed out that the Appellant conducted a search of the Register of Motor Vehicles and produced a Certificate of Search before the lower court which showed the owners of the **Motor Vehicle KBF 632N** to be **National Industrial Credit Bank Limited** and **Hashi Hauliers Limited** and not the Respondent; and that it was on that basis that the Respondent was struck out of the lower court suit. That, in the circumstances, the appeal stands no chance; and that the application is merely intended to delay and frustrate the Respondent in exiting the matter that they are not parties to.

[8] Counsel for the Respondent further submitted that the application is incompetent in so far as it was premised on **Order 22 Rule 22 of the Civil Procedure Rules**; which provides for situations where a decree has been sent to another court in another jurisdiction for execution. He relied on **Cyrus Gakuru Gitari vs. Magondu Gakuru [2008] eKLR** in which it was held thus:

“As rightly submitted by counsel for the respondent, this application is fatally defective as it is premised on the wrong provisions of the law. I agree with counsel on that aspect. Order XXI Rule 22 only applies to decrees which have been sent to another court in another jurisdiction for execution. This application is for a stay of execution of decree from this jurisdiction and not one which has been sent here for execution. On that basis alone, this application should fail for being fatally defective.”

[9] Lastly, it was the submission of Counsel for the Respondent that the conditions for the grant of stay set out in **Order 42 Rule 6 of the Civil Procedure Rules** have not been met. According to Counsel, the Appellant has not demonstrated that substantial loss may result unless the stay order is made. According to him, since the costs are yet to be taxed, the amount is uncertain; and therefore, it cannot be said that it will be unable to refund the same should the appeal succeed. Reliance was placed on **Governors Ballon Safaris Ltd vs. Skyship Company Ltd & Another [2015] eKLR** in support of this argument.

[10] Several technical points were raised by the Respondent attacking the competence of the application, which I propose to deal with upfront. The first such issue is that the application is *res judicata*. I have no hesitation in dismissing that argument, granted the clear provisions of **Order 42 Rule 6(1) of the Civil Procedure Rules**; which states that:

“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 to 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...” (emphasis supplied)

[11] Thus, the appellate court does have the requisite jurisdiction to entertain an application for stay of execution or proceedings notwithstanding that a similar application may have been refused by the lower court. (see **National Bank of Kenya Ltd vs. Alfred Owino Bala [2015] eKLR**; **Lochab Transport Limited vs. Teresia Wangari & Another [2015] eKLR** and **Githunguri vs. Jimba Credit Corporation Ltd (No. 2) [1988] KLR 838**). Accordingly, the Respondent’s argument that the application is *res judicata* is without foundation.

[12] The second technical point raised by the Respondent is that the application is fatally defective in so far as it was filed under **Order 22 Rule 22 of the Civil Procedure Rules**. It is true that one of the enabling provisions cited on the face of the application is **Order 22 Rule 22 of the Civil Procedure Rules**. It provides thus in **Sub-rule (1)**:

“The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.”

[13] There being no decree that has been sent to this Court for execution herein, I would agree with the submission by Counsel for the Respondent that the aforesaid provision is irrelevant to the instant application. I however disagree that the error is fatal. For one, **Order 22 Rule 22 of the Civil Procedure Rules** is not the only provision relied on by the Appellant in support of her application. Reliance was also placed on **Order 42 Rule 6 of the Civil Procedure Rules** as well as **Sections 3 and 3A of the Civil Procedure Act**. Moreover, in **Order 51 Rule 10 of the Civil Procedure Rules**, it is provided that:

“(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the

application.”

[14] I therefore find no merit in the argument that the application is fatally defective merely because **Order 22 Rule 22** of the **Civil Procedure Rules** was cited as one of the enabling provisions. Any order to that effect would fly against the face of **Article 159(2)(d)** of the **Constitution**. It is for the same reason that I find the invocation of **Order 2 Rule 15** of the **Civil Procedure Rules** inappropriate. I would accordingly dismiss all the technical hurdles placed in the way of the Appellant’s application and proceed to consider it on the merits.

[15] For purposes of **Order 42 Rule 6(2)** of the **Civil Procedure Rules**, the only conditions an applicant for stay of execution of decree, order or proceedings needs to satisfy, are:

[a] that substantial loss may result to the applicant unless the order is made;

[b] that the application has been made without unreasonable delay.

[c] that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

[16] The rationale for the circumspection has been considered in various cases such as **Machira T/A Machira & Co. Advocates vs East African Standard (No. 2) [2002] KLR 63**, in which it was held that:

“The ordinary principle is that a successful party is entitled to the fruits of his judgment or 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.”

[17] In the premises, the first issue to consider, then, is whether the Appellant has demonstrated to the requisite standard that it stands to suffer **substantial loss** unless the order of stay is made. It was the case of the Appellant/Applicant that the Respondents had filed a Bill of Costs and that there is a likelihood of the Bill being assessed before the Appeal can be heard and determined. I note however that the said Bill of Costs is not annexed to the application; and as the Record of Appeal is yet to be filed, there is no basis for gauging whether substantial loss will likely be suffered by the Appellant should the assessment of costs be proceeded with, granted that the lower court record is yet to be submitted. More importantly, it was not the contention of the Appellant that the Respondent will be unable to refund the amount of costs should the appeal turn out successful.

[18] Whereas it can be said that the application was filed without undue delay, there being credible proof that it was not until **10 January 2019** that a similar application was ruled on and dismissed by the lower court, it would be a matter of conjecture for the Court to settle on a figure, for purposes of determining what is appropriate security for the satisfaction of the lower court Decree, without the benefit of having the costs assessed by the lower court.

[19] In the premises, I am far from persuaded that the Appellant’s application for stay of proceedings before the lower court is warranted. The same is accordingly dismissed with costs.

It is so ordered.

SIGNED, DATED AND DELIVERED AT ELDORET THIS 24TH DAY OF SEPTEMBER 2019

OLGA SEWE

JUDGE