



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. 63 OF 2019**

**THE CHAIRMAN/SECRETARY**

**BOG LUBINU BOYS HIGH SCHOOL.....1<sup>ST</sup> APPELLANT**

**THE ATTORNEY-GENERAL.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**HEZRON AMAKOBÉ.....1<sup>ST</sup> RESPONDENT**

**VITALIS WABUTI.....2<sup>ND</sup> RESPONDENT**

**JACKSON MALOBA.....3<sup>RD</sup> RESPONDENT**

*(An appeal arising from the judgment and decree of the Hon. T Odera, Senior Principal Magistrate (SPM), in Mumias SPMCCC No. 208 of 2014 of 31<sup>st</sup> August 2018)*

**RULING**

1. A judgment was delivered in Mumias SPMCCC No. 208 of 2018 against the appellants and in favour of the respondents for unlawful arrest and malicious prosecution. The appellants were aggrieved by the outcome, hence the instant suit.
2. The appeal herein was lodged on 12<sup>th</sup> June 2019. While the appeal was still pending, the appellants lodged at the High Court registry a Motion dated 13<sup>th</sup> August 2019, in what they described as a Miscellaneous Appeal being No. 171 of 2019, seeking, in the main, stay of execution of an order made in Mumias SPMCCC No. 208 of 2018, pending the hearing and determination of the appeal herein.
3. When the Motion was placed before me on 14<sup>th</sup> August 2019 under certificate of urgency, as the course of action adopted by the appellants, of filing a miscellaneous appeal to obtain orders of stay of execution pending the determination of another appeal arising from the same proceedings, was clearly duplicitous and a misguided abuse of court process, I directed that the miscellaneous appeal file be placed with the main appeal file, and the Motion in question be fixed for hearing within the main appeal file.
4. The Motion in question seeks two orders in the alternative. The main prayer is for stay of an order that was made in Mumias SPMCCC No. 208 of 2018 on 2<sup>nd</sup> August 2019, dismissing an application for stay of execution or be varied pending the hearing and determination of the application/appeal. The alternative prayer is for grant of stay pending appeal in HCCA No. 63 of 2019. In the affidavit sworn in support of the Motion, it is averred that the appeal was filed out of time following grant of leave by the High Court in HCMisc.Appl. No. 54 of 2019. It is also averred that there was an attempt to execute upon a school bus of the appellant school, which was temporarily stayed by the trial court. It is said that the pending appeal has high chances of success and that the school would suffer damage and loss should execution ensue.
5. The respondents filed grounds of appeal dated 16<sup>th</sup> September 2019. They aver that the Motion was misconceived, mischievous, frivolous, and vexatious and an abuse of the court process. It is submitted that the concept of a miscellaneous appeal was foreign, and that the stay application could only be validly filed in the main appeal. It is further submitted that there were no orders in Mumias SPMCCC No. 208 of 2018 capable of being stayed. It is also averred that the alternative prayer was nebulous and incapable of being enforced. It is also submitted that the order made on 14<sup>th</sup> August 2019 for consolidation of the two causes had no basis in law. It was also argued that the order granting leave to appeal out of time had not been annexed.
6. The Motion was argued on 17<sup>th</sup> September 2019. I was urged by the appellants to stay execution pending appeal. I was told that the appeal had been admitted, and there had been an attempt to attach a bus belonging to the 1<sup>st</sup> appellant. The respondents pointed out that the Motion for stay had been brought through a wrong procedure, and that the order to consolidate the causes did not cure the anomaly. It was submitted

that the correct procedure should be that the stay application should be sought first before the trial court, and should that court decline to order stay, then the appellant should seek stay in the appeal cause. It was further submitted that stay orders are made on certain terms, and that in the instant case, the said terms have not been satisfied. It was said that the decree sought to be stayed being a money decree an offer for deposit of the decretal sum or part of it ought to have been made. It was argued also that the appeal was filed after prolonged delay, yet it had not been demonstrated that the appellants had obtained leave to appeal out of time. It was submitted further that the appeal was defective to the extent that stay was not sought initially from the trial court. It was said that the decree was not contested, and that the application itself was not clear as to what the appellants exactly wanted from the court.

7. Let me start by addressing the case of the filing of the miscellaneous appeal within which the Motion was filed. I have stated elsewhere that the initiation of that cause was misguided and unnecessary for the appeal against the judgment of the trial court was already pending, and the stay application ought to have been filed in the appeal. Secondly, I agree with the respondents that the concept of a miscellaneous appeal is foreign. Indeed, I would rather say that no such an appeal exists under Kenyan legal system. It is a fiction. That notwithstanding, there is a pending appeal, and a stay order could be validly sought in that appeal. Secondly, the spirit of Article 159 of the Constitution is that courts ought to focus more on substance rather than form. That is what informed my order that the two causes be consolidated, for it would have served no purpose to strike out the miscellaneous cause only for appellants to lodge a similar application within the appeal cause. There should be interest in saving judicial time and effort as well as saving time and expense on the part of the parties. The issue as to the propriety of that order of 14<sup>th</sup> August 2019 is water under the bridge.

8. On the prayers sought in the Motion, I agree with the respondents that the grant of the first prayer would serve no purpose. It seeks stay of an order that the trial court made dismissing an application for stay of execution. The application dismissed on 2<sup>nd</sup> August 2019 by the trial court was dated 3<sup>rd</sup> July 2019. It was very poorly drafted: no wonder it was dismissed. It sought stay of execution pending appeal, yet neither the application itself, nor the affidavit in support of it, was specific on what was sought to be stayed. Surely, a court should not be expected to speculate as to what a party really seeks from it. Pleadings must be as precise as possible on what a party seeks. The averments made in the supporting affidavit were futuristic. The affidavit was sworn on 3<sup>rd</sup> July 2019 to support an application dated 3<sup>rd</sup> July 2019, yet its paragraph 2 talks of an unfavourable ruling that that court had delivered on 31<sup>st</sup> August 2019. The one page affidavit presents no facts at all to justify why a stay of execution was sought, to provide basis or background for grant of that order by the court.

9. The ruling of 2<sup>nd</sup> August 2019 merely dismissed the application dated 3<sup>rd</sup> July 2019. The nature of an order dismissing an application is that it is incapable of being stayed. What exactly is there to be stayed? The trial court delivered its ruling. The delivery of the ruling cannot be undone by a stay. Such a stay would mean that the parties end up with the *status quo ante* the ruling. Even if the stay order were to be granted, so that the ruling is undone, what would be the *status quo ante*? Would it not be that the application then would be restored following the undoing of the order dismissing it, so that we would then have the application dated 3<sup>rd</sup> July 2019 pending? Of what use would that, that is the pendency of the application dated 3<sup>rd</sup> July 2019, be to the appellants?

10. The second prayer, the one in the alternative, is no better. It seeks stay of execution pending the hearing and determination of the appeal, yet neither the Motion nor the affidavit sworn in support of it are specific on what is sought to be stayed. Is it the order of the trial court of 2<sup>nd</sup> August 2019, the subject of the first prayer? Or is it stay of the decree in the judgment of the trial court of 31<sup>st</sup> August 2018? Parties are bound by their pleadings, and courts decide matters based purely on the material placed before them by the parties. Stay of execution must be of an order or a decree, and a prayer for stay of execution must be specific on the particular order or decree that is sought to be stayed. A court should not be left to speculate on what the parties mean by their prayers where such prayers are vague and meaningless.

11. I have noted that the judgment the subject of the appeal was delivered on 31<sup>st</sup> August 2018. After judgment was delivered, a bill of costs was taxed on 9<sup>th</sup> April 2019. There were court appearances on 26<sup>th</sup> March 2019 and 9<sup>th</sup> April 2019, during which the appellants were represented by counsel. The first application for stay of the judgment was filed on 6<sup>th</sup> May 2019, and that was only after execution proceedings commenced. Efforts to lodge an appeal were initiated through an application for leave to appeal out of time dated 9<sup>th</sup> May 2019, filed in HCMisc, Appl. No. 54 of 2019. There was, no doubt, considerable delay between the time judgment was delivered August, 2018 and the time the appellants began to seek stay of execution of the decree in that judgment May 2019.

12. The principles upon which a stay of execution of a decree or order is given are notorious. These are set out in Order 42 rule 6(2) of the Civil Procedure Rules. Firstly, it must be demonstrated that the appellants would suffer substantial loss if stay is not granted, and second, that security for due performance is provided. I have perused the Motion and the affidavit in support, none of the two filings make any reference to the potential substantial loss that is likely to be suffered by them if stay is not granted. They have also not made any offer of security, I am sensitive to the wording of the provision, which appears to suggest that the party seeking stay would have to wait for the court to make the order. But it would be expected that a party makes proposals of the nature of security that would be convenient for them to provide. That would keep the court to make an order that is sensible and capable of implementation by the parties without causing hardship to them.

13. Overall, from the material that is before me, I am not persuaded that the orders sought in the Motion dated 13<sup>th</sup> August 2019 are for granting. The Motion is hereby dismissed. Costs shall abide the outcome of the appeal.

**DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 25<sup>TH</sup> DAY OF OCTOBER, 2019**

**W. MUSYOKA**

**JUDGE**