



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

FORMER NAIROBI ELC MISC 78 OF 2015

MISCELLANEOUS APPLICATION NO. 35 OF 2015

KWETU SAVINGS AND CREDIT CO-OPERATIVE

SOCIETY LIMITED (formerly) MASAQU TEACHERS

INVESTMENT LTD.....RESPONDENTS

VERSUS

JAMES MUIYA and 11 others.....APPLICANTS

RULING

1. The applicants vide application dated 6.3.2018 are seeking for stay of execution of the ruling issued on 26.2.2018. The application was filed in this court on 7th March, 2018 by Andrew Makundi & Co. Advocates and is supported by the affidavit of James Muiya deponed on 6th March, 2018. The application is brought under Order 42 Rule 6 of the Civil Procedure Rules and Section 1A and 1B of the Civil Procedure Act.

2. The grounds upon which the application is premised as contained in the supporting affidavit are:

- a) That a ruling was delivered in favour of the respondents on 26.2.2018 and a notice of appeal has been filed*
- b) That the respondents herein will suffer no prejudice should this application be allowed.*

3. Vide supplementary affidavit filed on 27th March, 2018, the deponent averred that the appeal will be rendered nugatory if the application is not allowed and proposes a security of Kshs 100,000/-.

4. In the affidavit in reply deponed by Stanley M. Kyelenzi, the General Manager of Kwetu Savings and Credit Cooperative Society, the successor to Masaku Teachers Savings and Credit Cooperative Society dated 14th March, 2019 the deponent averred that the applicants have not fulfilled the requirements for grant of the order sought as per Order 42 Rule 6 of the Civil Procedure Rules.

5. The application was canvassed vide submissions. Learned counsel Mr Andrew Makundi cited Order 42 Rule 6 of the Civil Procedure Rules and submitted that this court has discretion to grant the orders sought. He cited the case of **Mukuma v Abuoga (1988) KLR**, and submitted that the applicants shall suffer substantial loss if the orders sought are not granted; counsel submitted that the applicants propose Kshs 100,000/- as security for costs. Counsel also submitted that there is a notice of appeal and the appeal will be rendered nugatory if the application sought will not be granted.

6. In response, learned counsel for the respondents submitted that the applicants have not demonstrated to court that they have a right to appeal without leave of court because the Companies Act does not grant an automatic right of appeal. Learned counsel cited the case of **Edith Wairimu Njoroge v Brooks Holdings Co Ltd & Another (2018) eKLR**, where the court observed that the court did not have jurisdiction to entertain the notice of motion before the court for it was an issue of an interlocutory appeal from an order of the lower court. Learned counsel urged the court to dismiss the application. On the other limb, counsel submitted that the applicant has not met the conditions for grant of the order of stay of execution.

7. I have considered the application and the submissions of the parties and find that the two issues for determination are Firstly whether Moses Odawa and Co. advocates are properly on record and Secondly whether the court may grant stay.

8. With regard to the 1st issue, Order 9 Rule 9 is the operative section and note that there is a notice of appointment of advocates that was filed on 22nd May, 2019 by Moses Odawa and Co. Advocates and yet the instant matter was concluded vide ruling that was delivered on 26.2.2018. The import of the said order was discussed in **S.K. Tarwadi v Veronica Muehlemann [2019] eKLR**, where Justice Korir observed that:

“In my view, the essence of Order 9 Rule 9 CPR is to protect advocates from mischievous clients who will wait until a judgement has been delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away. Indeed Order 9 does not foresee how Rule 9 can be sidestepped hence the enactment of Rule 10 as follows:

“An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”

9. I have noted that there is no application or prayer by Moses Odawa and Co. Advocates or any allusion to the effect that the said advocate is to come on record before the ruling in respect of this matter was issued. Consequently I find that the notice of appointment that was filed on 22nd May, 2019 is incompetent and in effect the firm of Moses Odawa and Co. Advocates is not properly on record for the applicants.

10. With regard to the 2nd issue, from the evidence as per the affidavit in support of the application and from the reading of Order 42 Rule 6 of the Civil Procedure Rules there is need to determine whether the applicant is entitled to the orders for stay. The conditions to be met by an Applicant in order to be entitled to an order for stay are laid out in that Rule in the following terms:

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

(2) No order for stay of execution shall be made under sub-rule (1) unless—

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

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.

11. I have had due regard to Section 2 of the Civil Procedure Act Cap 21 of the laws of Kenya which in the definition of a “decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—

(a) Any adjudication from which an appeal lies as an appeal from an order; or

(b) Any order of dismissal for default:

Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;

Explanation. — A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

12. In the same section, decree holder, alludes to an order that “is capable of execution.” In that section, a decree holder is defined as “any person in whose favour a decree has been passed or an order capable of execution has been made...” It therefore obtains that there are orders that are capable of execution while others are not.

13. In **Ndungu Kinyanjui vs Kibichoi Kugeria Services & Another Civil Application No NAI 79 Of 2007** (unreported) in the Re Sonalux case, the Court of Appeal had this to say:-

“This Court has repeatedly stated in previous decisions... that in an application under Rule 5 (2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to pay any sum there would be nothing arising out of that decision for this court to enforce or to restrain by injunction.”

14. The court has no jurisdiction to stay any action by private juridical persons unless there is a positive order of court for something to be done or enforced. Even if the application was refused, the court has no power to stay a negative order of dismissal of the application. In **Exclusive Estate Limited vs. Kenya Posts and Telecommunications Corporation and Another [2005] 1 EA 53 (CA)** it was held by

the Court of Appeal that stay of execution envisaged under rule 5 (2) (b) of the Court of Appeal Rules of Kenya is the execution of a decree capable of execution in any of the methods stipulated under section 38 of the Civil Procedure Act. The Court further held that a decree holder as defined under the Civil Procedure Act means a person in whose favour a decree capable of execution has been passed. In that case the order which had been made dismissed the suit and was a negative order in that it was not capable of execution. It was held that a negative order can only be set aside by the appellate court.

15. Section 38 of the Civil Procedure Act provides for the various modes of execution in the following words:

- a. “by delivery of any property specifically decreed,*
- b. by attachment and sale, or by sale without attachment, of any property,*
- c. by attachment of debts,*
- d. by arrest and detention in prison of any person,*
- e. by appointing a receiver,*
- f. in such manner as the nature of the relief granted may require.”*

16. The section envisages an order which is not yet implemented or executed and which is capable of execution. For the order or decree to be satisfied, the judgment creditor or an officer of the court such as a bailiff must force or compel the judgment debtor or 3rd party such as the Garnishee using any of the modes provided for under section 38 of the Civil Procedure Act to implement the order or decree. In this regard I disagree that there is need to apply for leave to lodge an appeal against the order issued herein. However I agree that this court has no jurisdiction and cannot entertain an application for stay because the orders granted by the court can only be set aside by an appellate court since its operation commences immediately it is issued or notified and cannot be stayed as it can only in effect be set aside by a court having jurisdiction on appeal. The order that had been issued on 26.2.2019 was a negative one which is incapable of execution and that such an order can only be set aside by the appellate court. In deed it would appear that no action has been taken by the Applicant/Respondents since the delivery of the said ruling to warrant an order of stay of execution. Looking at the submissions by the learned counsels I find that there is no order that is capable of execution and hence the application for stay of execution lacks merit.

17. In the result the application dated 6.3.2018 is devoid of merit and is dismissed with costs. The interim orders earlier issued are hereby vacated.

It is so ordered.

Dated and delivered at Machakos this 24th day of October, 2019.

D. K. Kemei

Judge