



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 39 OF 2017

ONESMUS KINYUA MICHUDU.....APPELLANT/APPLICANT

VERSUS

MISHI KAMBI.....1ST RESPONDENT

KENNEDY NDETO NZUKO.....2ND RESPONDENT

(Being an Appeal against the judgement of the Hon. Madam S.R. Wewa, Principal Magistrate, delivered on the 24th April, 2017 in Malindi PMCC No. 381 of 2015 between Mishi Kambi Charo alias Michel Kambi vs Onesmus Kinyua Michundu and Kennedy Ndeto Nzuko)

Coram: Hon. Justice R. Nyakundi

Mr. IRB Mbuya for the appellant

Mr. Njoroge for the respondents

RULING

The applicant **Onesmus Kinyua Michudu** move this court vide notice of motion dated 22nd January, 2019 seeking the following orders against the respondent: -

1) That this honourable court be pleased to grant stay of execution of the judgement/decree delivered in Malindi RMMCC 379 of 2016, 380 of 2015, 381 of 2015 and 383 of 2015 pending the hearing and determination of the applicant's appeal.

2) That this honourable court be pleased to stay the proceedings in Mombasa RMCC 2265 of 2018, and 2266 of 2018 ending the hearing and determination of the application

The application is expressed to be brought pursuant to Section 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 42 Rule 6 and Order 51(1) of the Civil Procedure rules.

The application is supported by the grounds on the face of the motion and an affidavit deposed by the applicant.

The relevant parts of this dispositions challenging the judgement of the trial court were couched in the following language: -

1) That the trial magistrate Hon. S.R. Wewa delivered the judgement apportioning vicarious liability at 100% whereas the 2nd defendant was not an employee of the applicant.

2) That the judgement was delivered in his absence and that of counsel without any prior notice being served upon them to participate as required by the law.

3) That on learning of the outcome of the judgement he was aggrieved of its contents and an appeal has been preferred to that effect on both liability and quantum.

4) That though stay and deposit of security for due performance of the decree was granted in PMCC 381 of 2015 there was an

oversight in respect of the same orders being sought correspondingly to apply in PMCC 380 of 2015, PMCC 383 of 2015, PMCC 379 of 2015 and PMCC 382 of 2015.

5) That if stay of execution is not granted substantial loss may result once the decretal amount is paid out to the respondents.

The respondents vehemently opposed the application for stay of execution vide his replying affidavit dated 23 of 2019. The key affidavit material raised by the respondent is that of denying that PMCC 381 of 2015 was never made a test suit in reference with PMCC 382 of 2015, PMCC 397 of 2015, 380 of 2015 and PMCC 383 of 2015.

That it is a fact confirmed by the applicant's affidavit that decretal sums of Kshs.225,480 and 455, 480 in respect of PMCC 382 of 2015 and PMCC No. 379 of 2015 respectively have all been settled in compliance with the decree of the court.

That in HCC 35 of 2017 through an application filed by the applicant the court issued orders and gave leave to file an appeal out of time, stay of execution and amount to deposit the decretal sum within 21 days from the date of the order.

That the applicant defaulted in complying the order to deposit security for due performance of the decree in PMCC 381 of 2015 and therefore stay orders lapsed.

That this current application is therefore an attempt to revoke this court orders in HCCC Misc. No. 35 of 2017 without full disclosure.

That there is evidential material of declaratory suit sin PMCC 265 of 2018 and SRMCC 2266 of 2018 both of Mombasa respectively.

That this court cannot issue order s affecting the proceedings in those two cases which no appeal has been preferred by the applicant.

Mr. I.R.B. Mbuya in arguing the application submitted that the grant of stay of execution under Order 42 Rule 6 is merited despite the objection raised by the respondent counsel invited this court to give due reference to the principles in **Chris Munga N. Bichage v Richard Tongi & 2 others 2013 eKLR**.

The appellant's counsel contended that findings on liability and quantum were issued in error of law and fact hence the necessity to have the appeal heard and determined on the merits.

Mr. Njoroge, on behalf of the respondents argued and submitted that the applicant has not filed any appeals in respect of other matters save in **PMCC 381 of 2015**.

Further counsel submitted that the applicant was granted an interim stay of execution which he defaulted rendering the orders void. According to counsel the applicant's application is purely from academic from an already decided motion by this court.

It was also the contention of the respondent counsel that the applicant's motion lacks full disclosure and good faith which can only be equaled to an abuse of the court process.

I have considered the notice of motion, materials in support and opposing to grant the orders of stay of execution.

Several issues have arisen from the record and submissions by both counsels. In my view the issues for determination in this notice of motion are as follows: -

1) Whether the applicant has met the criteria to be granted stay of execution pending an appeal.

2) Whether CMCC 381 of 2015 was prima facie a test suit in respect of those other specified cases in the motion by the applicant.

The Law

The Civil Procedure Rules and or Order 42 Rule 6 makes legal provisions for grant of stay of executing pending an appeal as follows: -

a) The application has been filed without undue delay

b) That the applicant will suffer substantial loss

c) That security for due performance of the decree be provided for by the applicant.

The requirements for stay and injunction are somewhat similar but what is notable about an application for a stay of execution is that it must be done in the context of an appeal. If there is no appeal in court or pending appeal, one cannot seek for a stay of execution.

The court in **Kiambu Transporters v Kenya Breweries [2000] eKLR** was of the opinion that an appeal is deemed to have been filed after the filing of a notice of appeal. Application for stay of execution is done through a notice of motion under Order 42 rule 6. The Court of Appeal in **Kiambu Transporters v Kenya Breweries** outlined the conditions to be satisfied before the Court can grant a stay:

1. The application has been made without unreasonable delay.
2. That substantial loss will result to the applicant unless such order is made.
3. Security for due performance of the decree has been given by the applicant.

An applicant seeking a stay of execution must also demonstrate that unless the application is allowed the intended appeal, or appeal, if successful would be rendered nugatory. This test is subjective to the circumstances of each case as was stated in **Reliance Bank Limited v Norlake Investments Ltd [2002] 1 EA 227**. Along with this, the court must also be satisfied that the application for stay of execution must not be frivolous meaning that it is arguable.

The court shall not issue an order for stay of execution if an application is only meant to delay the execution process filed in the lower court and that if the application was allowed, the respondent would suffer prejudice as she would be prevented from enjoying the fruits of Judgment. **Alfred Wekesa Kizito v Nick Wafula Walela [2007] eKLR**. Applications to the Court for stay of execution should not be seen to defeat the ends of justice. This was affirmed in **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** where the Court held: **“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order.”**

In affirming the need for the existence of an appeal while applying for an application of stay of execution, Justice Makhandia in **Raymond M. Omboga vs Austine Pyan Maranga Kisii HCCA No. 15 of 2010** stated, **“The court cannot see how it can order stay of the decree that is not the subject of an appeal. Had the aforesaid order been the subject of this appeal then different considerations would have applied. The court would have looked at it alongside the settled principles aforesaid for granting stay of decree.”**

Condition No. 1 on whether the application was filed timeously

In the case before me judgement was delivered on 24th April, 2017. Being a condition procedural before the court can exercise discretion to make orders for stay of execution. The applicant must demonstrate that he was not guilty of laches to file the application.

From the record, applicant lodged a memorandum of appeal to the High Court on 3rd August, 2017. It is also not in dispute that the applicant filed Misc. No. 35 of 2017 seeking orders and leave of the court to file an appeal out of time. In determining the application, the learned Judge exercised discretion to extend time to file an appeal out of time and on condition that security for due performance in the form of depositing the decretal sum be compiled by the applicant.

The nature of the proceedings has been confirmed from the order of the court. It is also an admitted fact that the applicant did file Misc. application in respect of PMCC 380 of 2015 the subject matter of this appeal. Further the applicant admits that he is in breach of the condition on deposit of the decretal amount within the stipulated period set by the court.

According to **Mr. Njoroge** the issues in the application touching on CMCC 381 of 2015 were disposed off specifically in Misc. 35 of 2017 as the parties are directly or substantially the same in the prescribed suit subject matter of the appeal.

In my view and in accordance with Section 7 of the Civil Procedure Act and its provisions these issues on stay of execution pending appeal and deposit of security for due performance of the decree could not be raised again for the second time in the motion dated 22nd January, 2019.

Upto this point I agree with **Mr. Njoroge** for the respondent that the application is res judicata having been conclusively litigated and determined by the court. The application of 22nd January, 2019 is therefore barred by the doctrine of res judicata and the applicant is prohibited from introducing through the back door to look like a new cause of action.

Secondly, even in absence of res judicata the observation, I make from the record is that essentially the application has been made with unreasonable delay and no sufficient reason has been provided by the applicant.

Why do I say so? The impugned judgement was delivered on 24th April, 2017. In her consideration the learned trial magistrate granted 30 days stay of execution immediately on delivery of Judgment.

In an application to the High Court the applicant applied for stay almost two months after the decision before the trial court. In this case I am satisfied from the applicant's affidavit evidence. There is no extenuating circumstance for this court to exercise discretion for the relief of stay of execution.

On the other hand, as the court pointed out in **Kenya shell Ltd v Kibiru & another CA No. 97 of 1986, Meteluie Ole Kitelu & 10 others v Moses K. Nalhohe CA No. 340 of 2008, Machira T/A Machira & C. Advocates v East African Standard (2002) KLR 63** although the case may fall within the two categories on undue delay and security for due performance of the decree it does not necessarily follow that the court will exercise discretion unless the condition on substantial loss has been fulfilled.

In the instant case there is no doubt in my mind that the law did not envisage commencement of execution process to be equated with substantial loss. The applicant has the burden to prove that by the act of the execution to satisfy the decree from a valid judgement he is likely to suffer substantial loss in which he would not be adequately compensated in damages or costs.

In a powerful persuasive argument **Mr. Njoroge** has demonstrated that the applicant has failed to prove substantial loss by way of cogent evidence. There is no good faith on the part of the applicant inspite of his right of appeal. The court has a duty to balance the competing interest of both parties to ensure the ends of justice are met.

A case which seems to be on all fours with the present application is that the appeal Court of Malawi in **Anti-Corruption Bureau v Atupele Properties Ltd MSCA Appeal No. 27 of 2007** where the court held as follows:

“First it (stay of execution) is within the discretion of the court. Secondly, that the general rule is that the court shall not interfere with the right of a successful party to enjoy the fruits of litigation. Third where a respondent would be unable to pay back the money then a stay may be justified. Lastly, the court would still have discretion to refuse a stay even where the respondent is impecunious if the stay would be utterly unjust and oppressive. The bottom line is that the applicant must demonstrate that the respondent falls within the exceptions. It is not for the respondent to demonstrate capacity to pay back. The duty lies on the applicant to establish the respondent’s lack of capacity to pay back.”

There is ample evidence on record that the applicant has not discharged the burden of proof on this ground to deny the respondent the fruits of the Judgement delivered on 24th April, 2017. Counsel has not seen it fit to address the court in regard to this ground on substantial loss.

In the evaluation of the facts of this motion it is imperative to state that even on the merits the applicant has failed to show that a court confronted with the facts of this nature can exercise discretion under, Order 42 Rule 6 of the Civil Procedure Rules merely because an applicant has filed an appeal.

I also wish to emphasize that learned counsel on behalf of the applicant in view of the basis on affidavit evidence contended that he will suffer substantial loss if stay of exaction is not granted in respect of PMCC 379 of 2015, 380 of 2015, 382 of 2015, 383 of 2015, RMCC 2265 of 2018 and 2266 of 2018. While on the other hand, the applicant is guilty of non-disclosure of material facts relevant in exercise of discretion by this court to grant or deny stay of execution. From the record, there has been no appeal on the above particularized Judgments of the lower court.

The appeal so filed arises out of a suit in CMCC 381 of 2015 in which the respondent obtained judgment against the applicant/appellant. On the recorded evidence and trial judgement there was no order made of a test suit or consent between the parties filed and adopted as a court order on this issue. All these in my opinion to be raised at this point of time does not fall under the ambit of Order 42 Rule 6 of the Civil Procedure Rules.

For the above reasons, the notice of motion dated 22nd January, 2019 is hereby dismissed for lack of merit with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF NOVEMBER 2019.

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Atyang for Njoroge for the respondent
2. Ms. Azei for Mbuya for the appellant