



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CIVIL APPEAL NO 20 OF 2016

DR G.N. MUEMA P/A(SIC)

MT VIEW MATERNITY & NURSING HOME.....APPELLANT

VERSUS

MIRIAM MAALIM BISHAR.....1ST RESPONDENT

JIMALE RASHID HASSAN.....2ND RESPONDENT

RULING

INTRODUCTION

1. The Applicants' Notice of Motion application dated 18th July 2017 and filed on 19th July 2017 was brought pursuant to the provisions of Order 42 Rule 6(1) and (2), Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling provisions of the law. Prayers No (1) therein were spent. The application sought the following remaining prayers **THAT:-**

1. Spent

2. There be a stay of execution of the judgment and/or decree in this appeal pending the hearing and determination of Civil Appeal No 20 of 2016.

3. Costs bein the cause.

THE APPLICANTS' CASE

2. The Applicant's application was supported by the Affidavit of Geoffrey Ndeto Muema that was sworn on 18th July 2018. His Written Submissions were dated and filed on 24th October 2017.

3. His case was that the Learned Trial Magistrate erred in law and fact by holding that he was wholly liable for the incident herein and also erred in law and fact when she adopted the wrong principles in awarding damages therein that were excessive in the circumstances.

4. It was his contention that his Appeal had high chances of success and that if a stay of execution was not granted, he would suffer greatly and his appeal rendered nugatory. It was further averment that if the decretal sum was paid to the Respondents and he succeeded in his Appeal, he would have to file another suit to recover the same from the Respondents. He also pointed out that he filed the present application without any delay and was ready to tender in his logbook for Motor Vehicle Registration Number KBF

523A as security.

5. He therefore urged this court to grant him the order that he had sought in his application herein.

THE RESPONDENTS' CASE

6. There was no evidence on the court record of the Respondents having filed any response in opposition to the Appellant's said application. Counsel for the Appellant also informed this court that he had not been served with any response to his application. The Respondents, however, alluded to a Replying Affidavit in their Written Submissions dated 7th September 2017 on 12th September 2017.

7. As the Respondents and/or their advocates did not attend court whenever the matter came up in court to clarify if all the pleadings they had filed had been placed in the court file, this court concluded that they may have intended to rely on points of law only hence their filing of their Written Submissions.

8. It was their argument that for the Appellant to be granted the order for stay of execution, he had to demonstrate the following:-

a. Substantial loss may result to the applicant unless the order is made;

b. The application has been made without undue delay;

c. Such security as to cost has been given by the applicant.

9. They contended that the Appeal herein was not merited as the Applicant had not demonstrated how he would suffer substantial loss if the stay of execution was not granted, this being a money decree. They added that he had not demonstrated that he would not be able to recover the decree sum from them in the event he succeeded in his Appeal herein. In this regard, they referred this court to the cases of **Kenya Shell Limited vs Benjamin Karuga Kibiru [1986] KLR 410** and **Joseph Gachie t/a Joska Metal Works vs Simon Ndeti Muema [2012] eKLR**.

10. In this latter case **Joseph Gachie t/a Joska Metal Works vs Simon Ndeti Muema** (Supra), Odunga J stated as follows:-

“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 were before judgement and that would be denying a successful litigant of the fruits of judgment which should not be done if the applicant has not given to the court sufficient cause to enable it exercise its discretion in granting the order of stay.”

11. They further stated that the present application was not filed timeously as it was filed on 19th July 2017 which was nine (9) months from the date judgment was delivered on 24th October 2016. It pointed out that the Appellant had not explained the delay in having brought the present application and that having been indolent, he could not expect this court to exercise discretion in its favour.

12. They therefore urged this court to dismiss his application with costs to them.

LEGAL ANALYSIS

13. In the cases of **Kiplagat Kotut vs Rose Jebor Kipngok [2015] eKLR**, **Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR** and **Kenya Shell Limited vs Kibiru** (Supra), the common thread was that a stay of execution will not be granted unless the conditions in Order 42 Rule 6 of the Civil Procedure Rules are satisfied.

14. Order 46 Rule 6 (2) of the Civil Procedure Rules, 2010 provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following:-

1. Substantial loss may result to the applicant unless the order was made;

2. The application was made without unreasonable delay; and

3. 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.

15. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is **“and”**. It connotes that all three (3) conditions must be met simultaneously.

16. It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.

17. As can be seen hereinabove, there was no affidavit evidence by the Respondents on the court record. This therefore left the court in a quagmire especially as regards the ability of the Respondents to pay back the decretal sum in the event the Appellant was successful in his Appeal herein. In the absence of proof of their ability to pay back the said sum, this court was satisfied that the Appellant would suffer substantial loss. He had thus satisfied the first condition of being granted a stay of execution pending appeal.

18. In that regard, court came to the conclusion that the Applicant had satisfied the condition of demonstrating that he would suffer substantial loss if the order for stay of execution pending appeal was not granted.

19. Turning to the second issue, this court found a period of nine (9) months for filing the present application was too long. As the Respondents correctly pointed out, the Applicant did not explain the delay and/or proffer a reason why he failed to file the said application timeously. Notably, delay must not only be inordinate, it must also cause prejudice to the opposing party. The delay herein appeared to have been inordinate but did not cause the Respondents to suffer prejudice or injustice.

20. This court came to the aforesaid conclusion because there was no evidence that was adduced before this court to demonstrate that the Respondents had obtained the Certificate of Costs and Decree or made an application for execution of the decree that would have been thwarted midstream by the filing of the present application. In addition, a perusal of the lower court file showed that the proceedings were only certified as a true copy of the original on 14th June 2017. The implication of this was that the Applicant would not have been able to have filed his Record of Appeal before this time. In the circumstances foregoing, this court was persuaded to find and hold that the Applicant had satisfied the second ground for being granted a stay of execution pending appeal.

21. The Applicant demonstrated his willingness to furnish security demonstrated. However, this was indicated in his Written Submissions. In other words, there was no affidavit evidence pointing to the fact that he was willing to furnish security. Be that as it may, this court noted that although his willingness was demonstrated through the wrong pleading, it opted to consider this issue and avoid dismissing the same on a technicality as there was some sort of demonstration of such willingness.

22. Having said so, there was no doubt in the mind of this court that a log book of a Motor Vehicle was not good security in a case such as this. Indeed, the Applicant did not tell this court if the said Motor Vehicle would be off the road for the entire duration of hearing and determining the said Appeal. In view of the imponderables of life such as possibility of accidents and theft, there was no guarantee that the said Motor Vehicle would still be available once the Appeal was concluded.

23. Further, a security must be one that a respondent would be able to access with no hardship such as going to court to recover the same in the event an appeal was unsuccessful. The Applicant had not indicated that this Motor Vehicle would be under the custody of a neutral party to ensure that the same was accessible to the Respondents in the event his Appeal was unsuccessful.

24. In the case of Ujagar Singh vs Runda Coffee Estates Limited [1966] EA 263, the court therein invoked its jurisdiction and ordered the preservation of the *status quo* pending the hearing and determination of the appeal. The court therein observed thus:-

“...It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful...”

25. As this very court held in the case of Siegfried Busch vs MCSK [2013]eKLR,

“A superior court to which an application has been made must recognise and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment...”

26. Accordingly, having considered the parties' pleadings, affidavits, Written Submissions and the case law relied in support of their respective cases, it was the considered view of this court that as the Applicant was entitled to exercise to his right of appeal, it was in the interests of justice that a stay of execution pending the hearing and determination of the Appeal of the Learned Trial Magistrate's judgment be granted so as not to render his appeal nugatory.

DISPOSITION

27. Accordingly, the upshot of this court's ruling was that the Applicant's Notice of Motion application dated 18th July 2017 and filed on 19th July 2017 was merited and the same was hereby allowed in the following terms:-

1. THAT there shall be a stay of execution of Judgment that was delivered by Hon E.G. Nderitu on 24th October 2016 pending the hearing and determination of the intended appeal on condition the Appellant shall deposit into an interest earning account in the joint names of his advocates and those of the Respondents, M/S Mwakireti Ndumia & Co Advocates, the sum of Kshs 467,870/=, as per the said Advocates letter dated 22nd May 2017 to the Appellant's Advocates annexed to the present application and marked “GM 2”, within the thirty (30) days from the date hereof i.e. by 2nd March 2018.

2. For the avoidance of doubt, in the event, the Appellant shall default on Paragraph 27 (1) hereinabove, the conditional stay of execution shall automatically lapse.

3. This matter shall be listed for directions in respect of the hearing of the Appeal herein on 5th March 2018.

4. Costs of the application herein shall be in the cause.

5. Either party is at liberty to apply.

28. It is so ordered.

DATED and DELIVERED at VOI this 30th day of January 2018

J. KAMAU

JUDGE