



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 190 OF 2008

MEHARI K. TEWOLDE T/A

MEHARI TRANSPORTERS....APPELLANT/APPLICANT

VERSUS

DAMUS MUASYA MAINGI.....RESPONDENT

RULING

Introduction

1. This is a ruling on an application for stay of execution of judgment entered upon a consent order filed by the parties in the matter. The parties entered into a consent agreement on the amount payable to the respondent as Ksh 890,529/=. The appellants allege that was an erroneous figure, the correct figure being said to be Ksh 749,875/=. The appellant then filed an application to seek orders for setting aside the consent filed on 8th May 2013 on the ground that the same had arithmetic errors. That application was dismissed on 12th March 2015 and they filed a Notice of Appeal dated 23/3/2015.

2. The appellants filed a Notice of Motion on 21st April 2015 seeking for a stay of execution of the consent order filed on 8th May 2013. They had paid Ksh 749,875/= leaving a balance of Ksh 141,875 pending the hearing and determination of this application. They also sought for stay of execution of the consent order filed on 8th May 2013 pending the hearing and determination of the intended appeal from the court's ruling dated 12/3/2015 together with costs.

3. The application was supported by an affidavit sworn by Francis Manthi Masika on 21st April 2015. Before the said application could be heard and determined, the appellant filed another application dated 24th April 2015 seeking for a temporary stay of execution.

4. The respondent filed a replying affidavit sworn by Damus Muasya Maingi on 7th May 2015 in response to the application dated 21/4/2015. He averred that the applicant herein had not satisfied the conditions for the grant of stay since he had not shown the loss he would suffer if the prayers sought are not granted. He stated that he owns many cattle and 10 acres of land thus he was in a position to refund the decretal sum should the intended appeal succeed. Further he averred that in the event the court grants the orders, then the appellant be ordered to release half the decretal sum to him and the rest be deposited in a joint interest earning account in the names of both advocates.

5. Edith Nzisa Mutuku swore a supplementary affidavit in response to the replying affidavit. She stated that an advocate who was in conduct of this matter swore the affidavit in support of the application. He was fully aware of the facts deponed. Further she gave the correct calculations at Ksh 749,854.05/= and the wrong calculations as Ksh 890,525.35/=. The respondent knowing quite well that it was an erroneous amount demanded the excess figure of Ksh 141,875. She urged the court to grant stay of execution.

SUBMISSIONS.

APPELLANT/ APPLICANTS'S SUBMISSIONS

6. The submissions were filed on 30th November 2015. It was submitted that the determination sought was for stay of execution of the consent order filed on 8th May 2013. The parties had agreed on the decretal sum plus costs. When calculating the amount, the appellant made an arithmetic error by indicating the wrong figure on the consent as Ksh 890,525/=. which was in excess of Ksh 141,785/=. They have already settled the correct amount of Ksh 749, 875/=. An application to set aside the consent was dismissed on 12/3/2015. An appeal has been filed against the said ruling. This instant application seeks stay pending hearing and determination of the said appeal.

7. The conditions, which have to be established as set in Order 42 Rule 6(2), are that substantial loss may result to the appellant unless the order is made and the applicant is willing to give security for the due performance of the order or decree. They urged the court to find that they shall suffer substantial loss and the appeal may be rendered nugatory. The respondent had already instructed Auctioneers to execute against the applicant's property, which was proclaimed on 20/4/2015. Thus the applicant were forced to file a second application under Notice of Motion dated 24/4/2015, if the orders are not granted execution shall proceed and the present appeal shall be rendered nugatory. See *Githunguri v. Jimba Credit Corp Ltd*(1980)KLR 838; *Kenya Airport Authority v. Mitu-Bell Welfare Society & Anor* (2014) eKLR.

8. It is further their submission that the respondent has not shown any evidence of his capability of paying back the amount should the appeal succeed. In *National Industrial Credit Bank Ltd v. Aquinas Francis Wasike & Anor*, the court stated that though it is the legal duty of the applicant to demonstrate that the respondent may be unable to pay back, it would be difficult for him to know the amount of resources he owns, then at that point the evidential burden shifts to the respondent to show what resources he has.

9. The appellant is willing to provide the kind of security as may be ordered by the court. Security has been provided in the appeal and they oppose the respondent's submission that they deposit half of the decretal sum since they have been paid the entire decretal sum and the appeal is on the amount in excess and the same should not be released to the respondent.

10. Finally, they urge the Court to find the appeal is arguable for the reason that the error was apparent on the face of the record but the court held that the mistake in calculation had not been demonstrated. In *Damji Praji Mandavi v. Sara Lee Households & Body Care (K) Ltd* as quoted in *Kenya Airports Authority v. Mitu- Bell Welfare Society & Anor.*, the Court held that, "**an arguable point need not be one that will necessarily succeed when the appeal proper is heard, for it is not the function of the court at the hearing of such an application to make final determination on the points to be argued on Appeal.**"

RESPONDENTS SUBMISSIONS

11. Counsel for the respondent urged the Court to rely on Order 42 Rule 6(2) of the Civil Procedure Rules 2010 and to find that the appellant has not demonstrated which substantial loss he shall suffer, which was a question of fact and evidence, which ought to be proved and that the applicant has alleged the respondent is a man of straw but has not shown how. In *Mutua Kilonzo v. Kioko David Mks HCCA No. 62/2008* the court held that the question of substantial loss is the most crucial test.

12. It was contended that Mr. Francis Manthi Masika, advocate for the appellant has not stated whether he knows the respondent, when he swears the affidavit in support of the application, and that it is wrong for an advocate to swear an affidavit on behalf of clients. The respondent has shown in his replying affidavit that he is a man of means capable of refunding the decretal sum should the appeal succeed. The respondent relied on *Patani & Anr v. Patani (2003) KLR* where the court held that no prejudice would be caused to the applicant in the event that the intended appeal was successful as the respondent would have no difficulty in refunding the decretal sum. Further the appellant has not given security as required by the law, which is a requirement for an application for stay to be granted.

13. In addition to the above, Counsel urged that the sum being appealed against arose out of a consent order, which was dismissed by the High Court. The applicant has not elaborated why he thinks the second appeal shall be successful as issues in controversy arose out of a consent order. It is their humble submission that the application be dismissed. Counsel, however, sought should the Court find otherwise, that half the decretal sum be released to the respondent and the remainder be deposited in a joint interest earning account in the name of both advocates.

DETERMINATION

14. The court has gone through the application, responses and submissions and the issue that arises is whether the conditions of the grant of stay of execution pending appeal have been satisfied. The appellant/applicant seeks for stay of execution. In a matter where the parties entered into an agreement on 6th May 2013. The contents of the consent was as follows:

a) *That the sum payable to the respondent upon judgment of this honorable court is Ksh 890,529/=.*

b) *The said sum be paid to the respondent within twenty-one (21) days.*

c) *That in default execution to proceed.*

15. As to whether the appellant has satisfied all the conditions under Order 42 Rule 6(2) of the Civil Procedure Rules, that is that **substantial loss** may result to the appellant unless the order is made and the applicant is willing to give security for the due performance of the order or decree, the appellant herein urged the court that an amount of Ksh 749,875/= which is the correct amount payable to the respondent has already been paid. Ksh 141,875/= is yet to be paid, and this is an excess. Although the respondent in both his submissions and replying affidavit does not acknowledge whether they have received any sum from the appellant, the respondent has annexed a copy of the cheque amounting to Ksh 749,854/= in its supplementary affidavit dated 18th June 2015.

16. The appellant urges this Court to grant stay of execution of the consent that was entered by both advocates and therefore binding on the parties in terms of its contractual terms. Clause three of the consent stated that execution was to issue in default of payment. The respondent, while opposing the application, would pray that if stay is considered, the amount should be deposited in a joint interest account in names of both Counsel. On his part, the appellant was willing to deposit a security of Ksh 141,875/= as a condition for the grant of stay.

17. The appellant contends that his appeal shall succeed and if stay is not granted then the appeal shall be rendered nugatory. As held in *Kenya Hotel Properties Limited v Willesden Properties Limited* Civil Application Nai. No. 322 of 2006 (UR 178/06), even if the decree is one for the payment of money stay of execution may still be available –

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree.”

18. The appellant has to demonstrate what kind of loss they shall suffer if sale of the attached properties is effected. See ***Mukuma v. Abuoga*** (1988) KLR 648 as to importance of substantial loss as a factor in granting stay. The appellant fears that if the appeal succeeds then the respondent shall not be in a position to refund the amount paid, if the court orders the remaining sum be paid to the respondent. The respondent only stated that he has 10 acres of land and cows. I respectfully agree with the decision made in ***National Industrial Credit Bank (supra)*** that the burden shifted to the respondent to show his means and prove that he has the said assets as stated in his replying affidavit but there is no evidence before the court. The appellants in their 2nd application for stay of execution dated 24/04/2014 cited that the respondent had already sent auctioneers who had proclaimed the appellant’s property on 20/4/2015 and attachment was to take effect on 27/4/2015. In its affidavit the appellant is willing to deposit Ksh.141,635/= as **security** for the performance of the decree in terms of Order 42 Rule 6 (2) of the Civil Procedure Rules.

Arguable case

19. The principles for considering an application for setting aside of a consent judgment or order are clear. As was held in ***KENYA COMMERCIAL BANK LIMITED vs BENJOH AMALGAMATED LIMITED & ANOTHER [1998] eKLR*** citing ***Flora Wasike vs Destimo Wamboko*** (1988) 1 KAR 625, where Hancox JA (as he then was) said in his judgment at page 626 that -

“It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.”

20. A consent entered by the Counsel for parties also binds the parties. See ***Kenya Commercial Bank Ltd v. Specialised Engineering Co. Ltd*** [1982] KLR 485, where Harris J.:

“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.”

21. The Consent herein was filed in court on 8th May 2013 and a decree was drawn and issued on 6th June 2013. The appellants made an application to have the consent order set aside and the same was dismissed. This Court cannot review the order of another court of equal jurisdiction and set it aside, and indeed it has been asked so to do. The object of an application for stay is only the preservation of the status quo pending appeal. The Order 42 rule 6 (2) of the Civil Procedure Rules only requires the trial court to consider the two principles of substantial loss and provision of security. However, in considering the application for stay the court may in considering whether there exists “**sufficient cause**” for the grant of stay under rule 6 (1) look for existence of serious questions to be put to the appellate court, or what is sometimes called ***an arguable case***.

22. The appellants filed a supplementary affidavit sworn by Edith Nzisa Mutuku who has illustrated how the erroneous figure was arrived at, and would appear that it would appear that the appellant has an ***arguable case*** as to whether there was an error on the face of the order, which could be rectified as a ***mistake*** as a ground justifying the setting aside of a consent order as a contract between the parties.

23. Not being satisfied that the respondent is able to pay back the disputed amount should the appeal succeed, and considering that loss by payment of the disputed amount or the prospect of attachment in default as substantial loss on the part of the appellant, this court is minded to grant the stay of execution on condition that the disputed amount is paid to respondent and the disputed amount is deposited in a joint account in the names of Counsel for the parties.

ORDERS

24. Accordingly, for the reasons set out above, the Court makes the following orders:

1. There shall be stay of execution of the judgment on consent order filed on 8th May 2013, pending the hearing and determination of the intended appeal, subject to confirmation that the appellant has already paid to the Respondent the undisputed sum of Ksh. **749,854.05/=** in full.

2. Should the said undisputed amount of Ksh. **749,854.05/-** be not paid, as in Order 1 above, the Order for stay of execution shall not take effect and the application for stay shall stand dismissed.

3. If the said amount has been paid, the appellant shall as a further condition for stay of execution deposit a sum of Ksh. **141,635/=** in a joint interest earning account in the names of the Counsel for the parties within 21 days from the day of delivery of this ruling.

25. Costs in the cause.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 27TH DAY OF FEBRUARY 2018

KEMEI J.

JUDGE

APPEARANCES:

M/S MANTHI MASIKA & CO. ADVOCATES FOR THE APPELLANT

M/S L. M. WAMBUA & CO. ADVOCATES FOR THE RESPONDENT