



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 37 OF 2015

ABDULLAHI SAID SALAT.....APPELLANT

Versus

UGAS SHEIKH MOHAMMED.....RESPONDENT

RULING

[1] Before me is a Notice of Motion dated 16th July 2018, and expressed to be brought pursuant to Order 42 Rule 6 (1) and 2 and Order 51 of the Civil Procedure Rules 2010 and Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act CAP 21 of the Laws of Kenya and all other enabling provisions of the Law. Therein, the Respondent seeks *inter alia* stay of execution of the judgment, decree and all the consequential orders of the court issued on 16th July 2018, pending the hearing and determination of the intended appeal herein.

[2] The grounds upon which the motion is premised are set out in the motion and the affidavit sworn by the Respondent. These include:-

- a. That, the Respondent was greatly aggrieved by the judgment of the court and had filed a notice of appeal;
- B. That he would suffer substantial loss in the event motor vehicle registration number KBK 854M Toyota Allion was released to the Appellant as there would be no guarantee of getting if the intended appeal succeeds; and
- c. That the Respondent had filed this application timeously.

No submissions filed

[3] Despite having given the parties adequate time, none filed written submissions. Nonetheless, I have carefully considered the application and affidavit filed. I am being asked to stay execution of the judgment delivered by this court on 16th July 2018. In considering this application brought under Order 42 Rule 6 of the Civil Procedure Rules, I must be satisfied *inter alia*:

- a. That the application has been made without undue delay;
- b. That the applicant would suffer substantial loss if the stay is not granted;
- c. The applicant will give security for the performance of the decree that may ultimately be binding on him.

[4] The Court of Appeal in **BUTT vs RENT RESTRICTION TRIBUNAL [1982] KLR 417** gave guidance on how the exercise of discretion in such applications as follows:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

[5] See also the case of **CARTER & SONS LTD. vs. DEPOSIT PROTECTION FUND BOARD & TWO OTHERS – Civil Appeal No. 291 of 1997, at Page 4** where the Court of Appeal, stated as follows;

“ . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

Is there delay in filing application?

[6] From the outset, let me state that the application was made without any delay for it was filed in court on 17th July 2018 against a judgment that was delivered on 16th July 2018. Exactly after 1 day. I move to the next consideration.

Substantial loss occurring

[7] Will the Appellant suffer substantial loss in the event motor vehicle KBK 854M Toyota Allion is released to the Appellant? The Respondent argued that there is no guarantee of getting the vehicle back in the likely event the intended appeal succeeds. My view is this. *First, the record shows that the subject vehicle has been released to the Appellant already. The court cannot prevent that which has already taken place. Accordingly, an invitation to stay release of the vehicle is just but a chase after the wind. Courts do not act in vain. Second, following a ruling delivered by this court on 31st March 2016, the Appellant deposited a sum of Kshs 900,000 in an interest earning account in the joint names of the parties in a reputable bank. The said amount was the value of the vehicle in question. The deposit is still held in the said account. In the face of these facts, I am not satisfied that the Appellant would suffer any or any substantial loss; nothing to be prevented by an order of stay of execution. Accordingly, I decline to exercise discretion in his favour. Instead, I dismiss the Notice of Motion dated 16th July 2018 for lack of merit. I award cost to the Appellant. It is so ordered.*

Dated, signed and delivered in open court at Meru this 24th day of September, 2018.

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F. GIKONYO

JUDGE

In the presence of:

M/s. Mamu for Mr. Kiogora for Respondent

Mr. Mwanzia for Applicant – absent

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F. GIKONYO

JUDGE