



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 29 OF 2018

KENYA WILDLIFE SERVICE APPELLANT

-VERSUS-

GEORGE OMONDI OTIENO RESPONDENT

RULING

Before me is an application which is made by the applicant pursuant to Order 42 Rule 6(1) and (6), Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 79(1) of the Civil Procedure Act. The applicant is seeking a stay of execution of the judgement of the lower court given on 8/8/2018 pending the hearing of the intended appeal.

In support of the application is an affidavit sworn by Doreen Mutunga an Advocate of the High Court who deposes that she is seized of the matter and therefore knowledgeable to the material facts of the case. The gist of the affidavit evidence avers Ms Doreen was the fact that the judgement in question was delivered on 8/8/2018 with an award of damages assessed at 2,003,000 plus costs and interest was pronounced without the appellant being notified of the date to secure the attendance of their legal counsel.

Ms. Doreen further deposed in the affidavit that the appellant is aggrieved by the entire judgement on both findings on liability and quantum and hence the necessity of lodging an appeal. Ms. Doreen for the appellant further stated that the respondent relying on the judgement is likely to commence execution proceedings rendering the appeal nugatory. As a result, if the decree is satisfied by the appellant and the appeal later succeeds the respondent might not be in a position to repay the decretal amount.

In opposing the application, the respondent George Omondi filed a replying affidavit. In his affidavit the respondent avers that the application to stay execution of judgement granted in his favour involves vexations and an abuse of the court process to deny him the fruits of the judgement. George Omondi further deposed that contrary to the assertion by the appellant that the judgement was delivered without their participation there is evidence of a notice by the court as supported by an annexure marked GOO2. According to the defendant there is no sufficient cause why the court should grant an order of stay which end up denying him the fruits of a valid judgment on a dispute heard on the merits.

I have considered the notice of motion and the rival affidavit evidence without the benefit of the primary record which was to be presented by the Deputy Registrar. To my amazement as at the time of this ruling it had not been delivered to my court. I had to contend with the copy of a certified judgment of the trial court to have a glimpse of the background and circumstances of the claim at the trial court. There is a danger that the continued waiting of the primary file may affect the expediency and speedy dispensation of this notice of motion. I therefore had to take a leap of faith to consider the application without the advantage of the original record or certified copy of the handwritten proceedings.

It is common knowledge that sometimes preparations of the record take ages or otherwise on an exercise expected to take an appropriately reasonable time. However, that as it may I am certain that in applying my mind to this application. There would be no mistrial for reason that the entire record was not before me.

Analysis and Resolution

In an application of this nature, the court is mandated to consider the nature and particular circumstances of each case before issuing an order of stay of execution, under order 42 Rule 6 of the Civil Procedure Rules which is at the discretion of the court. What I can see from the annexed judgement of the lower court, the appellant is aggrieved with the award on liability and general damages in favour of the defendant. The essential attribute of Order 42 Rule 6 of the Civil Procedure Rules which the applicant must establish before an appellate court are that:

- (a) The application has been made without reasonable delay**
- (b) The applicant may suffer substantial loss unless the Order is made and**
- (c) Finally, the applicant has to demonstrate that he is ready to give security as the court may order for the due performance**

of the decree or order which may be eventually binding rendered upon the outcome of the appeal.

As can be deduced from Order 42 Rule 6 a stay of execution is a temporary injunction issued by the court to stop any further execution proceedings based on the impugned judgement. It therefore prevents the plaintiff a holder of a valid judgement from putting into effect the execution machinery to enforce the payment of the decretal amount. The above principles guide the court in exercising discretion to grant or decline stay of execution.

The main question in this application to be resolved is whether the appellant had brought himself within the legal threshold of Order 42 Rule 6 of the Civil Procedure Rules. One important consideration in stay motions is to preserve the status quo already in existence that in the event the appeal succeeds the appellant does not suffer substantial loss.

According to the court in the case of **SewanKambo Dickson V Ziwa Abby HCT OOC MA 0178 of 2005**. The gist on substantial loss rests on the following:
“Substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal; insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals especially in a commercial court, such as ours, where the underlying transactions typically tend to lead to colonial decretal amounts. In order for the appellant to satisfy this element one has to persuade the court that he will suffer substantial loss unless discretion is exercised to grant stay of execution of the judgement.”

The court addressing itself to this issue in the case of **Andrew K. Njuguna V Rose Kuria Nairobi Civil Case 224 of 2001** where it was held as follows:
“coming to the substantial loss likely to be suffered by the applicant if the stay order is not granted, she was bound to place before the court such material and information that should lead this court to conclude that surely she stood a risk of suffering substantial loss money wise or other and therefore grant the stay.”

In the case of **JamesWamalwa & Another V Agnes Naliaka HCC 42 of 2011** when the issue of stay of execution arose the statement of the court on substantial loss was as follows:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail. Secondly, the jurisdiction of the court on stay of execution being an equitable remedy has to ensure that the application has been made without unreasonable delay as an ingredient is intended to affirm the principle of speedy and expeditiously trial in the nature of the matter and the surrounding circumstances. In seeking stay orders against a judgment of a competent court timeliness should be considered to be of essence as the plaintiff is entitled to payment of the decretal amount. Thirdly, as a general principle of law the relief of stay of execution pending appeal involving the hearing and determination of the appeal should exercise discretion to order for security for the due performance of the decree.”

The ingredient compelling the court under order 42 Rule 6 to order deposit of security should be seen from the perspective that there is already a debt owed and due for payment to a successful litigant in a litigation before a court which has decided the matter in his or her favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The appellant court would order for the release of the deposited decretal amount to the respondent in the appeal”.

Based on the above principles, I find no dispute that judgement subject matter of the intended appeal was delivered on 8/8/2018. The appellant filed a notice of motion in court on 17/9/2018 seeking stay of execution of the judgement. I accept appellant confirmation that the court did not notify them of the date on delivery of judgement. I am satisfied that this motion has been brought without undue delay.

Regarding the criteria on substantial loss, the evidence from the annexed judgment of the Senior Resident Magistrate indicates that a colossal award of Ksh. 2,000,300 plus costs and interest is demanded of the appellant by the respondent. This means that the respondent has every right to commence execution to its completion to have the decree settled by the appellant. The circumstances and facts of the case relate to the tort of negligence and breach of the duty of care on the part of the appellant as against the respondent. The court on its part held that the plaintiff/respondent was owed a duty of care concerning the safety of an attack from a rogue elephant under the custody and control of the respondent. That this duly owned and breached occasioned injury and damage to the plaintiff/respondent necessitating the claim for compensation against personal injuries suffered.

According to the affidavit by the appellant if the appeal succeeds after the appellant has successfully executed a might not be possible for him to repay back the decretal amount currently standing over Ksh. 2,003,000 plus costs and interest. The respondent relying on his affidavit did not show by way of evidence that he will be in a position to repay the amount to the appellant in the event the appeal succeeds. What that means is that there is risk upon the circumstances of this case to leave the appellant financially ruined if this court refuses to stay the execution of the judgement.

My approach to this application would therefore be two fold in the first instance stay of execution be and is hereby granted in favour of the intended appellant. There is a likelihood of irremediable substantial loss if stay of execution is not granted in this matter. Secondly, the stay of execution order be pegged on condition precedent for the appellant to deposit the entire decretal amount in the joint earning interest account in a preferred account by both counsels to this appeal within a period of 30 days from today’s date. That the appellant expedites the preparation and service of the record of appeal upon the respondent in order for directions to be taken on the intended appeal. That the Executive Officer, Chief Magistrate Court is hereby directed to expedite the issuance of the certified proceedings and judgment in CMCC 24 of 2016 to both parties to these proceedings. That the matter be mentioned before the Deputy Registrar on 22/11/2018 to confirm compliance with the order.

The costs of this application to abide the outcome of the appeal.

Dated, delivered and signed in open court at Kajiado this 19th October, 2018.

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R. NYAKUNDI

JUDGE

Representation

Mr. Ongoto for Ntabo for the Respondent - present

Hamilton Harrison & Mathews for the Appellant - absent