



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 458 OF 2018

G.N. WAHOME.....APPELLANT/APPLICANT

-VERSUS-

HKM (A minor suing through

her next friend and mother)

MMN.....1ST RESPONDENT

PG.....2ND RESPONDENT

RULING

1. The Appellant/Applicant herein has filed a Notice of Motion under Certificate of Urgency dated 1st October, 2018 supported by the grounds set out in the body thereof in addition to the affidavit of **Godfrey Njihia Wahome** sworn on the same date together with annexures. The said application is brought under Sections 1A, 1B, 3A of the Civil Procedure Act, Order 5, Rules 7 & 8, Order 10, Rule 11 and Order 51, Rule 1 of the Civil Procedure Rules, 2010. In essence, the Motion seeks the following orders:-

a) Spent

b) Spent

c) Spent

d) **THAT** pending hearing and determination of the appeal herein, there be a stay of execution of the decree and consequential orders made by Honourable Mmasi (Mrs.) (SPM) in **Milimani CMCC No. 2750 of 2009**.

e) **THAT** costs of the Application be provided for.

2. The Applicant, who is also the deponent in the Supporting Affidavit, states that he had previously filed an application seeking to set aside the ex parte judgment entered against him for non-appearance in the main suit and leave of court to file a Defence out of time, arguing essentially that he was never served with summons to enter appearance and was therefore unaware of the existence of the suit until the execution process commenced against him.

3. The Applicant added that he was not the owner of the subject motor vehicle [particulars withheld] at the time of the accident since he had sold it to a third party who was not involved in the proceedings.

4. That the Applicant filed a previous application seeking stay of execution, setting aside of the judgment entered, and leave to enter appearance and file a defence, which application was subsequently dismissed vide a Ruling delivered by Honourable Mmasi (Mrs.) (SPM) and an Order made to that effect on 28th September, 2018 thus prompting the application currently before court. Furthermore, the Applicant has in turn lodged an Appeal against the abovementioned Ruling by filing a Memorandum of Appeal on 1st October, 2018.

5. The Respondent has filed Grounds of Opposition dated 3rd October, 2018 to the aforesaid application asserting that the application has failed to meet the criteria for stay of execution and that litigation ought to come to an end considering that the main suit instituted at the Magistrate's Court is a fairly old matter, having been filed in 2009.

6. Parties argued their respective submissions orally before court. Counsel for the Applicant submitted that in view of the fact that the Applicant's goods have been proclaimed, unless a stay is granted, the appeal will be rendered nugatory and the Applicant stands to suffer

irreparable loss. The advocate further submitted that summons to enter appearance were never served upon the Applicant and that he was not the owner of the subject motor vehicle KAQ 194T.

7. Counsel went ahead to argue that on the subject of security, the Applicant should not be compelled to deposit any such security since he has an appeal with high chances of success. However, she prayed that should the Applicant be ordered to deposit security, such security be half the decretal amount.

8. In opposition to the abovementioned arguments, the advocate for the Respondent maintained that the Applicant was served with a Notice to show cause why execution should not issue and eventually, the court ordered that execution do proceed. Counsel reiterated that service of summons to enter appearance was effected upon the Applicant in the concluded proceedings and an Affidavit of Service filed to that effect. Counsel added that the Applicant has never applied to have the process server cross-examined in respect to the said Affidavit. Further, he submitted that the previous application was dismissed on the basis that the Applicant was indolent and had failed to prove that he was not the owner of the subject motor vehicle.

9. The advocate for the Respondent went ahead to submit that the Applicant is required by law to show how he stands to suffer substantial loss if stay is not granted, which in counsel's mind, he has failed to do; instead, the Applicant through his advocate has only claimed he will suffer prejudice. To add on, the Applicant has not deposed that should he deposit the decretal sum, the Respondent will not be able to refund the same in the event of a successful appeal. That threat of execution is not proof of substantial loss. In essence, counsel maintained that the present application does not meet the criteria under Order 42, Rule 6 of the Civil Procedure Rules, 2010 for granting stay pending appeal.

10. Having considered the application, grounds of opposition and oral submissions by the parties herein, the court will now move to consider the issues arising therefrom and give a determination.

11. This being an application for stay of execution pending appeal, it is imperative to indicate that the issue to be addressed is solely on whether stay ought to be granted or not. It is reasonably expected that the other pertinent issues raised by the parties will come into play during the hearing of the appeal. It is also important to point out that the provisions indicated in the heading of the application (specifically Order 5, Rules 7 & 8 and Order 10, Rule 11 of the Civil Procedure Rules) are inapplicable herein since they relate to service upon defendants and setting aside of judgment respectively, whereas the application is one for stay of execution pending appeal. As such, the court is of the view that the application is improperly brought but nonetheless, in due consideration of Article 159 (2) (d) of the Constitution of Kenya, the court will consider the substance of the application.

12. The law is quite clear on the principles that govern stay of execution pending appeal. To begin with, **Order 42, Rule 6 (2) of the Civil Procedure Rules, 2010** stipulates verbatim that;

“No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) 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.”

13. Whether or not to grant a stay is purely a matter of discretion and varies on a case-to-case basis. As such, stay should ordinarily be granted where sufficient cause has been shown by the applying party. Drawing from the abovementioned Order 42, Rule 6, stay should be granted in instances where:-

a) Substantial loss may result:

14. Judicial precedents have acknowledged that establishing substantial loss is crucial in the granting of stay pending appeal. Before looking into the facts brought out in the application, it is wise to make reference to court decisions that have sought to define and interpret the term 'substantial loss.'

15. In **Antoine Ndiaye-vs-African Virtual University [2015] eKLR**, Honourable Justice F. Gikonyo cited the Court of Appeal case of **Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018** where it was held that;

“...If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdiction for granting stay”

16. Similarly, in the case of **James Wangalwa & Another-vs-Agnes Naliaka Cheseto [2012] eKLR** wherein it was held that;

“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...”

The aforesaid cited case further brought out the argument that;

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not

amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.”

17. To echo the discretionary power of the superior courts in granting stay pending appeal, the Court of Appeal in **Mukuma-vs-Abuoga (1988) KLR 645** indicated the following:-

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

18. It is therefore evident from the above that for stay to be granted, the onus is on the applicant to not only state that substantial loss will be suffered but make every effort to show the manner in which such applicant stands to suffer loss. In the same way, the argument that execution is anticipated or has begun is not basis enough for stay to be granted. One must specifically prove that failure to grant stay will gravely if not utterly leave the party disadvantaged in such manner that he will not be able to recover even on a successful appeal.

19. It is observed that the application seems not to have exhaustively addressed the issue of substantial loss, though counsel submitted briefly on the same whilst presenting her oral arguments in court. What has been made reference to in the application is that the appeal will be rendered nugatory should stay not be granted and that such appeal has high chances of success. No further explanation has been given to this argument. On the flip side, counsel for the Respondent argued orally that the Applicant has not shown the manner in which he stands to suffer substantial loss and as such, stay should not be granted.

20. In view of the above, it is noteworthy that whereas the Applicant through his advocates has stated that he will suffer prejudice and irreparable loss, he has not demonstrated the same. He has merely indicated that he was not the owner of the subject motor vehicle at the time of the accident and that his goods have been proclaimed in the execution process.

21. Drawing from the law and authorities touching on substantial loss referenced hereinabove, it is fair to state that the Applicant has not managed to establish this ground and has made little if any effort to adduce any evidence or clearly show the manner and extent to which such loss will be suffered. The mere fact that execution is underway is not reason enough.

22. The Applicant has therefore not convinced the court that substantial loss will be occasioned and that the same will have a largely irreversible effect.

b) The Application has been made without unreasonable delay:

23. The Order on which the application and resultant appeal are premised was made on 28th September, 2018, whereas the present application is dated 1st October, 2018 and filed on the same date. The court is convinced that the application for stay was timeously filed. Moreover, the Respondent has not argued against this ground. There is thus little, if any need, to dwell any further on this subject.

c) The provision of security:

24. In respect to this ground, it is noted once again that the Applicant has not addressed the same in his Application; rather, his counsel argued orally in court that he should not be compelled to provide security, adding that in the event that the court should find otherwise, he be allowed to deposit half the decretal sum.

25. It is likewise noted that the Respondent's advocate vehemently opposed the prayer, submitting that the Applicant is not willing to comply with the legal requirement to provide security. Counsel further submitted that if the court decides to grant stay of execution, then the court should order that the decretal sum be deposited in a joint interest earning account and that the Applicant be further ordered to pay auctioneer charges.

26. The subject of security is clearly brought out in **Order 42, Rule 6 (2) (b)** cited hereinabove thereby shedding light on whether or not an Applicant is required to provide security in a situation where stay pending appeal has been sought. As such, the argument by counsel for the Applicant that he should not be compelled to provide security simply holds no ground. It could be said that the legal inclusion of the provision on security in a stay application of such nature was intended to cast away all uncertainty.

27. It has already been established that the Applicant is not welcome to the idea of depositing any form of security, save for oral submissions that if the court deems otherwise, the prayer is that such security be half of the decretal amount.

28. The general practice has been that the security is ordinarily determined by terms based on the decretal sum. This was well appreciated by Honourable Justice F. Gikonyo in the **Antoine Ndiaye-vs-African Virtual University** case mentioned earlier on, who reasoned that;

“...I reckon that the Applicant is alive to the fact that even where stay is granted it must be on terms in the form of a security for the due performance of such decree or order as may ultimately be binding on the Applicant.”

29. In deciding whether or not to grant stay of execution pending appeal, the court is required and expected to balance the interests of the parties. In reiteration, the case of **Absalom Dova-vs-Tarbo Transporters [2013] eKLR** correctly articulated that;

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of

an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.’’

30. In support of the above, we have the case of **Edward Kamau & another vs- Hannah Mukui Gichuki & another [2015] eKLR** where the court judiciously analyzed the subject of judicial discretion *vis-a-vis* the pursuit of justice hereunder;

“The commanding preamble provisions of Order 42 Rule 2. No order for stay of execution shall be made under Sub Rule (1) unless...imply that the three conditions are inextricable. They must all be met for an applicant to be granted the order of stay of execution pending appeal. However, those conditions are guidelines which the courts follow in the exercise of the discretion to grant or refuse to grant orders of stay of execution pending appeal.

In making any orders under the said provisions, this court is enjoined to consider the justice of the case for both parties. Having found that the right of appeal is intrinsically linked to a right to fair hearing and a right to access justice, while appreciating that the respondent should not be denied the enjoyment of the fruits of her lawfully obtained judgment...”

31. In view of the foregoing, it would be reasonable and just in every respect to strike a balance between the parties hereto and ensure justice is not only done but seen to be done.

32. Having carefully considered the positions of the respective parties and the relevant statutory provisions, coupled with authorities, it would only be reasonable to grant a stay of execution of the decree and consequential orders pending hearing and determination of the appeal on condition that the Applicant deposits within 30 days from the date of this Ruling, the decretal sum into a joint interest earning account to be held by the advocates for the relevant parties; failure to which the order for stay shall lapse.

Each party to bear their own costs.

Dated, signed and delivered at **NAIROBI** this 22nd day of **November**, 2018

L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the 1st Respondent