



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CIVIL APPEAL NO. 86 OF 2015

*(Being an appeal from a Ruling of the Chief Magistrate's Court at Naivasha Civil Case No.727 of 2012),
E.KIMILU - SRM)*

PETER MAINA.....APPELLANT

-VERSUS-

FRANCIS MONYO KIMERE.....RESPONDENT

R U L I N G

1. The background to the Appellant's Motion filed on 21st November 2016 is that judgment was entered against him in **Naivasha SPMCC No. 727 of 2012** on 15/9/2012. The Appellant appealed against the decision.

2. Subsequently, on 12th January 2016 the lower court granted a conditional stay of execution pending appeal, on terms that the Appellant deposits Shs 800,000/= into court; pays over the sum of Shs 232,726/= to the Respondent; and prosecutes the appeal within a year.

3. The Appellant complied with the first two conditions. By the time of approaching this court however the record of appeal was yet to be filed.

4. The Notice of Motion brought under Order 42 Rule 6 (1) of the Civil Procedure Rules is seeking stay of execution pending appeal. The grounds upon which the application is brought, and which are further expanded in the Supporting affidavit are *inter alia* that:-

“a)

b)

c)

d)

e) The Appellant did comply with the condition regarding the deposit and payment to the Plaintiff but foresees inability to abide by the Second condition for reasons beyond his control.

f) The condition that the Appeal filed herein be concluded in one year is unfair and oppressive to the Appellant since the Appellant does not have exclusive control of the Appeal

process.

g) The Appellant's quest for proceedings and Judgment to enable him compile the Record of Appeal has been unsuccessful to date, typing thereof still being in progress.

h) The Plaintiff is likely to seek execution of the Decree arising from the judgment or otherwise procure release of the money held in the deposit account after 11th January, 2017 should the appeal filed herein not be concluded by then.

If the Plaintiff is allowed to execute the decree the appeal herein shall be rendered nugatory and the Applicant shall suffer substantial loss and prejudice.

j) The Plaintiff shall not be prejudiced in any way if the application herein is allowed as he has received partial payment and the balance thereof is secured by a joint deposit account."

5. For his part, the Respondent responded by filing Grounds of Opposition. To the effect that:

"1. That the application as drawn is misconceived, frivolous, unmeritorious and an abuse of court process.

2. That the trial court is the proper forum to canvass the instant application since conditional stay was granted by it.

3. That the Appellant has not appealed against the order of the trial court if he felt that the condition for the grant of stay were oppressive.

4. That the judgment was delivered on 15th September 2015, more than one year ago. The Appellant has had more than sufficient time to obtain the proceedings and prosecute his appeal.

5. That the application is an afterthought and is an attempt at further delaying the Respondent from enjoying the fruits of his judgment.

6. That the proper and just course of action is for the Respondent to be allowed to enjoy the fruits of his judgment and the Appellant to prosecute his appeal for as long as he wishes."

6. For the most part, the Appellant emphasises delay that was occasioned by the lower court's inability to provide typed proceedings on time, making it impossible to comply with the one year limit set by the lower court for the prosecution of the appeal. The Appellant asserts that this court's appellate jurisdiction under Order 42 Rule 6 of the Civil Procedure is unfettered and therefore that, despite a similar application having been determined in the lower court, this court can entertain the present application.

7. The Appellant pleads with the court to stay the execution of the decree in the lower court to allow the Appellant who is not at fault a chance to prosecute his appeal so that justice is done. That if the stay order is denied, the Appellant will suffer substantial loss.

8. The Respondent submitted in opposition to the application, that under Order 42 Rule 6 of the Civil Procedure Rules the Appellant had two choices namely, to file an appeal against the ruling of the lower court or to apply to have the orders set aside. Thus if the Appellant felt that the condition requiring the prosecution of the appeal in one year was oppressive, he should have filed an appeal (in this case he sought review in the lower court) or sought the setting aside of the condition, and not waited until the end of the year to approach this court. The Respondent sees the instant application as an attempt to deny the Respondent the enjoyment of the fruits of his judgment. Further, that the Respondent has argued that the Applicant should seek the enlargement of time in the lower court.

9. Only two questions require determination in this case, namely, whether the present application is

properly before this court, and if so whether the same is deserving.

10. An answer to the first question calls for an interpretation of Order 42 Rule 6 (1) of the Civil Procedure Rules which is in the following terms:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from any for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

11. In this case the Appellant is not appealing against the condition that he prosecutes the appeal within one year, or seeking the setting aside of the stay orders in the lower court. His substantive appeal relates to the judgment of the lower court. What I hear the Appellant say is that he was not necessarily aggrieved by the condition regarding the one year limit at the time it was imposed, but rather that, with the passage of time it became evident that he could not comply. He was concerned that non-compliance would lead to loss, by way of execution, of monies deposited in court, rendering his appeal nugatory.

12. With regard to the legal objections raised by the Respondent, it does seem to me that this court does exercise both original and appellate jurisdiction with regard to applications for stay pending execution. Order 42 Rule 6 (1) contains the words:

“.....whether the application for such stay shall have been granted or refused by the court appealed from, the court to which the appeal is, preferred shall be at liberty to consider such application and make such order thereon as may to it seem just.....”

13. There is before this court an appeal filed by the Applicant in respect of the substantive decision of the lower court. On the authority of **Githunguri -Vs- Jimba Credit Corporation Ltd (No.2) [1988] 838** it seems that the existence of the memorandum of appeal clothes this court with a separate original jurisdiction under Order 42 Rule 6 (1) to consider a similar application to the one heard in the lower court. It matters not therefore that no appeal has been filed in respect of the specific decision on the application in the lower court.

14. In a recent case, **Equity Bank Ltd -Vs- West Link MBO Ltd [2013] eKLR** the Court of Appeal discussed at length the nature of its jurisdiction under Rule 5 (2) b) of the Court of Appeal Rules which states:

“Subject to sub-rule (1) the institution of an appeal shall not operate to suspend any sentence or to stay execution but the court may

a).....,

b) In any civil proceeding where notice of appeal has been lodged in accordance with Rule 75, order a stay of execution, injunction or stay any further proceedings on such terms as the court may think just.”

15. **Githinji JA** stated *inter alia* in his judgment:

“It is trite law that in dealing with 5 (2) b) applications the court exercises discretion as a court of first instance and even where a similar application has been made in the High Court or other similar court under Rule 6 (1) of Order 42 of the Civil Procedure Rules and refused, the court in dealing with a fresh application exercises an original independent discretion as opposed to appellate jurisdiction (Githunguri -Vs- Jimba Credit Corporation Ltd (No.2)

[1988] 838.”

16. In his judgment **Musinga J A** observed on the same question that:

“The court is said to be exercising special independent original jurisdiction because on considering whether to grant or refuse an application for stay, it is not hearing an appeal from the High Court decision. It can grant orders of stay, irrespective of whether or not such an application had been made in the High Court. (See Stanley Munga Githunguri –Vs- Jimba Credit Corporation Ltd (Supra).”

17. **Kiage J A** in his judgment quoted a passage from the judgment of the Court of Appeal in **Gurbux Singh Suiri & Anor. –Vs- Royal Credit Ltd. Civil Application NAI 281 of 1995** expounding the court’s reflection in its dictum in the **Githunguri** case as follows:-

“In ordinary circumstances the court has only appellate jurisdiction and in the absence of Rule 5 (2) (b) a party who has been refused a stay of execution or an injunction by the High Court would have been obliged to apply to the Court of Appeal to set aside the refusal and then, having done so, to grant the stay or injunction.

.....But because of the existence of Rule 5 (2) (b) one does not have to apply to the court to first set aside the refusal by the High Court and then having set aside the High Court order, to grant one itself. That is clearly the sense in which the expression ‘independent original jurisdiction’ is to be understood and that was made abundantly clear in the Githunguri case, supra, by use of the expressions such as “we have to apply our minds *denovo* or it is not an appeal from the learned Judge’s discretion to ours.”

18. Similarly, the jurisdiction of the High Court in this case was invoked when the substantive appeal (itself a fresh pleading separate from the suit in the lower court) was filed. It is true that the application for stay of execution was allowed with conditions in the lower court. The wording in Order 42 Rule 6 (1) however does not preclude the Applicant from approaching this court as he has done.

19. The option of applying to set aside the orders of the lower court may exist under Order 42 Rule (1) of the Civil Procedure Rules but in this case, the Appellant has already complied with two of the three conditions for stay, that required payment of over Shs 1 million. A mere order to set aside the order of the lower court would not be efficacious as the Appellant herein would remain exposed to execution. Thus I do not accept the objection that the instant application is not properly before this court.

20. On the second issue; the conditions for the grant of stay pending appeal in Order 42 Rule 6 (2) of the Civil Procedure Rules are that:

“(2) 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.”

21. The Appellant had between January 2016 and January 2017 to prosecute his appeal. He has demonstrated the efforts made in attempting to get copies of proceedings from the lower court. When he approached this court, it was about 2 months before the one year period had lapsed. It is true he could have approached the court earlier, but in the circumstances of this case, the delay was not inordinate. I take judicial notice of the scarcity of personnel in the said period within the court to enable prompt preparation of proceedings. The Appellant however should have obtained a certificate of delay from the

Deputy Registrar.

22. The Appellant has deposited a sum of Shs 800,000/= in court and paid over to the Respondent a sum of Shs 200,000/= odd. He stands to lose this money if the court rejects his application. It is a tidy sum and the loss would be substantial.

23. In the circumstances, I do grant prayer 3 of the Motion. The sums deposited in court will be treated as security for the eventual performance of the decree. The Deputy Registrar is directed to ensure that the proceedings of the lower court are availed without any further delay. The Respondent is awarded the costs of the Motion in any event.

Delivered and signed at Naivasha on this **23rd** day of **May, 2017**.

In the presence of:-

Mr. Mbugua for the Appellant

No appearance for the Respondent

C/C - Quinter

C. MEOLI

JUDGE