



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CIVIL APPEAL NO. 100 OF 2017

JOSPHAT KITHEME KYALOAPPELLANT

-VERSUS-

WEBSTER MUEMA MUAMBI RESPONDENT

RULING

INTRODUCTION

1. By a Notice of Motion dated **20/03/2017**, the Applicant seeks principally an interim stay of execution of decree in **Kilungu SRMCC 60/2016** pending hearing and determination of the instant civil appeal.
2. The application is based on the grounds set out in the motion and is based on Order 42 Rule CPR *inter alia*. It is supported by affidavit of Appellant sworn on **20/03/2017**.
3. Principally, the grounds are that the trial court awarded Respondent in a slander case **Kshs.700,000/=** of which the respondent seeks to execute.
4. The Applicant avers that the appeal has high chances of success and if execution is levied the appeal will be rendered nugatory. The application was lodged promptly.
5. The Applicant also offers to abide by conditions and terms which court may impose for stay.
6. The application is opposed and the Respondent has filed a replying affidavit.

SUBMISSIONS

7. The Applicant submits that he has met the threshold of grant sought namely:

- 1) He will suffer substantial loss unless orders sort are granted.**
- 2) The application was filed without unreasonable delay.**
- 3) The Applicant has offered security for due performance of the decree.**

8. On the first limb of substantial loss, the Applicant submits that if **Kshs. 700,000/=** is paid to the Respondent, same may not be recovered thus Applicant will suffer loss and render appeal nugatory.

9. He relies on **NIC BANK LIMITED –VS- AQUINAS FRANCIS WASIKE AND ANOTHER CIVIL APPEAL NO. 238/2005**. In regard to the filing the application without delay, the Applicant

submits that the Judgement was delivered on **20/02/2017** and temporary orders of stay were granted for 30 days. The application was filed on **22/03/2017**.

10. On offer of security, the Applicant submits that he is ready and willing to deposit the security which court may impose pending appeal.

11. The security ought to be enough not too huge or too low. See **KILIMANJARO SAFARI CLUB HD-VS- COUNTY COUNCIL OF OLE KEJUANDA (2013) EKLR**. Also **KCB -VS- SUN CITY PROPERTIES LIMITED AND 5 OTHERS**.

12. In opposition to the same application, the Respondent submits that the threshold has not been met as set out in Order 42 Rule 6 Civil Procedure Rule. First there is no demonstration of what substantial loss Applicant will suffer in event stay is denied.

13. The Applicant does not show that he will not recover money back if stay is denied or that the decree sum is so huge vis a vis his status or business that the execution would in itself ruin his business or threaten his very existence.

14. He relies on **METEINE OLE KILELU -VS- MOSES K. NAILOLE CIVIL APPEAL 340/08**. See also **KENYA SHELL -VS- KIBIRU & ANOR CIVIL APPEAL 97/86 NAIROBI**. And also **KABAE -VS- KIMANI HCA 182/1999 NBI** which stated that it was improper for the lower court to grant stay without security.

15. The Respondent further argues that there is no arguable appeal. If same is there, it is not demonstrated. The Respondent thus urge court to deny the orders sought.

16. In the instant matter the Plaintiff/Respondent lodged in magistrate court a defamation claim against the Applicant and the Respondent was awarded **Kshs.700,000/=** against the Appellant.

17. The Applicant has filed appeal and set out 9 grounds of appeal.

18. Under ***Order 46 Rule 6 (2) Civil Procedure Rules*** the court is supposed to be guided by the Principles set therein in determining whether to grant or not the Orders for stay of execution of the decree pending appeal.

19. The principles guiding the grant of stay of execution pending appeal are well settled.

-Under Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant should satisfy the Court that:

-substantial loss may result to him unless the order is made;

-that the Application has been made without unreasonable delay; and

- the Applicant has given such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him.

20. The Applicant bone of contention is that if the decretal amount is paid to the Respondent either directly or via execution, the sum will never be recovered. This will render the appeal nugatory.

21. The Respondent does not demonstrate the ability to refund the amount award in event, the same is paid before the appeal is concluded and in event the appeal succeeds.

22. In the case of **JASON NGUMBA KAGU & 2 OTHERS -VS- INTRA AFRICA ASSURANCE CO. LIMITED** the court held that:

“The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory.

Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process”

23. In the case of **BUNGOMA HC MISC APPLICATION NO. 42 OF 2011 JAMES WANGALWA & ANOTHER -VS- AGNES NALIKA CHESETO** the court 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...”

24. The court defined substantial loss as outlined above as factors which show that the execution of the judgement 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.

25. In **JAMES WANGALWA & ANOTHER -VS- AGNES NALIKA CHESETO MISC APPLICATION NO 42 OF 2011 [2012] eKLR** (Gikonyo J as he then was) stated that:-

“...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.”

26. The Respondent was awarded **Kshs.700,000/=** as general damages. If this is not stayed, then the very essential core of the Applicant as the successful party in the appeal will have been negated causing an irreparable state of affairs.

27. This is because the Applicant would already have transferred the **Kshs. 700,000/=** which the Respondent may or may not be in a position to transfer back the decretal sum.

28. If refund of same is not eventually effected in event of appeal succeeding obvious the Appellant would suffer a loss of **Kshs.700,000/=** which is substantial.

29. The appeal success will also be an academic exercise. The court thus finds that the same principle has been demonstrated to apply in the instant matter.

30. On the lodging of the application without unreasonable delay, the court notes that, on **20th February, 2017** when the judgement was delivered, the applicant made an informal application for stay of execution of the judgement immediately after it was delivered as per rules.

31. A temporary stay of execution for 30 days was granted to enable applicant make a formal application for stay of execution pending appeal. The temporary stay lapsed on the **22nd March 2017**. Under the rules, the applicant was supposed to file a formal application for stay of execution pending appeal within the prescribed period from **22nd March 2017**.

32. The court therefore observes that, the Applicant was well within time in filing this Application for stay of execution pending appeal and thus there has been no unreasonable delay.

33. In the case of **WINFRED NYAWIRA MAINA –VS- PETERSON ONYIEGO GICHANA [2015] EKLK**, the Court held that:-

“The foundation of the stay pending appeal is that the party is intending to file or has filed an appeal in the exercise of his constitutional right of appeal. He must, however, show sufficient cause and preponderantly, that, if his appeal succeeds, he will suffer substantial loss unless stay is ordered. Moreover, he must bring his application without unreasonable delay and give security sufficient to cover performance of the decree which may ultimately be payable by him. The Applicant filed the appeal in a supersonic speed but did act likewise to cover his back by applying for stay of execution pending appeal.”

34. On security, the Applicant submission is that this Hon court orders security for the due performance of such decree or order as may ultimately be binding on the Applicants.

35. The Applicant relies on the case of In the matter of an Arbitration between **KILIMANJARO SAFARI CLUB LTD –VS- COUNTY COUNCIL OF OLE KEJUADO (2013)** where Ogola J stated:-

“Security, if it is monetary should not necessarily equal the decretal sum, but should where the decretal sum is a hefty sum, be enough to demonstrate good faith on the part of the Applicant that it will settle the entire decree if the appeal fails. Putting the amount of security too high would deny the Applicant its constitutional right of appeal. Putting it too low may deny the Respondent the fruits of its judgment should the appeal fail.”

36. In support of the order for security, reference is made to the case of **KENYA COMMERCIAL BANK LTD -VS- SUN CITY PROPERTIES LTD & 50 OTHERS** where Mabeya J., stated:-

“.....In an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should be balanced. In a bid to balance the two competing interests, the courts usually make an order for suitable security for due performance of the decree as the parties wait for outcome of the appeal.”

37. The applicant offers to deposit the security which court may impose. Same should not be too low nor too high. The court finds that the threshold for stay of execution pending appeal has been established.

38. The court thus will grant the same with the conditions thereof. The court makes the following orders:-

Orders

- 1) Kshs.100,000/- be paid to the Respondent within 30 days.
- 2) Kshs.200,000/- be deposited in interest earning account in joint names of the parties' advocates in the next 30 days.
- 3) In defaults of any of the 1 or 2 or both above, execution to issue.
- 4) Costs in the main appeal.

SIGNED, DATED AND DELIVERED THIS 22ND DAY OF JUNE, 2017.

C. KARIUKI

JUDGE

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