



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO 120 OF 2017

FRANCIS MBOYA WAMBUA.....APPELLANT

VERSUS

AGNES NDINDA MASAI

JAPHETH MASAI MBANE (Suing as the

Administrators of the Estate of

the late PETER MUSAU MWATHI).....RESPONDENT

RULING

The Application

The Appellant has appealed against an order for a warrant of arrest issued against him on 24th August 2017 in **Machakos Chief Magistrate's Civil Case No.1574 of 2009 - Agnes Ndinda Masai and Japheth Masai Mbane suing as the Administrators of the Estate of the late Peter Musau Mwathi vs Boniface Mutiso Musau, Francis Mboya Wambua and Nyeri Motor Services** by way of a Memorandum of Appeal filed herein on 30th August 2017. The trial Court issued the said Orders for the arrest of the Appellant, for having failed to appear in court for the hearing of an application by the Respondents for Notice to Show Cause why he should not be committed to civil jail, in execution of the Decree issued by the said court in Chief Magistrate's Civil Case No.1574 of 2009.

The Appellant after filing the appeal subsequently filed an application by way of a Notice of Motion dated 31st August, 2017, and supported by an affidavit of Francis Mboya Wambua sworn on the same date and filed on 4th September, 2017. In the said application, the Appellant seeks that there be a stay of execution of the order of warrant of arrest, and of the Court's Decree in Chief Magistrate's Civil Case No.1574 of 2009 pending the hearing and determination of the Appeal filed before this Court by the Appellant.

The main grounds for the application are that there was no proper and lawful application for execution by way of notice to show cause, as the Court unlawfully and unprocedurally opened an alternative mode of execution before the exhaustion of the initial mode of warrants of attachment issued on 10th March 2017, and the Respondents did not invoke mandatory applicable provisions of law. Further, that the trial Court failed to accord the Appellant a chance to contest the Respondents' Notice of Motion dated 16th August 2017, and there was a moratorium in force staying proceedings in matters where Defendants such as himself had insured motor vehicles with Blue Shield Insurance Company Limited. Therefore, that the Appellant will suffer substantial loss.

The Appellant on 12th October, 2017 also filed a Supplementary Affidavit sworn on 10th October, 2017 by Francis Mboya Wambua, to which he attached documents and orders on the moratorium of payments by Blue Shield Insurance Company to its policy holders and creditors.

In response to the said application by the Appellant, the Respondents on 15th September, 2017 filed a Replying Affidavit sworn on 14th September, 2017 by Japheth Masai Mbane. The Respondents gave a detailed history of the proceedings in the trial Court leading to the application for Notice to Show cause that they filed therein on 16th August 2017. In summary, the Respondents explained that the trial Court found the Appellant liable for the death of Peter Musau Mwathi and subsequently issued a Decree for the payment of a sum of Kenya Shillings Four Million Five Hundred and Eighteen Thousand Nine Hundred and Twenty Seven (Kshs.4,518,927/=) to the estate of Peter Musau Mwathi.

Upon attempts by the Respondents to execute the same by way of attachment and public auction of the Appellant's motor vehicle registration number KCC 676S, the money for the value for the said motor vehicle was not realized as it was found that the log book was in the custody of Equity Bank, which Bank also objected to the sale of the said motor vehicle on the ground that it was a joint registered legal owner thereof with the Appellant, as the motor vehicle was security for a financing facility extended to the Appellant. Hence the application for notice to show cause why the Appellant should not be committed to civil jail.

According to the Respondents, in issuing the warrants of arrest of the Appellant in execution of the Decree issued by it in Chief Magistrate's Civil Case No.1574 of 2009, the Appellant was granted adequate opportunity by the subordinate Court to appear before it, and it was only after he had failed to do so that the said court issued warrants of arrest against him. The details of the hearings held were given in the replying affidavit.

In addition, that a moratorium is meant to protect an insurance company from claims against its policy holders or creditors, but it does not prevent the third parties from pursuing the tortfeasors who are policy holders with the insurance company under moratorium. Lastly, that pursuant to Order 22 rules 17 and 27 of the Civil Procedure Rules 2010, the Court in exercise of its discretion may allow execution at the same time against the person and property of the judgment-debtor, and it is therefore not true that the trial Court unlawfully and unprocedurally opened an alternative mode of execution before the exhaustion of the initial mode.

The Determination

The Appellant's application was canvassed by way of written submissions filed by the Appellant's and Respondents' Advocates on 12th October 2017 and 30th October 2017 respectively. The issue before the Court is whether the order of warrant of arrest issued against the Appellant on 24th August 2017 and decree issued in **Machakos Chief Magistrate's Civil Case No.1574 of 2009 - Agnes Ndinda Masai and Japheth Masai Mbane suing as the Administrators of the Estate of the late Peter Musau Mwathi vs Boniface Mutiso Musau, Franics Mboya Wambua and Nyeri Motor Services** should be stayed pending the hearing of the appeal.

The issues raised on the legality or otherwise of the proceedings by the trial Court, and whether or not the moratorium in force against payments by Blue Shield Insurance Company Limited applied to the said case, and the findings on the arguments made by the Appellant and Respondents thereon, will however have to await argument and determination in the hearing of the appeal and not at this stage, as they raise substantive questions on the merits or otherwise of the Appellant's appeal.

Stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

“6.(1) 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 may 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 to 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.

(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.”

For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:

(a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;

(b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and

(c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

On these prerequisite conditions for grant of stay of execution, Nyiha Mukoma & Company Advocates for the Respondents in their submissions conceded that the Appellant filed his application within eleven (11) days of issuance of the orders by the trial Court, which period can be said to be reasonable.

On the second requirement of substantial loss the Appellant’s Advocates, L.N. Ngolya & Company Advocates urged that the Appellant will suffer substantial loss if the stay is denied as the Respondents are persons of straw who are unable to reimburse the decretal sum in the event the appeal succeeds as their means are unknown. The Respondents’ Advocates on the other hand responded that by paying the aforesaid amount no substantial loss will result to the Appellant herein as he will be paying what is rightly due to the estate of Peter Musau Mwachai, and he had therefore not shown any substantial loss.

They cited the decision in **Antoine Ndiaye vs. African Virtual University [2015] eKLR** that mere financial burden occasioned by a judgment does not constitute substantial loss for purposes of grant of an order of stay of execution. The case of **John Mwangi Ndiritu v Joseph Ndiritu Wamathai [2016] eKLR** was also cited, where the court held that 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 and 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. The Respondents also contended that the Appellant had not proved that they were persons of straw.

In this regard, I hold the view that an Applicant should show what loss over and above the payment of the decretal sum he or she is likely to suffer in the event that stay of execution is not granted, which is the effect of the decisions in **Antoine Ndiaye vs. African Virtual University [2015] eKLR** and **John Mwangi Ndiritu v Joseph Ndiritu Wamathai [2016] eKLR**. I however find the Appellant’s averments that Respondents may not be able to refund the decretal sum in the event that its appeal succeeds, sufficient and specific enough as to the substantial loss that he will suffer if the application for stay is not granted.

I am in this regard guided by the position as stated by the Court of Appeal in **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike, Nrb CA Civil Application No 238 of 2005** where it was held as

follows:

“The court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge see for example Section 112 of the Evidence Act Cap 80 Laws of Kenya.”

Lastly, on the requirement of security, the Appellant urged the Court to overlook the requirement of security given the circumstances giving rise to the present Appeal. The Respondents on the other hand submitted that in the event that the Appellant's appeal fails he will have to pay a sum of Kenya Shillings Four Million five Hundred and Eighteen Thousand Nine Hundred and Twenty Seven (Kshs.4, 518,927I =) for the due performance of the Decree as issued by the subordinate Court, as may ultimately be binding on him.

Therefore, that that this Court should order the Appellant to deposit the said decretal sum in court to guarantee that if his appeal succeeds the same would be reimbursed to him, and that if his Appeal fails the same would be available to the Respondents for due performance of the Decree as issued by the subordinate Court. Reliance was once again placed on the decision in **Antoine Ndiaye v African Virtual University [2015] eKLR** where the court went on to grant the applicant stay of execution on the basis that he had provided security even though the he had not established that he would suffer substantial loss.

Provisions of security is a condition for stay of execution, as shown in the foregoing, and the Appellant is thus required to provide security if the orders he seeks are to be granted, and given that the judgment in favour of the Respondents has not been overturned. It is thus necessary if the Court is to grant the orders of stay, so as to balance the respective rights of the Appellant and Respondent.

Accordingly, the orders that commend themselves to me arising from the foregoing is that the Appellant's Notice of Motion dated 31st August 2017 is allowed on the following terms and conditions:

1. There shall be a stay of execution of the order of warrant of arrest issued against the Appellant on 24th August 2017 and decree issued in **Machakos Chief Magistrate's Civil Case No.1574 of 2009 - Agnes Ndinda Masai and Japheth Masai Mbane suing as the Administrators of the Estate of the late Peter Musau Mwathi vs Boniface Mutiso Musau, Franics Mboya Wambua and Nyeri Motor Services** pending the hearing and determination of the Appellant's appeal only on condition that the Appellant secures the decretal sum with a Bank Guarantee in the sum of Kshs Five Million (Kshs 5,000,000/=) from a reputable Bank within forty five (45) days of the date of this ruling.
2. Upon default of compliance by the Appellant the stay orders herein shall stand vacated and the Respondents shall be at liberty to execute.
3. The costs of the Notice of Motion dated 31st August 2017 shall follow the costs of the Appeal.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 21st day of November, 2017.

P. NYAMWEYA

JUDGE