



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPLICATION NO. 42 OF 2015

DR. JOHN GACHANJA MUNDIA.....APPLICANT

Versus

FRANCIS MURIIRA alias

FRANCIS MUTHIKA.....1ST RESPONDENT

TIGANIA MISSION HOSPITAL.....2ND RESPONDENT

RULING

[1] The Notice of Motion dated 23rd June 2015 is essentially seeking for stay of execution of the judgment and decree in Meru Civil Case No. 475 of 2002 pending the hearing and determination of the 1st defendant's appeal. It also seeks for costs of the application. The said Motion is expressed to be brought pursuant to Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act CAP 21 of the Laws of Kenya.

[2] The said application is premised on the following grounds:

- a. ***THAT the 1st defendant /Applicant is dissatisfied with judgment and decree delivered on 3rd June 2015 in Meru Civil Case No.475 of 2002.***
- b. ***THAT the 1st defendant/Applicant has now instructed his advocate on record to institute an appeal.***
- c. ***THAT the 1st defendant/Applicant has an arguable appeal with a high probability of success.***
- d. ***THAT the granting of the order sought will not occasion any prejudice to the plaintiff.***
- e. ***THAT it is in the interest of fairness and justice that the 1st defendant/applicant's application be allowed.***
- f. ***THAT there has been no unreasonable delay in the bringing of this Application.***

Brief facts

[3] Briefly the Applicant's case is that, on 3rd June 2005 judgment was delivered against him and the 2nd respondent jointly and severally in Meru Civil Case No. 475 of 2002 for Kshs 1,472,000 for general and Kshs 52,113 for special damages together with interests and cost. The applicant was aggrieved by the said orders whereupon he instructed his advocates to file a memorandum of appeal. He says that if the orders of stay of execution are not granted, the appeal will be rendered nugatory. The applicant further stated

that he was willing to abide by any conditions that the court may attach to the grant of stay execution and would provide security as the court may order.

[4] The 2nd Respondent on the other hand asserted that the judgment passed in his favour is a valid one and that the same had not been set aside or varied by a competent court. He contended that he not a pauper and in the unlikely event that the appeal succeeds, the applicant can still recover the money from him.

[5] On 5th October 2015, it was agreed between parties that the application be canvassed by way of written submissions. Parties filed their respective submissions and amplified their positions on the matter. The applicant, who is a government employee, undertook that, as a good gesture he will provide as security Kshs 762,056.50 to be held in a joint interest account in both names of the advocates. Consequently he urged the court to exercise its discretion and grant the orders sought. The Respondent on the other hand submitted that conditions in Order 42 of the Civil Procedure Rules in Order 42 have not been met: First of all, the Applicant had not filed any appeal. Second, there was delay in filing the application and there is no explanation for the delay that has been given. Consequently, he urged the court to dismiss the application with costs.

DETERMINATION

[6] I have carefully considered the application, the rival submissions by the parties and the authorities relied upon by the Applicant. I take the following view of the matter. The jurisdiction of the court to grant stay of execution pending appeal is governed by Order 42 Rule 6(2) of the Civil Procedure Act. The said rule places the onus on the Applicant to establish sufficient cause as to warrant stay of execution of the decree. Among other things, the court will take into account three traditional considerations in this kind of applications which are:

(1) Whether the application has been brought without unreasonable delay;

(2) Whether the Court is satisfied that substantial loss would occur unless stay is granted; and

(3) On being convinced that stay is deserved, the court will ask the Applicant to furnish such security as shall be sufficient to satisfy any decree that might ultimately be binding on the Applicant.

Needless to state that the cornerstone of the jurisdiction of the court under Order 42 rule 6 of the CPR is to prevent substantial loss from occur upon the Applicant.

[7] Applying this test, has there been unreasonable delay in bringing this application? The judgment was delivered on 3rd June 2015 and this application was filed on 23rd June 2015. Therefore, there is no unreasonable delay. I now move to the next most important consideration.

Will Substantial Loss Occur?

[8] I should state that I will engage in the novel balancing act of two competing rights of the parties herein. On this, see what the court said in the case of Absalom Dova vs. Tarbo Transporters [2013] eKLR:

“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”.

Therefore, stay of execution is a matter of the discretion of the Court. But for the court to postpone the right of the judgment holder to immediate enjoyment of the fruits of his judgment, the Applicant must show that the Respondent cannot make a refund of the decretal sum; as that would certainly reduce a successful appellant to merely a holder of a barren success, thus, a pious explorer in the judicial process. I must, however, restate the law, that is; the onus of proving substantial loss would occur falls on the shoulders of the Applicant. He must not throw or shift it to the Respondent to state his financial ability before the Applicant has shown a prima facie case on reasonable facts that there is some financial limitation on the part of the Respondent. It is only after the legal burden is discharged by the Applicant that the Respondent will be called upon to discharge his evidential burden or provide affidavit of means. This subject is replete with judicial authorities and I do not wish to multiply them except to refer to the case of **Winfred Nyawira Maina vs. Peterson Onyiego Gichana [2014] eKLR** in which many cases on the subject were analyzed. The Applicant has reversed the legal burdens when he submitted that:-

“The Respondent has not disclosed nor furnished the court with any factual or documentary evidence to prove his financial standing. He has merely stated that he is not a pauper. Your Lordship, the Respondent has failed to shift the legal burden upon the Applicant to show that he can repay back the money once it is passed over to him”.

And as the court stated in **Esther Nyawira case** (ibid) so I shall restate again that:-

*I think the foregoing justifies a little rendition on evidential burden for a fuller understanding of the decision of the court in this matter. The way I understand the law, the term Burden of proof, entails the Legal burden of proof and evidential burden. The two terminologies are most of the time misunderstood; albeit distinct. I am concerned mostly with the evidential burden which initially rests upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence. See HALSBURY’S Laws of England, 4th Edition, vol. 17. Therefore, the Applicant must first lay prima facie evidence against the Respondent if evidential burden is to be created on the shoulders of the Respondent. In simple terms see what the Supreme Court said in the case of **Raila Odinga vs. IEEBC & 3 Others [2013] eKLR** that:-*

“...a Petitioner should be under obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden”.

[9] The 1st Respondent is the legal representative of the estate of the deceased and the focus for purposes of this application should not be on the financial ability of the personal representative in his personal capacity. The focus should be on the estate. The Applicant completely missed the point and misdirected his attention. In the circumstances, there is absolutely nothing which has been placed in the hands of the court to show that substantial loss would occur unless stay of execution is granted. There is doubt the Applicant has shown that substantial loss would occur unless stay is granted. However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in the Constitution as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief. I have considered all the circumstances of the case and I find the willingness by the Applicant to deposit the sum of Kshs. 762,056.50 in the joint names of the advocates to be a good gesture. However, there is an issue here which has been raised by the Respondent; that this is a **case of joint and several liability** and so he should provide security for the entire amount. See the following cases on this subject; **Dubai Electronics vs. Total Kenya & 2 Others High Court (Milimani Commercial and Admiralty Division) Civil Case No. 870 OF 1998** and **Republic v Permanent Secretary in Charge of Internal Security – Office of the President & another ex-parte Joshua Mutua Paul [2013] eKLR** where the court stated:

Clearly therefore where you have joint liability all the tortfeasors are and each one of

them is liable to settle the full liability. However, in a purely several liability each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them. That is my understanding of joint and several liability. In the case of Kenya Airways Limited vs. Mwaniki Gichohi (supra) Ringera, J (as he then was) stated as follows:

The concept of joint and several liability comprehends one judgement and decree against two or more persons who are liable collectively and individually to the full extent of such decree; however double compensation is not allowed and accordingly whatever portion of the decree is recovered against one of such defendant cannot be recovered from the other defendant(s).

[10] I am alive to the fact that the 1st Respondent carries a judgment and decree on behalf of the estate. The judgment and decree are valid and enforceable. This is a matter I must also consider. In making my final orders, I must also view the application before me within the concept of joint and several liability since the Applicant is confronted with the entire judgment. But, I shall also ensure that the Applicant is not forced into a judicial journey that will be barren. Therefore, I will make a decision which strikes almost symmetrical balance between the rights of the parties. In light of the above, and in all fairness, I am inclined to grant a stay of execution except on the following conditions:-

(a) That the Applicant shall pay a sum of Kshs. 762,056.50 to the estate of the deceased within 30 days from today; and

(b) That the Applicant shall provide a bank guarantee in the sum of Kshs. 762,056.50 within the next 90 days from today.

On Costs

[11] Given the result of this application, each party shall bear his own costs of the application. It is so ordered.

Dated, signed and delivered in open court at Meru this 28th January 2016

F. GIKONYO

JUDGE

In the presence of:

Mr. Murango advocate for the respondent

Mr. Thangicia advocate for Mr. Kiarie advocate for the applicant

F. GIKONYO

JUDGE