



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO.21 OF 2015

ABSOLOM OLUCHINA APPELLANT

VERSUS

JOSEPH WAGUKHU RESPONDENT

RULING

Absolom Oluchina (the applicant) was a defendant in the lower court. He had been sued by *Joseph Wagukhu (the respondent)* in that court in *PMCC No.352 of 2013* and on 5th February 2015, that court entered judgment against him for Kshs.70,000/- and being aggrieved by that judgment he lodged the present appeal to this court seeking to reverse the lower court's judgment. Thereafter, the applicant took out a motion on Notice dated 1st December, 2015 and filed in court on even date seeking a stay of execution of that court's judgment pending the hearing and determination of his appeal. The application does not mention the provisions under which it is premised but being an application for stay pending appeal, it can be presumed to be under *order 42 rule 6(2)* of the Civil Procedure Rules, 2010.

The application is supported by grounds appearing on the face of the motion and by an affidavit by the applicant sworn on 1st December, 2015. The grounds on the face of the motion are captured as follows:-

- a) *That substantial loss may result to the applicant if stay is not granted.*
- b) *That the application is made in good faith.*
- c) *That if the respondent is allowed to execute lower court judgment then this appeal may be rendered nugatory."*

The affidavit in support of the motion is a short one of some seven (7) paragraphs. The applicant says in that affidavit that there is a decree in favour of the respondent in the lower court and the respondent is in the process of executing that judgment while his appeal to this court against that decision is pending. The applicant says that if the respondent is allowed to proceed with execution he stands to suffer substantial loss. He therefore beseeches this court to grant him stay of execution pending his appeal.

The application is opposed through an affidavit by the respondent sworn on 11th December, 2015 and filed in court on 14th December, 2015. The respondent says that after judgment was given in his favour the applicant filed a notice of motion dated 12th March 2015 in the lower court seeking a stay of execution. That application was dismissed with costs on 18th November, 2015. The respondent further says that the application does not meet the conditions for granting stay of execution set out in law, in that the applicant has not shown the substantial loss he will suffer if execution proceeds and has not offered security.

When the application came up for hearing *Mr Anziya* appeared for the applicant while *Mr Kiveu* represented the respondent. *Mr Anziya*, learned counsel for the applicant, moved the motion and urged the court to grant the application. Counsel more or less adopted the applicant's affidavit saying that the application was filed timeously and pleaded with the court to allow it.

Mr Kiveu, learned counsel for the respondent on his part, opposed the application saying that the application failed to meet the conditions for stay of execution under order 42 rule 6(2) of the Civil Procedure Rules, 2010. He further submitted that the application was an afterthought and that the applicant had not come to court without clean hands. He prayed for the dismissal of the application.

I have considered the application, the affidavit in support that in opposition and submissions by counsel for the parties herein. This being an application for stay of execution, it is important that I examine what order 42 rule 6(2) says about such an application.

Order 42 rule 6 provides as follows:-

- 1.) ...
- 2.) No order of stay of execution shall be made under sub-rule (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."

From the reading of Order 42 rule 6(2) there are three conditions for consideration in an application of this nature, that is substantial loss to be suffered, timely filing of the application and security. I propose to start with the requirement that an application be filed without delay.

The impugned decision of the lower court was made on 5th February 2015. The applicant filed an application for stay of execution before that court dated 12th March 2015 which was heard and dismissed on 18th November, 2015. Thereafter the applicant filed the present application on 1st December, 2015 less than one month from the date his application was dismissed by the lower court. I am therefore satisfied that the application before this court was filed timeously and meets the requirements of order 42 rule 6(2).

The second point for consideration is that of substantial loss. An applicant is required to show to the satisfaction of the court that he will suffer substantial loss if the order for stay is not granted. In the case of *Kenya Shell Ltd vs Kabiru & Another* [1986] KLR 410 *Gachuhi, JA* said:-

"In an application of this nature, the applicant should show the damages it would suffer if the order of stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of the appeal succeeding? On the other hand granting the stay would be denying a successful litigant of the fruits of his judgment. The applicant has not given to the court sufficient materials to enable it to exercise its discretion in granting the order of stay."

An applicant must place before court sufficient material to enable the court determine whether or not in exercising its discretion the application for stay merits that exercise of Judicial discretion in his favour. In the case of *Machira & Machira & Co Advocates vs East Africa Standard* (No.2) [2002]2 KLR 63 *Kuloba J.* had the following to say:-

"The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage – this is the trite knowledge. This is

one of the fundamental procedural values which is acknowledged and normally must be put in effect by the way we handle applications for stay of further proceedings or execution pending appeal.

The learned Judge then continued:-

“A court will not order a stay of execution upon a mere vague speculation. There must be the clearest ground of necessity disclosed on evidence. Commonly the applicant may obtain a stay of further proceedings or execution if he shows facts which point to a conclusion that to allow execution or further proceedings to go ahead before appeal is concluded would let an impecunious party to pocket and squander or pilfer what may be needed in restitution if the appeal succeeds and is allowed ...”

On the same point, *Musinga J.* (as he then was) in the case of *Daniel Chebutul Rotich & 2 others vs Emirates Airlines, Civil Suit No.368 of 2001* stated:-

“Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.”

Back in the case of Kenya Shell (supra) *Platt J.A.* on his part stated as follows:-

“It is usually a good rule to see if order XLI rule 4 (now order 42 rule 6(2)) of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant it would be a rare case when the appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what is to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money ...”

An applicant who approaches the court for a stay of execution must show by evidence that he will suffer substantial loss. It is not enough for the applicant to merely state that he will suffer substantial loss without demonstrating how. Substantial loss is not a mere allegation but a fact that must be shown to exist or likely to happen in order for the court to exercise its discretion in favour of that applicant.

The applicant before me has not in any way attempted to show what substantial loss he will suffer if the court declined to grant him stay of execution. It is clear on the authorities cited above that the applicant has not discharged the burden of showing that on this point he deserves this court's exercise of discretion in his favour.

The last point for consideration is that of security. An applicant is required to provide security for the due performance of the decree or order should the court find him liable. In the case of *Kenya Commercial Bank Ltd vs Sun City Properties Ltd & 5 others* [2012] eKLR the court said:-

“In an application for stay, there are always 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 competing interests should always be balanced. In a bid to balance the two competing interests, the courts usually make an order for suitable security for the due performance of the decree as the parties wait for the outcome of the appeal?”

The applicant has not volunteered to offer security for the due performance of the decree should he be found to be liable. He is not interested in the fact that the respondent is a successful party who has a decree in his favour, a right that has accrued and which should also be safeguarded.

Upon a careful consideration of this matter and the material before me I am not satisfied that the applicant has met the threshold for granting a stay of execution under *order 42 rule 6(2)* of the Civil Procedure

Rules. Consequently the application dated 1st December, 2015 is declined and is hereby dismissed with costs.

Dated and delivered at Kakamega this 26th day of January, 2016.

E.C. MWITA

JUDGE