



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 15 OF 2014

GEOFFERY MURIUNGI

NJERU INDUSTRIES.....APPELLANT'S

Versus

**JOHN RUKUNGA M'IMONYO suing as legal representative of the estate
of**

KINOTI SIMON RUKUNGA (DECEASED).....RESPONDENT

RULING

[1] I have before me a Notice of Motion which is expressed to be brought pursuant to Order 42, Rule 6 of the Civil Procedure Rules and Sections 1A,1B,3,3A of the Civil Procedure Act and Articles 10 (2), (B), and 159 (a), (b), (d) and (e) of the Constitution of Kenya. The major orders sought in the application are:-

- a. **That court be pleased to issue orders of stay of execution of the judgment/decree in Tigania PMCC No.4 of 2013 dated 13th May 2014 pending the hearing and determination of the intended appeal herein.**
- b. **That cost of this application to be in the intended appeal.**

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

- a. **That the applicant herein is aggrieved by the entire judgment of the learned trial magistrate and has lodged an appeal against the same.**
- b. **That the applicant has filed a memorandum of appeal within the prescribed time in law.**
- c. **That the applicant has requested for certified copies of the decree and judgment.**
- d. **That the respondent has now threatened to execute against the applicant vide the letter dated 26th June 2014 tabulating costs of the suit awarded with a demand of the payment of costs of the suit as well as decretal award.**
- e. **That the applicant shall be greatly prejudiced if the stay of execution is not granted as they have an arguable appeal.**

f. That no prejudice shall be suffered by the respondent if the orders sought are not granted

[3] The Appellants argued that being dissatisfied with the judgment/decreed in Tigania PMCC NO.4 of 2013 they instructed their advocate to lodge an appeal- the appeal is arguable with a great probability of success. Thus, in the circumstances, it was only fair, just and in conformity with the rules of natural justice to be granted stay of execution.

[4] The Respondent opposed the application and filed a Replying Affidavit on 12th August 2014. The Respondent deposed inter alia that the application was an afterthought having been filed almost 2 months after filing of the appeal on 27th May 2014. He averred further that stay of execution should be denied because he is financially stable and materially well endowed to refund the decretal sum and costs in the unlikely event the appeal succeeds.

[5] Parties also filed submissions following the directions of the court on 9th November 2015 that this application shall be canvassed by way of written submissions. The Applicants submitted that they have met the requirements of Order 42 Rule 6 of the Civil Procedure Rules. First, they stated that the instant application was filed two months after the judgment appealed from was delivered and hence there was no unreasonable delay in bringing the application. They also asserted that the applicants are bound to suffer substantial loss and damage which cannot be adequately compensated if the stay orders are not granted. This argument was elaborated upon further. The Applicants urged that their appeal would be rendered nugatory if stay was not granted as the applicant's assets would be in danger of attachment and that the respondent had not demonstrated that in the event the appeal was allowed and the decretal amount paid to him he would be able to pay back. In support of this proposition the applicants relied on a number of cases by yours truly, and a Court of Appeal decision in the case of **Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988)1 KAR 1018.** Lastly, the Applicants submitted that security need not be ordered because they are persons of means and shall at any time after judgment if required pay the decretal sum at the most convenient instant. Consequently the appellants urged the court to grant a stay of execution.

[6] The Respondents submitted that there was no evidential material before court to demonstrate substantial loss as to persuade the court to grant stay of execution. Again, the Respondent stated that he was not a man of straw but would be able to repay the decretal sum in the unlikely event that the purported appeal succeeds. The Respondent further contended that the instant case is attended to by a delay of about 41 days which had not been explained. The application was an afterthought. The delay offends the law and so the application should be dismissed for that reason. dent urged the court to dismiss the application.

DETERMINATION

[7] I have carefully considered this application; the rival submissions and the authorities relied upon by the parties. The instant application is brought inter alia pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules. I need not re-invent the wheel. Under Order 42 Rule 6 of the Civil Procedure Rules, the court has discretion to order stay of execution pending appeal if sufficient cause is shown by the Applicant. Traditionally, in determining such application, the court will be guided by the following considerations- :

- 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.**

But the cornerstone of the jurisdiction of the court in Order 42 rule 6 of the Civil Procedure Rules is whether substantial loss would occur if stay of execution is not granted. In other words, where it is not

proved that substantial loss would occur it is less likely that a stay of execution will be ordered. Has the Applicant met the threshold of the law?

Timeous filing of application

[8] This ground is normally easy to determine and is usually straight forward. Although there is no exact measure as to what amounts to unreasonable delay, it will not be difficult to discern inordinate delay when it occurs. It must be such delay that goes beyond acceptable limits given the nature of the act to be performed. In the instant case the decision being appealed against was made on 13th May 2014. The original Memorandum of Appeal was filed in court on 27th May 2014. This was a period of approximately 14 days from the date of the impugned decision. This application for stay was filed in court on 8th July 2014, which was a period of slightly over one month from the date of the impugned decision. In my estimation, there has been no inordinate delay in bringing the application. Accordingly, I find and hold that the applicant has satisfied the 1st consideration for stay of execution. I move on to the most important ground: Will substantial loss occur if stay of execution is not granted?

Of substantial loss occurring

[9] The undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “*reducing the successful appellant into a pious explorer in the judicial process*”. The said state of affairs is what is referred to as “*substantial loss*” within the jurisprudence in the High Court, or “*rendering the appeal nugatory*” within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal. On this, see the decision of the Court of Appeal in the case of **Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018**, that:-

“It is usually a good rule to see if Order 41 Rule 4 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 an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

For fuller understanding, “substantial loss” has been defined and in this respect I am content to cite a work of Ogola J in ***Antoine Ndiaye vs. African Virtual University Nairobi Hccc No 422 of 2006*** where he, in a superb manner, analyzed contemporary jurisprudence from Uganda and elsewhere on this subject as follows:

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”

[10] Will substantial loss occur? The Applicant bears the legal burden to prove that substantial loss would occur. Courts of law have said time and again that mere claim that the Respondent cannot refund the decretal sum is not sufficient. At least there must be reasonable grounds provided by the Applicant to show that the Applicant cannot make refund of the decretal sum; after which the Respondent will be called upon to discharge his evidential burden. This scheme of things is so tailored by the law in recognition that both parties have rights: The Applicant has right of appeal which includes right for his appeal not to be rendered nugatory; and the Respondent has right to immediate enjoyment of the fruits of his judgment which must not be restricted or postponed except on a lawful and justifiable cause. The court then finds itself in a novel balancing act of these competing rights in order to attain almost symmetrical balance between them. That is exactly what I will do here.

[11] The Applicant contended that if an order of stay is not granted, his appeal would be rendered nugatory; and his assets would be in danger of attachment. He also stated in his submissions that the Respondent is a man of straw and cannot be able to refund the decretal sum herein which is colossal. The Applicant also submitted that there is no prejudice that will be suffered by the Respondent if stay is

granted. He did not end there. He submitted that security need not be ordered as the Applicant is a man of means and shall at any time after judgment, if required to do so, pay the decretal sum at the most convenient instance. The Respondent, on the other hand, has sworn in his Replying Affidavit that he is financially and materially well-endowed as to be able to refund the decretal sum herein. He went ahead to provide evidence of his means, to wit; he owns four parcels of land measuring 5.69 acres with over 20,000 tea bushes. The tea gives him substantial monthly earnings, and he annexed KTDA pay slip to show that he earned Kshs. 226,428.40 in the month of September 2013. He also averred that his said parcels of land are worth more than Kshs. 6,500,000. On the basis of this information, the Respondent stated that he is able to refund the decretal sum herein if he is required to do so. I must state that the averments by the Respondent on his means have not been challenged. There is no doubt that he is able to refund the decretal sum herein if he is called upon to do so. The submission by the Applicant that the Respondent is a man of straw was, therefore, not founded on any factual reality. Despite the foregoing, however, I note that the Respondent is the personal representative of the estate of Kinoti Simon Rukunga, deceased- and perhaps a beneficiary too for he is the father of the deceased. This fact is substantial and adds a twist to the matter; and may shift focus from the Respondent's personal capacity to his representative capacity. In consideration of that squirm, I am inclined to grant stay of execution except on condition that: the Applicant pays 1/3 of the decretal sum to the Respondent and deposits the other 2/3 in an interest earning account in the joint names of counsel for the parties within 45 days. I note that the Applicant had stated boldly that he is a man of means capable of paying the entire decretal sum at once and at any time or instance. But before I close, I should say two things here: First, the said declaration is only good in sanctifying the court in making its order as I have done. Second, the Applicant's ability to pay the decretal sum at once or at any time or instance is not a substitute for security which the court may order for the due performance of a decree which may ultimately be binding on the Applicant under Order 42 rule 6 of the Civil Procedure Rules. In light of the results of this application, costs of the application shall abide the appeal. It is so ordered.

Dated, signed and delivered in court at Meru this 18th day of February 2016

F. GIKONYO

JUDGE

In the presence of:

M/s. Kiome for A. Anampiu for appellant.

M/s. Nyaga for Mbaabu advocate for respondent.

F. GIKONYO

JUDGE