



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL NO.45 OF 2015

M'NDAKA MBIUKI.....APPELLANT

VERSUS

JAMES MBAABU MUGWIRIA.....RESPONDENT

RULING

[1] Other than provision for costs, the significant order sought in the Notice of Motion Application dated 6th October 2015 is stay of execution of the decree in **Nkubu SRMCC NO.26 OF 2015** pending the hearing of this appeal. The Motion is expressed to be brought pursuant to Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules 2010. The grounds on which the application is premised are:-

- a. **That the appellant's movable properties have been proclaimed in execution of the decree obtained by the Respondent in the lower court.**
- b. **That substantial loss will result to the Applicant unless the orders sought herein are granted.**
- c. **That this application has been made without unreasonable delay.**
- d. **That the applicant is ready and willing to provide such security as the court orders for the due performance of the decree.**

[2] According to the Appellant, interlocutory judgment was entered against him at the instance of the Respondent on 29th April 2015. He sought to have the said judgment set aside but his application was dismissed on 16th September 2015. Thereafter, auctioneers proclaimed his property in execution of the said ex parte judgment. In the circumstances, the Appellant argued that he stands to suffer irreparable loss and damage unless stay is ordered.

[3] The Respondent opposed the application. He asserted that the ruling that was delivered by the trial court was sound in law and in fact and should not be disturbed on appeal. He also was of the view that the appeal herein lacked merit and was incompetent.

[3] On 21st October 2015 it was agreed that the application for stay be canvassed by way of written submissions. Parties filed their respective submissions on the application and each reinforced their respective grounds stated above. The Applicant submitted that he had met the requirements of Order 42 Rule 6 (1) (2) of the Civil Procedure Rules. On substantial loss, the Applicant relied on the case of **Antoine Ndiaye vs. African Virtual University Nairobi H.C.C.C No 422 of 2006** where Ogola J rendered himself thus:

“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.”

With regard to the other ground namely whether the application has been brought without unreasonable delay, the Applicant submitted that this application was filed on 6th October 2015 whereas the impugned decision was made on 16th September 2015- a period of about 20 days- which in his view was not unreasonable. And on the third condition, the Applicant expressed willingness to offer security as may be required. Consequently, the Applicant is convinced he had satisfied the requirements in Order 42 of the Civil Procedure Rules and that his application should be allowed.

[4] The Respondent took a different view. He urged that the Applicant should not be the one to satisfy the decree; in such a scenario the Applicant ought to have filed a third party notice and not an appeal. Consequently, the Respondent urged the court to dismiss the application with costs.

DETERMINATION

[5] I have carefully considered this application, the rival submissions by the parties and the authorities relied upon by the Applicant. The power of the court to grant stay of execution of a decree pending appeal is provided for in Order 42 Rule 6 of the Civil Procedure Rules. Under the said Rule, the court will only grant a stay of execution of decree pending appeal where the Applicant has shown sufficient cause. Traditionally, in determining whether to grant stay of execution, the court will consider:-

(a) Whether the application for stay of execution has been brought without unreasonable delay;

(b) Whether substantial loss will occur if stay of execution is not granted; and

(c) If the court is inclined to grant stay upon consideration of the two foregoing factors, the court should call for such security for the due performance of such decree or order as may 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

[5] 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. The impugned decision herein was made on 16th September 2015 and this application was filed in court on 6th October 2015. We are talking of about 20 days which in my opinion is not unreasonable delay no matter the yardstick one uses. Consequently I do hold and find that the application has been brought without unreasonable delay. 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

[5] It bears repeating that 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. It is not in dispute that the Applicant's properties have been proclaimed in execution of the decree herein. It is expected that attachment of the J/D's properties is painful to him. However, that *per se* would be the pain of justice in execution of a decree which is duly authorized process of the court. Therefore, merely that attachment has occurred is not synonymous with substantial loss occurring in the sense of Order 42 rule 6 of the Civil Procedure Rules. Much more is needed to be proved by the

Applicant and in money decree such as this; it is the inability to recover the decretal sum from the Respondent in the event the appeal succeeds which is the major consideration for stay of execution pending appeal. Needless to state that; this subject is replete with judicial decisions but I do not wish to multiply them. Except to state that, the position taken by the law on stay of execution pending appeal is in recognition of the fact that each party has a right. The Appellant has a right of appeal which includes the right that his appeal will not be rendered a mere barren result. Similarly, the Respondent has a right to immediate enjoyment of his judgment; this is not the lesser and it will only be postponed or restricted upon the Applicant showing sufficient cause for the court to do so. I am afraid to state that the Applicant did not canvass the above factor at all. Thus, there is absolutely nothing which shows that he will not get a refund from the Respondent if he is successful in his appeal. Instead he was preoccupied with the notion that “...my appeal raises strong and cogent issues and has a high chance of success”. Court have said time without number that success or otherwise of the appeal is a threshold in the Court of Appeal. The court, at this stage is not primarily evaluating the prospects of the appeal. Although, however, demonstrating that the appeal has high chances of success may add power and punch to the Applicant’s push for stay of execution. The major consideration in the High Court is whether substantial loss would occur if stay of execution is not granted. The foregoing notwithstanding, the appeal relates to right to have his defence heard on merit. I also note that the Applicant has expressed his willingness to deposit the entire decretal sum in court. For those reasons, I am inclined to granting stay of execution pending appeal. But on condition that the Applicant;

- (a) Pays one half of the decretal to the Respondent within 30 days from today;***
- (b) Pays the other half of the decretal sum to an interest earning account in the joint names of counsels herein within 30 days of today; and***
- (c) Pays the auctioneers charges on scale- to be taxed or agreed between the parties- within 30 days of taxation or agreement thereto. It is so ordered.***

Accordingly, I allow the application dated 6th October 2015 subject to the above conditions. The costs of this application will abide the appeal.

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

F. GIKONYO

JUDGE

In the presence of:

Mr. Anampiu Advocate for B.G. Kariuki Advocate for respondents

M/s. Nyagah advocate for applicant.

F. GIKONYO

JUDGE