



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL NO 37 OF 2015

ABDULLAHI SAID SALAT.....APPELLANT

VERSUS

UGAS SHEIKH MOHAMED.....RESPONDENT

RULING

Stay of execution pending appeal

[1] Before me is the Motion dated 27th October 2015. The Motion seeks for stay of execution of the judgment and decree dated 23rd October 2015 by MAUA CMCC NO 4 OF 2015 pending the hearing and determination of this appeal. The specific act that is to be stayed is the release of motor vehicle registration number KBK 854M TOYOTA ALLION to the Respondent by Maua Police Station. In effect, the Applicant is saying that the said motor vehicle should remain at Maua Police Station until the appeal is heard. The Motion is supported by three affidavits sworn by the Applicant to wit; the Supporting Affidavit of the Applicant sworn on 27th October 2015; the Further Affidavit and 2^{NND} Further Affidavit. The application is expressed to be brought under Order 42 rule 6(1) & (2), and Order 51 of the Civil Procedure Rules, Sections 1A, 1B, 3A & 63(e) of the Civil Procedure Act and all other enabling provisions of the law. The application has been opposed by the Respondent.

[2] On 14th December 2015 with the consent of the parties, the court directed that this application shall be canvassed by way of written submissions. Parties filed their respective submissions which I shall consider below.

The legal threshold

[3] I will not re-invent the wheel. The power of the court to grant stay of execution pending appeal is provided for in Order 42 rule 6 of the Civil Procedure Rules. The cornerstone of that jurisdiction is to prevent substantial loss from occurring upon the Applicant while he is pursuing his right of appeal. Thus, the Applicant must show that substantial loss would occur unless an order of stay of execution is granted. In addition to this linchpin consideration, the court should also consider:

- (a) Whether the application was brought without inordinate delay; and
- (b) If the court is inclined to granting stay, what security would be sufficient for the due performance of the decree that might ultimately be binding on the Applicant?

These prescriptions of the law are to be fed into the circumstances of the case in order to do justice. This is achieved by recognizing that each of the parties in the suit has rights. The Appellant has right of appeal which should not be reduced to mere aspiration. Such unsatisfactory state of affairs would arise if execution of the decree will render the appeal nugatory; that is the substantial loss which should be prevented. On the other hand, the Respondent has a right to immediate enjoyment of the fruits of his judgment which should not be postponed, restricted or diminished except on sound legal cause. In this mix, the court finds itself in a novel balancing act of those rights. This is exactly what I am now descending upon to do.

Timeous application

[4] There is no exact measure as to what amounts to inordinate delay and this will depend on the circumstances and nature of each case. However, there will be little difficulty to discern that delay that is beyond acceptable limits has occurred. The judgment being appealed from was delivered on 23rd October 2015. This application was filed on 27th October 2015- barely 4 days thereafter. By any yardstick, this is not inordinate delay whatsoever. Therefore, the application passes the first test. I move on to the more substantial points.

Of substantial loss occurring

[5] I have already stated that the Applicant must prove that substantial loss would occur unless stay of execution is granted. But what is substantial loss as a concept in law? The phrase "substantial loss" has been defined and I am content to cite a work of Ogola J in **ANTOINE NDIAYE vs. AFRICAN VIRTUAL UNIVERSITY NAIROBI HCCC NO 422 OF 2006** where the good judge, in a superb manner, analyzed contemporary jurisprudence from Uganda and elsewhere on this subject and concluded that:

"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."

[6] To illustrate the kind of loss that is to be prevented through stay, I normally equate a successful appellant to mere holder of a barren result which he cannot realize. It bears repeating that to allow a right to be dwindled in that manner will be like "*reducing the successful appellant into a pious explorer in the judicial process*". The said state of affairs would be most regrettable. But it is the Applicant who should prove substantial loss. On this, see the decision of the Court of Appeal in the case of **KENYA SHELL LIMITED vs. BENJAMIN KARUGAKIGIBU & RUTH WAIRIMUKARUGA (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."

[7] Applying this test, has the Applicant established that he will suffer substantial loss if stay of execution is not granted? I can summarize the Applicant's contentions as follows. That the subject matter of the appeal is motor vehicle number KBK 854M, Make Toyota Allion. He is apprehensive that, if the said vehicle is released to the Respondent, it will be dealt with in a manner that defeats the purpose of the appeal. The Applicant stated that there is no guarantee that the vehicle will be available or in good condition at the time the appeal is finalized. Thus, if that is not prevented, and his appeal succeeds, he will be a mere holder of a barren success. He, therefore, seeks preservation of this vehicle by the County Commander, Criminal Investigation Department, Meru, until the appeal is heard and finalized. He relied on the case of **JAMES GATHIRUGITAU VS. STEPHEN NJOGUKIRUMBA [2005] eKLR** where Visram J (as he then was) ordered a vehicle whose ownership was in dispute to be committed to the Flying Squad at Pangani Police Station for preservation until the appeal was heard and determined. The Applicant added another angle to this case when he claimed that the Respondent regained possession of

the subject motor vehicle when an order for stay of execution was subsisting. According to the Applicant, the Respondent is determined to frustrate the cause of justice and keep the Applicant from the vehicle.

[8] The Respondents opposed the application. He argued that the vehicle herein was released to him on 26th October 2015 after the trial court ordered it to be released to him forthwith. He, therefore, vehemently refuted the argument by the Appellant that he obtained possession of the vehicle during the subsistence of a court order as none was brought to his attention until 2nd November 2015. He was of the view that this application has been overtaken by events as the vehicle has already been released to him. He continued to submit; that this application is an afterthought and has been brought in bad faith. He complained that the intention of the Applicant is to tie the Respondent in litigation forever for he has nothing to lose if the vehicle depreciates. He averred that the said vehicle was vandalized when it had been held at Maua Police station and is now mere shell. He, therefore, read mischief in the request by the Applicant that the vehicle to be returned to a police station, worse still, for unspecified period of time. In any event, he urged that the loss herein is quantifiable and will be recovered as such if he succeeds in his appeal.

[9] The Respondent summed up; that he is the registered owner of the vehicle herein, thus, the James Gathiru case is distinguished; this appeal lacks merit and should be dismissed with costs to him.

[10] These parties are really feuding over the vehicle in question. From the record, each is doing his best to out-do the other on possession of the vehicle in issue. But besides that, the Applicant is claiming ownership of the vehicle herein and so is the Respondent. The Respondent is the registered owner of the vehicle and claims he has always been in possession of the vehicle until it was impounded in 2014. He has already a judgment in his favour. The Applicant claims that the Respondent did not buy the vehicle, but rather, he fraudulently transferred it into his name. But ownership is still in dispute, hence, this appeal. The question would be; will substantial loss occur if the appeal succeeds and the vehicle has been wasted away or even transferred to a third party? Definitely, the answer is yes. Nonetheless, it is also likely that the vehicle will be dissipated if it is placed in a police station for unspecified period of time. But since ownership is in dispute, it would be inappropriate to leave the vehicle in the hands of one party, in this case the Respondent. But, I am minded about the wasting away or dissipation of the vehicle if it is committed to a police station for unspecified period of time. I am acutely aware that appeals may take a considerable time to conclude, and if that were to happen in this case, the entire litigation may become a complete mockery of justice to whoever will eventually take the vehicle. Therefore, whereas the Applicant has made out a prima facie case for the need to preserve the vehicle herein, I will only order preservation of the vehicle herein in a police station on condition that the Applicant deposits a sum of Kshs. 900,000 in an interest earning account in the joint names of the parties and the Deputy Registrar in a reputable bank to be agreed among the parties herein within 30 days. The course I have taken will ensure full satisfaction of any decree including loss of user- that may become binding on the Applicant. I am glad that the Applicant undertook to give any security that the court may deem fit for the performance of the decree that he may be called upon to satisfy. Accordingly, I order that motor vehicle registration Number KBK 854M Make Toyota Allion shall be preserved by the office of the County Commander, Criminal Investigation Department, Meru. But, the vehicle shall be so preserved only after the Applicant has, within 30 days from today, deposited a sum of Kshs. 900,000 in an interest earning account in the joint names of the parties and the Deputy Registrar in a reputable bank to be agreed among the parties herein. It is so ordered.

Dated, signed and delivered in open court at Meru this 31st day of March 2016

F. GIKONYO

JUDGE

In the presence of:

M/s Njenga for Appellant

Thangicia for Kiogora for Respondent

C/c Mwenda/Mark

F. GIKONYO

JUDGE