



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 280 OF 2015

JOHN MUSERA KILINGA.....APPLICANT

- VERSUS -

NIC BANK LIMITED.....RESPONDENT

RULING

1. The application is for enlargement of time within which to appeal. Secondly, the applicant seeks a stay of execution pending the hearing and determination of the appeal.

2. The Ruling in respect to which the applicant wishes to appeal was delivered on 21st July 2014.

3. Pursuant to the provisions of Section 79 (g) of the Civil Procedure Act;

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order;

Provided that an appeal may be admitted out of time if the appellant satisfied the court that he had good and sufficient cause for not filing the appeal in time?.

4. In this case, the appeal was lodged on 31st July 2014. That means that by the time it was lodged, the period within which it could be filed had not yet lapsed.

5. The respondent confirms that, in its understanding, the applicant did not require the leave of the court to appeal.

6. In the circumstances, I find that the request for leave to appeal out time was superfluous.

7. Meanwhile, as regards the prayer to stay of execution, the applicant pointed out that he had been served with a Notice To Show Cause, requiring him to show cause why he should not be arrested and committed to civil jail.

8. In effect, the applicant was saying that unless this court granted an order staying the execution of the

decree, there was a real probability that the decree would be executed against him.

9. By dint of the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules;

***“No appeal on second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside?.*”**

10. In this case, the appellant said that he had applied to the magistrate’s court for stay of execution. However the said application was said to be pending.

11. In effect, the application had neither been allowed nor rejected.

12. As the magistrate’s court had been informed about the application which the appellant had filed in the High Court, seeking stay of execution, the magistrate’s court decided to wait for a decision from the High Court.

13. There is no doubt that in an ideal scenario, an appellant from a decision of the magistrate’s court should, ordinarily first seek stay of execution from that court.

14. If the application was granted or rejected by the magistrate’s court, the appellant could lodge another application for stay of execution, at the High Court.

15. In my considered view, an application to the High Court could be made even when the magistrate’s court had allowed the initial application for stay, because the applicant may be unsatisfied by the terms which the magistrate’s court had imposed.

16. Order 42 Rule 6 (2) of the Civil Procedure Rules makes the following point, emphatically;

“No order for stay of execution shall be made under subrule (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 applicant?.

17. The respondent has pointed out that this application was made after one year had lapsed from the time the magistrate’s court delivered its ruling. Therefore, the respondent submitted that there had been unreasonable delay.

18. According to the respondent, there had been no explanation offered by the appellant, for the delay.

19. But the record shows that the court file before the magistrate’s court had been missing for a considerable length of time. During the time when the court file was unavailable, it would not have been possible for the applicant to move the court. Therefore, I find that the applicant has provided sufficient explanation for the delay in filing the present application. In the event, there was no unreasonable delay in bringing the application for stay of execution.

20. The respondent’s chosen mode of execution is the process of having the applicant arrested and detained in civil jail.

21. In my considered view, the arrest and detention in civil jail of the applicant, whilst his appeal was still pending, would cause him to suffer substantial loss.

22. In **MACHIRA t/a MACHIRA & Co. ADVOCATES Vs EAST AFRICAN STANDARD (No. 2) [2002] KRL 63** the court said;

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars ... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant stay...?”

23. Incarceration is tangible. It takes away a person’s liberty. And if a person is sent to jail on the strength of a court order, he may be unable to undo the damage caused to him even if he later wins his appeal against the decree.

24. In **JOSEPH SIMIYU MUKENYA Vs AGNES NALIAKA CHESETO MISC APPLICATION No. 42 of 2011 (at Bungoma)**, Gikonyo J. stated as follows, when discussing what constitutes substantial loss;

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal?”

25. In this case I find that the applicant has discharged that onus.

26. Finally, an applicant for stay of execution pending appeal is required to provide such security as may be needed for the due performance of the decree or order as may be binding on him, ultimately.

27. Although the applicant did not offer any security, the court cannot excuse him from the need to provide security, as a pre-condition for an order staying execution.

28. Accordingly, I now order that there shall be a stay of execution of the decree until the appeal is determined. However, the applicant is obliged to deposit in court, within the next fifteen (15) days, the sum of Kshs. 500,000/-, as security for the due performance of the decree. If the applicant fails to put together the security within the 15 days, the stay of execution shall automatically lapse.

29. Meanwhile, the costs of the application dated 2nd June 2015 shall be in the cause, in the pending appeal. If the applicant wins the appeal, he shall also get the costs of the application. But if the applicant loses the appeal, the respondent will be awarded the costs of the application.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of March 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Miss Atim for the Applicant

Wamae for Kabaiku for the Respondent

Collins Odhiambo – Court clerk.