



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 614 OF 2012

KINOTI MARETE.....APPELLANT

VERSUS

MOSES NJANE KIARIE.....1ST RESPONDENT

KENYA POWER & LIGHTING CO. LTD.....2ND RESPONDENT

RULING

1. **Kinoti Marete** the appellant herein took the motion dated 16th October 2015 in which he sought for the following orders:

- i. ***THAT the application be certified urgent;***
- ii. ***THAT a stay of execution be granted of the judgment, order and decree of the honorable Chief Magistrate T.W.C Wamae dated 2nd November, 2012 and all consequential orders until the hearing and determination of this application;***
- iii. ***THAT a stay of execution be granted of the judgment, order and decree of the honorable Chief Magistrate T.W.C Wamae dated 2nd November, 2012 and all consequential orders until the hearing and determination of the High Court Appeal number. 614 of 2012.***
- iv. ***THAT costs be in the cause hereof.***

2. When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent to have the matter disposed of by written submissions. I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavits filed for and against the application. The appellant avers that the respondent intends to execute the decree unless an order for stay is granted. The appellant further pointed out that he was ordered by the lower court to deposit the entire decretal sum of kshs 1,008,721/= within 21 days as a condition for being granted stay of execution. He claims that he is not in a position to secure the decretal sum since he has not been working for the reasons that, he has been ailing from hypertension and rheumatoid arthritis and he has other financial challenges that include paying school fees for his two children who are undertaking an education and taking care of his aging mother. He claims that he risks being committed to civil jail unless he pays the decretal sum. He claimed that if orders of stay fail to issue, he will suffer irreparable loss and is optimistic that the appeal is arguable and has overwhelming chances of success.

The respondent on his part argued that the appellant made a similar application in the lower court and was granted an order of stay of execution on condition that he deposits the decretal sum in court within 21 days. He averred that the application having been granted in the lower court, the filing of this application amounts to abuse of the court process since the appellant would be right to make a

similar application for stay if the one in the lower court was denied. He contended the order of stay lapsed upon the appellant failing to comply with the 21 days condition. He asserted that the appellant has not taken any step toward execution of the alleged appeal and has not prosecuted it in 3 years. He argued that the appellant only woke up from slumber after being served with the notice to show cause. He further argued that the appellant has not satisfied the conditions of order 42 rule 6(2) including the fact that he has not offered to deposit the decretal sum as security. He stated that there has been inordinate delay in filing the application for stay since the judgment was delivered on 2nd November 2012 and the appellant filed the application after 31 months. He concluded that the appellant has not shown that he will suffer substantial loss as required.

3. The principles to be considered in an application for stay are well settled under Order 42 Rule 6. Firstly, there must be threat of substantial loss on the part of the applicant if the orders of stay fail to issue. Secondly, the application must have been brought without delay and thirdly, that the provision for security for the due performance of the decree should be considered.
4. In this case, the respondent claims that the appellant sought similar orders of stay in the lower court where he was granted the orders of stay on condition that he deposits the full decretal sum as security within 21 days failure to which the orders of stay of execution will lapse. An order to this effect was annexed, which order I have perused and verified that an order of stay of execution was issued. In that order, the Honorable Magistrate gave her reasons for granting the order which included; that the application had been made more than two and a half years after the delivery of the judgment and the 2nd defendant is guilty of laches and that the memorandum of appeal had never been prosecuted. The respondent claims that the judgment in this matter was delivered on 2nd November 2012, an assertion that the appellant has not disputed. It is evident from the court record that the appeal in this court was initiated by a memorandum of appeal which was filed on 16th November 2012. However, the appellant later moved the lower court vide an application dated 24th June 2015 seeking orders of stay of execution which orders were granted.
5. The appellant is required to file an application for stay of execution without undue delay for this court to consider the application. In this case, the appellant despite filing the memorandum of appeal on 16th November 2012, he exercised his right and chose to return to the lower court to file the stay of execution application which was heard on 24th June 2015. He was granted the order of stay which lapsed after 21 days from the date of the order. The appellant then came to the High Court filed a similar application seeking orders of stay of execution.
6. It is clear from the history of this matter that the appellant has been indolent. It took him close to 3 years to file an application of stay after judgment was delivered on 2nd November 2012. That was unreasonable delay, however, the lower court was lenient on him despite this inordinate delay and explained to him thus at the same time giving him conditional stay with a stipulated time within which to deposit the security which he failed to do. Now the appellant is seeking orders of stay since the ones issued by the lower court have lapsed seeing that he did not deposit the decretal sum. Order 42 Rule 6 of the Civil Procedure Rules requires party to file an application for stay from the court appealed from and if denied then he has the right to file the same application in the court he is appealing to. The appellant in this case was not denied orders of stay instead he was granted with a condition. He cannot therefore come to this court seeking fresh orders of stay since the previous orders of stay have lapsed due to his ineffectiveness. This is an abuse of the court process and it is unacceptable. The appellant has not acted in good faith. To date, he has not filed a record of appeal and has not attempted to prosecute this appeal.
7. Having perused the material before the court, I see that the appellant claims that the respondent is not a man of means and that he will not be in a position to refund the decretal sum. He has not however shown or tendered proof to show that he will not be in position to pay the decretal sum should the appellants appeal be successful. I am therefore convinced that the respondent will pay up the decretal sum if the appeal is successful. Despite his woes, the appellant has not convinced me that the application filed herein is filed with honest intentions.

8. Even if I was to consider the application, though the appellant has established the substantial loss he would suffer which includes committal to civil jail with his poor health and the responsibilities on his plate, he has not addressed the issue of security. He has not shown that he is willing to deposit any security which under Order 42 Rule 6 of the Civil Procedure Rules is a prerequisite. Moreover, the delay in bring the application is more than two years which goes without saying that the same is inordinate delay.

9. In the end, I find the motion dated 16th October 2015, lacks merit and I hereby dismiss it with costs to the respondent.

Dated, Signed and Delivered in open court this 18th day of March, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent