



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CIVIL APPEAL NO. 97 OF 1999.

KENYA COMMERCIAL BANK LTD.APPELLANT/APPLICANT.

VERSUS

JOHN BENJAMIN WANYAMA..... RESPONDENT.

R U L I N G.

1. The application before me is in respect to prayer No. 3 of the Notice of Motion dated 25th November, 2015. It seeks orders in the following terms:-

“That upon interpartes hearing hereof, the Honourable court be pleased to issue order (sic) for stay of execution of its order/decreed herein as purportedly presented vide warrants of attachment and sale of property in alleged execution of decree (sic) allegedly issued on 16th June, 2015 pending the hearing and/or final determination of appeal arising herefrom and challenging the same.”

2. The application is predicated on the following grounds:-
 - a. *The appeal herein was on 16/6/2015 ordered dismissed with costs to the respondent;*
 - b. *The appellant/applicant herein being dissatisfied with and or aggrieved with the decision of the Honourable Court in its entirety promptly filed its notice of appeal, applied and paid for certified copy of the proceedings (sic) and judgment;*
 - c. *The said appellant/applicant by virtue of the timeous filing of the said Notice of appeal is deemed to have lodged its appeal against the said decision complained of herein;*
 - d. *In the pendency of the said appeal the respondent has proceeded to mislead the court into assessment of costs based on an illusory decree of the sum of Ksh. 2,636,760/= plucked from the skies and without any justification whatsoever and which he intends to execute;*
 - e. *The court file does not show an order as to costs ever been (sic) awarded in the sum of Ksh. 2,636,760/=;*
 - f. *The illusory value of the alleged decree is a serious irregularity on the part of the record of the honourable court as it is neither existent, verifiable nor justifiable;*
 - g. *On the date of alleged assessment of the alleged costs the appellant/applicant was neither served nor notified;*
 - h. *In deed (sic) the said respondent has already, through M/s. Eshikhoni Auctioneers, threatened the attachment and sale of the movable properties of the appellant/applicant by issuing a proclamation of attachment;*
 - i. *In view of the foregoing irregularities and misleads on the honourable court (sic) by the respondent, the orders of stay, review and or setting aside of order on costs and execution thereof as sought are bound to arrest an impunity perpetrated by the respondent who has acted without candor;*

- j. *In deed (sic) the intended appeal has overwhelming chances of success and shall be rendered nugatory if the orders sought are not granted;*
 - k. *The appellant/applicant will suffer substantial loss if the intended stay is not granted in view of the fact that the said respondent is a man of straw and a perpetual litigant thriving on the utilization of the courts through such misleading tactics to delay and confuse justice;*
 - l. *There is no prejudice that shall be visited on the respondent in the event the orders sought are granted;*
 - m. *The present application has been brought without unreasonable delay in the circumstances;*
 - n. *It is in the best interests of justice that the orders sought be granted.*
3. The application was supported by the affidavit of Wilson Kimeli Matikwony, the Branch Manager, Kenya Commercial Bank, Kakamega, dated 25th November, 2015.
 4. The respondent upon receipt of service of the application filed a Notice of Preliminary objection. One of the grounds dismissed by this court in a previous ruling was a prayer for this court to make a finding that it has no jurisdiction to grant stay of execution orders against its decree made on 16th June, 2015. The reason being that a period of over 5 ½ months had elapsed since then and the appellant/applicant has no pending appeal in the Court of Appeal instituted in accordance with the provisions of the Appellate Jurisdiction Act Chapter 9 of the Laws of Kenya. The respondent filed a replying affidavit dated 1st December, 2014, which date was long before the appeal the subject matter of this application was determined by the High Court. I will however not strike out the affidavit on a technicality. The respondent also filed a photocopy of a further replying affidavit dated 27th January, 2016. The respondent also filed his written submissions on 1st February, 2016.

The applicant's submissions:-

5. Mr. Osango, learned counsel for the applicant submitted that the application before me was brought under Order 42 rule 6 of the Civil Procedure Rules, Section 80 of the Civil Procedure Act and Order 45 rule 1 and Order 50 rule 1 of the Civil Procedure Rules. He informed this court that his prayers were for stay of execution of the decree presented by warrants of execution and sale of property by a decree allegedly issued on 16th June, 2015, pending the hearing and determination of the appeal in the Court of Appeal. He submitted that there was no decree issued assessing the respondent's costs at Ksh. 2,636,760.00 on 16th June, 2015 for the same to be executed by way of warrants of sale of property in execution for money in the warrants dated 18th January, 2016. He prayed for the court to declare those warrants null and void thus devoid of execution.
6. Mr. Osango submitted that the proceedings of 16th June, 2015 do not show an award of the sum of Ksh. 2,636,760.00. He stated that it is admitted by the respondent in his affidavit at paragraphs 18, 21, 22 and 23 that there was no such award. Mr. Osango informed to the court that at paragraphs 18 and 21 of the said affidavit, the respondent deposed that the costs were taxed by the Deputy Registrar (DR) at Ksh. 322,500.00. Mr. Osango submitted that the value of Ksh. 2,636,760.00 had been plucked from the skies without any justification whatsoever and that was an illusory amount with the respondent's intention being to reap from where he had not sown as he is not entitled to the said amount pursuant to the warrants of attachment. It was further submitted for the applicant that the respondent admits in his affidavit that he took the initiative to compute the interest at 14% p.a. whereas there was no order to that effect.
7. Mr. Osango relied on the list of authorities he filed on 3rd December, 2015. He cited the case of **Jackson Kiangi vs. Kasikwa Mukuna, [2005] eKLR, Machakos High Court decision 235 of 1995 at page 2, paras 2 and 3**, where the court stated that under section 27 (2) of the Civil Procedure Act, costs will not accrue interest unless the judge orders so.

He submitted that in the current case there is no order on interest on costs. He informed the court that in the case he had cited, the warrants of attachment that had been issued were recalled. He prayed for the warrants of attachment in this case to be lifted.

8. He added that a certificate of costs cannot be executed without a decree which is a summary of a judgment whereas the court had not been shown a decree or judgment to the effect that that the respondent be paid interest on costs. He relied on the authority of **Otieno Kajwang', Minister for Immigration and Registration of Persons & Another exparte Muhumed Sirat at pg. 12, para 28**. Mr. Osango submitted that, the certificate of costs and warrants of attachment are not in tandem and that it was upon the DR to be vigilant and verify documents before he signs and that the warrants of attachment were signed irregularly without ascertaining what was on record.
9. It was submitted that this court has supervisory powers to ensure that the wheels of justice are properly moved. In reference to the **Kajwang case (supra)**, the court was informed that the DR had signed a decree which was not in tandem with the orders of the court. This court was urged to recall any improper decree that has been issued by the DR.

The applicant also relied on the case of **Rubo Kimngetich Cheruiyot vs. Peter Kiprof Rotich [2006] eKLR at page 7**, where it was held that warrants and execution were null as execution had taken place without a decree.

10. It was submitted that in the present case, the decree was not sent to the applicant for approval after it was prepared by the respondent. Mr Osango urged the court to strike out the respondent's further replying affidavit dated 27th January, 2016, as it was filed without leave of the court. It was submitted that on 16th June, 2015, the respondent's bill of costs was taxed exparte without serving the applicant with a certificate of costs. Mr. Osango informed the court that the bill of costs is dated 11th July, 2015 had the sum of Ksh.180,000/= for taxation , while another bill of costs had a figure of Ksh. 22,000/=. He submitted that these two figures do not add up to Ksh. 322,000/= and had he been present in court, he would have opposed the bill of costs.
11. In conclusion, it was submitted that the applicant has filed a Notice of Appeal and a memorandum of appeal challenging the judgment of the High Court dated 16th June, 2015 and that it will suffer irreparable loss if the warrants of attachment are not stayed. The court was told that the respondent is a man of straw and the applicant will be unable to recover the sum of Ksh. 2,636,760.00 if the same is obtained by the respondent. The applicant was ready and willing to offer security for costs.

The respondent's submissions:-

12. Mr. Wanyama, the respondent who appeared in person, submitted that the applicant is a company and a look at Mr. Kimeli's affidavit dated 25th November, 2015 indicates that he had instructions to swear the affidavit on behalf of Kenya Commercial Bank. It was submitted that the appointment of Mr. Kimeli under corporate seal was neither served on the respondent in accordance with Order 9 rule 2 (c) of the Civil Procedure Rules nor was it filed in the court file. He submitted that Order 42 rule 2 of the Civil Procedure Rules states that a stay of execution is granted if the applicant will suffer substantial loss, the application has been brought to court without undue delay and that the applicant must furnish security. He added that the rule states that an application for stay of execution must be made immediately after issuance of court orders. The respondent submitted that it has taken over 5 months for the applicant to apply for stay of execution. The respondent referred to the ruling of this court in this matter, dated 21st January, 2016 where the court referred to article 159 (b) of the Constitution about justice not being delayed. The respondent submitted that there was unreasonable delay in bringing the application for stay of execution.
13. The respondent submitted that the memorandum of appeal before the court is a draft and that there is no appeal in the Court of Appeal as there is no notice of appeal. The respondent relied on Order 51 rule 1 sub rule 3, in responding to the applicant's prayer for this court to strike out the respondent's further replying affidavit for want of leave to file the same.

14. The respondent relied on the Court of Appeal decision in **Francis Kabaa vs. Nancy Wambui** that stated that stay cannot be granted in respect of costs.
15. He submitted that no decree was drawn on 16th June, 2015. The decree was drawn on 4th September, 2015 and that the certificate of costs was computed. He prayed that in the interest of justice and in line with the provisions of article 159 (b) of the Constitution, this court should dismiss the application with costs as the present application should be heard in the Court of Appeal.

The applicant's response

16. The applicant's counsel in response stated that the warrants of attachment and sale of property are not proper and justifiable for execution and that the respondent did not address this issue. He submitted that the notice of appeal was duly filed and they applied for certified copies of proceedings to enable them file a record of appeal. If they are late, they will apply for extension of time. It was submitted for the applicant that the issue of providing security for costs is discretionary.
17. Mr. Osango further submitted that Mr. Wilson Kimeli is the applicant's Bank Manager, Kakamega branch, thus conversant with the matters herein and competent to swear the affidavit and that Order 19 rule 3 of the Civil Procedure Rules is relevant to that assertion. He added that the notice of appeal was filed on 18th June, 2015, the delay in applying for the stay of execution was not for a period of over 5 months as the certificate of costs was made on 12th November, 2015. He stated that they learnt that the costs had been taxed on 24th November, 2015 and moved with speed to file this application on 25th November, 2015.

Analysis of the issues at hand.

18. The issues for determination are:-

1. *Is the decree dated 16th June, 2015 and issued on 4th September, 2015 in tandem with the judgment delivered on 16th June, 2015?*
2. *If this court can grant orders for stay of execution by virtue of the notice of appeal filed in this case;*

Decree vis a vis the judgment

19. The decree dated the 16th day of June, 2015 and issued on 4th September, 2015 was to the following effect:-

1. *The orders directing the appellant to hold on the appellant's title for plot No. N/Kabras /Kivaywa/515 as well as the order for payment of Ksh. 410,000/= are hereby set aside;*
 2. *There is no amount due to the appellant;*
 3. *The appellant do discharge the respondent's title deed within 90 days hereof in default the respondent shall be at liberty to obtain another title deed or pursue other legal avenues;*
 4. *The appeal lacks merit and is hereby dismissed with costs (sic).*
20. After perusing the judgment delivered on 16th June, 2015, I find that it is in tandem with the decree. The certificate of order for costs dated 12th November, 2015, is the one which threw a spanner in the works. It included compound interest payable at the court rate of 14% per annum

from 30th November, 1999 until the date of payment. Taxed costs certified by the taxing officer stood at Ksh. 322,500.00. The interest on the decretal amount at a rate of 14% amounted to Ksh. 2,636,760.00. This is discernible from the warrant of attachment of movable property in execution of decree for money, dated 18th November, 2015.

21. It is worth noting the Hon. Judge Chitebwe in his judgment did not award interest on costs. The respondent at paragraph 21 and 22 deposes that he applied a court interest rate of 14% per annum to the costs assessed at Ksh. 322,500/=. As at the time the warrants for execution were issued on 18th November, 2015 in satisfaction of the certificate of order for costs dated 12th November, 2015, the applicant had lodged a notice of appeal on 24th June, 2015.
22. I therefore make a finding that the notice of appeal had been filed within the stipulated period of 30 days from the date of the judgment appealed from.

Stay of execution

23. It was submitted that the appeal would be rendered nugatory if stay of execution is not granted as the respondent is a man of straw. In **Nairobi Civil Application No. 238 of 2005, National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another (UR)** the Court of Appeal stated thus:-

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example section 112 of the Evidence Act Chapter 80 Laws of Kenya.”

24. The respondent expected the applicant to avail his bank statement to this court to prove that he is not a man of straw. The court notes that this would have infringed the bank/client confidentiality rules. The respondent had a burden of convincing this court that he is not a man of straw. He failed to discharge the burden. He did not indicate his willingness and/or ability to repay the decretal amount in the event that the appeal is successful. There is therefore a likelihood of the appeal being rendered nugatory if this court does not grant stay of execution.
25. As regards the submission by the respondent that there is no valid appeal filed in the court of appeal, the said court in the case of **John N. Liboyi Vs. the Board of Governors of St. John College Civil Application No. Nai 13 of 2009 (UR 92/2009)**, stated:-

“The court has held on occasions too numerous to recite in this ruling that it is the filing of the notice of appeal which confers on the court the jurisdiction to grant an order of stay, an injunction or a stay of further proceedings that is clear enough”

26. On the respondent's submission that the applicant's appeal is against the judgment and not the decree herein, the Civil Procedure Act provides that a 'decree' includes **“judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up.”**

It is my finding that the notice of appeal as framed is proper.

27. The issues deposed by the respondent in his replying affidavit as regards the jurisdiction of the appellate court are matters that fall within the purview of the Court of Appeal.

28. The principles guiding the grant of stay pending appeal are well settled under Order 42 rule 6 (3) of the Civil Procedure Rules under which the court is to be satisfied that substantial loss may result to the applicant unless the order is made; that the application has been made without unreasonable delay; and that 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 the applicant.
29. In the case of **Vishyram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365**, the Court of Appeal held that *“whereas its powers to grant a stay pending appeal are unfettered, the High Court’s jurisdiction to do so under order 42 rule 6 is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. The application must also be made without unreasonable delay.*
30. The decision cited by the respondent in objection to the application herein is distinguishable with the circumstances of this case in that in the case of **Francis Kabea vs. Nancy Wambui and Jane Wanjiru Civil Application No. Nai 298 of 1998 (113/96) UR**, the appellant had not given any cogent reason why he should be granted stay. In the present case, the applicant has done so.
31. I find that the further replying affidavit by the respondent is properly on record. I also find that that the affidavit deposed by Mr. Wilson Kimeli Matikwony as the applicant’s Branch Manager, Kakamega is properly on record.
32. This court notes that the respondent is correct in submitting that the application for stay of execution has been brought over five (5) months after delivery of the judgment on the other hand, he has admitted in his affidavit that he applied an interest at the rate of 14% on costs to compute the amount due to him from the applicant. Although the application for stay of execution was brought over five (5) months after delivery of the judgment dated 16th June, 2015, in my view interest on costs was not awarded by the court and that contentious issue forms a sufficient cause for granting orders to the applicant as prayed.
33. For the foregoing reasons, I exercise my discretion and grant the following orders:-
- i. *A stay of execution of the decree herein is granted pending the hearing of the appellant’s/applicant’s appeal;*
 - ii. *That a sum of Ksh. 322,500/= be deposited by the appellant/applicant, in an interest earning account in the joint names of the applicant’s counsel on record and the respondent;*
 - iii. *Each party will bear its own costs.*

It is so ordered.

DELIVERED, DATED and SIGNED in open court at **KAKAMEGA** on this **28TH** day of **APRIL**, 2016.

NJOKI MWANGI.

JUDGE.

In the presence of

.....**for the Applicant**

..... **Respondent**

.....**Court Assistant**