



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
HIGH COURT CIVIL APPEAL NO. 41 OF 2015

*(Appeal from the Judgment of Hon. A.K. Mokeross (SRM) dated and
delivered on 5TH March, 2015, in the original
KILGORIS SRMC No. 28 of 2011)*

ANTHONY KIPLANGAT NGENO.....1ST APPELLANT

PAUL KIPRONO CHERUIYOT.....2ND APPELLANT

VERSUS

JONATHAN OLE TANKOI 1ST RESPONDENT

SOLOMON OLE TARAKWA.....2ND RESPONDENT

JOHANA KIPTONUI CHERUIYOT.....3RD RESPONDENT

JOSEPH TONUI.....4TH RESPONDENT

RULING

1. This ruling is in respect to an application dated 11th June, 2015 brought by way of **Notice of Motion under order 51 Rules 1 and 4, order 42 Rules 6 (1) and (2) of the Civil Procedure Rules** in which the applicant seeks orders as follows:
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 3. **That pending the hearing and determination of this Appeal, this Honourable Court to order stay of execution of judgment on 5th March, 2015 in KILGORIS SRMC No. 28 of 2011.**
 4. **That the costs of this application be provided for.**
2. The application is brought on the grounds that applicants have a right of appeal yet as the appeal is pending the respondents insist on assessing their bill of costs vide an assessment notice dated 30th April, 2015 fixed for June, 2015.
3. The application is further supported by the affidavit of the 1st applicant Anthony Kiplangat Ngeno sworn on 11th June 2015 in which he states that he had already appealed against the judgment

delivered on 5th March, 2015 in Kilgoris SRMC No. 28 of 2011 and the respondents insist on assessing costs awarded by the lower court and have already served the appellants with the assessment notice.

4. The 1st applicant depones that the appeal has high chances of success and the applicants will suffer irreparable loss if the orders sought are not granted.
5. On 17th July, 2015, the respondents herein filed a statement of Grounds of Opposition in response to the application in which they state that the application is premature, misconceived, incompetent and otherwise legally untenable because it is based on a negative order of dismissal of the applicants suit at the lower court not capable of being stayed and consequently this court lacks jurisdiction to entertain the application.
6. The respondents state that the application does not meet the mandatory conditions for grant of orders of stay of execution pending appeal as envisaged in **Order 42 Rule 6 of the Civil Procedure Rules**.
7. The respondents further state that the application is devoid of merit, has been filed after an unreasonable and inordinate delay and is intended to delay obstruct and/or otherwise defeat the due process of court.
8. On 15th June, 2015, the applicants obtained an interim order of stay of execution pending the interpartes hearing and determination of this application.
9. On 14th October 2015 parties agreed to canvass the application by way of written submissions.

Applicants' submissions

10. The applicants' submission is that they have already filed an arguable appeal before the high court which appeal has high chances of success and they will suffer irreparable loss if the orders sought are not granted while the respondents will not suffer any prejudice should an order for stay of execution be granted.

Respondents' submissions

11. The respondents submit that the judgment rendered by the lower court on 5th March, 2015 was a dismissal of the appellants, case before the lower court case with costs to the respondents.
12. The respondents argue that a dismissal of a suit is a negative order not capable of being stayed and therefore, the instant application is misconceived.
13. The respondents contend that in the absence of a positive order capable of being stayed, this court is being asked to grant orders of stay of execution in a vacuum and that such orders will be orders made in vain.
14. The respondents add that the order for costs granted to the respondents before the lower court upon the dismissal of the appellants case was a consequential and discretionary order in line with Section 27 of the Civil procedure Act and therefore, if the appeal lodged by the appellants was to succeed, then the appellants would as a consequence thereof be awarded a refund of the lower court fees that they have incurred, if any.
15. It is the respondents' case that the law on costs is now settled that the award of costs cannot be subject to a stay of execution whether pending appeal or otherwise.
16. The respondents sought to rely on the following authorities in support of their case:

Exclusive Estates Ltd vs Kenya Posts and Telecommunications Corporation and Another, Court of Appeal Civil Application No. 62 of 2004, Florence Achieng Abuoro vs Tom Stephen Manya & Another, Kisii HCCA No. 198 of 2008 (unreported) and Kenya shell Ltd vs Benjamin Karugu Kibiru & Another (1982-88)I KAR pgs 1018-1022.

17.The respondents have further argued that the application does not meet the mandatory conditions set by order 42 Rule 6 of the Civil Procedure Rules for the grant of orders of stay of execution.

Analysis and determination

18.I have considered the instant application, the supporting affidavit, the respondents' grounds of opposition, the parties' respective submissions and the authorities cited.

19.From the outset, it is clear to me that the orders and judgment of the lower court that gave rise to this appeal is an order dismissing the appellants' suit before the lower court. I have perused the judgment of the lower court that was attached to the application and I note that at the tail end of the judgment, the trial magistrate states as follows:

“For reasons contained above, the suit by the plaintiffs for a permanent injunction restraining the defendants either by themselves, their servants and/or agents howsoever from retaining and/or disposing off the plaintiffs' eight sheep fails. The suit is thus dismissed.

It is the norm in our judicial system that costs follow the event and the defendant shall therefore get costs.”

20.The applicants concede, in their application and affidavit in support thereof, that the stay sought is in respect to costs granted to the respondents which they state, the respondent has insisted on assessing before the lower court.

21.The above analysis brings me to the question of whether the court can grant an order for stay of execution in respect to costs. The answer to this question is to the negative because orders for stay of execution is generally and ideally granted only in instances where the appeal filed would be rendered nugatory unless the stay sought is granted.

22.In the instant application, however, all the applicants want stayed is the aspect of costs, then logically one cannot say that the pending appeal would be rendered nugatory since the applicants, if successful on appeal will be able to get a refund of the costs they had paid, if any, from the respondents. **(See Francis Kabaa vs Nancy Wambui & Another Civil Application No. 298 of 1996 at Nairobi).**

23.In a nutshell, the applicants' case before the lower court ended in a dismissal, which means, there were no positive orders capable of being stayed by the current application. The applicants were not ordered to do or not to do anything so as to justify their application for stay of execution.

24.Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules under which the instant application has been brought provides as follows:

“(1) No appeal or 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.

(2) 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 the applicant.”

25. In the instant case, I am not satisfied that the applicants' application falls within the purview of the provisions of the above Order and Rules for the following reasons:

26. Firstly the application is filed on 11th June, 2015 and the judgment/order sought to be stayed was delivered on 5th March, 2015. The application is filed after a period of over 3 months after the judgment was delivered and this in my view, constitutes an unreasonable delay. I therefore find that the instant application was not filed timeously and the delay has not been explained by the applicants.

27. Secondly, the applicants have not demonstrated that they would suffer any substantial loss if the stay sought is not granted. All the applicants state in their application is that they would suffer irreparable loss without disclosing the nature of the loss.

28. Lastly, as I had already stated in this ruling, the applicants have not addressed, to the satisfaction of this court, the issue of their appeal being rendered nugatory unless the orders sought are granted.

29. Under the above circumstances it would not be necessary for this court to address the issue of security for costs as the same is not applicable where stay of execution orders are not granted.

30. Ultimately, this court finds that the instant application dated 11th June, 2015 is not merited and the same is hereby dismissed with costs to the respondents.

Dated, signed and delivered in open court this 26th day of April, 2016

HON. .W. A OKWANY

JUDGE

In the presence of:

Mr. Bii for the Appellant

Mr. Nyangosi for Oguttu Mboya for the Respondents

Omwoyo court clerk