



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 585 OF 2009

KAVIN AGGREY WAKOLI1ST PLAINTIFF/ RESPONDENT

MARTHA NYAKAIRU WAKOLI2ND PLAINTIFF/ RESPONDENT

VERSUS

HOUSING FINANCE COMPANY LTD1ST DEFENDANT/ APPLICANT

JOSEPH MUNGAI GIKONYO T/A GARAM INVESTMENTS2ND DEFENDANT

DOROTHY THENYA.....3RD DEFENDANT

RULING

Background

1. Coming up for determination is a Notice of Motion application dated 29th April 2021 filed by the 1st Defendant/ Applicant seeking for the following orders:

i. Spent

ii. THAT there be a temporary stay of execution of the Judgment delivered in this matter on the 17th of October 2019 pending hearing and final determination of this application.

iii. THAT there be a stay of execution of the Decree in this matter pending full and final determination of the appeal against the Judgment and Decree in the Court of Appeal.

iv. THAT costs be in the cause.

2. This application is premised on the grounds elucidated in the body of the application and further expounded in the Supporting Affidavit sworn by Patrick Wainaina a legal officer of the applicant and Henry Omino an Advocate at Walker Kontos Advocates who are on record for the Applicant both dated 29th April 2021. They aver that the Applicant was dissatisfied with the judgement delivered on 17th October 2019 which awarded the respondents a sum of Kshs 5,000,000 plus costs and interests. They filed a Notice of Appeal on 31st October 2019 but they are yet to receive typed proceedings to facilitate lodging of the Appeal. They stated that the judgement was read by Justice Eboso on behalf of Justice Onyango and it was indicated that the file would be sent to Kisii to enable Justice Onyango to make grammatical and spelling corrections before the judgement would be released to the parties. Despite several follow ups at the registry by emails, physically, and through telephone calls the information they got from the registry was that the file was not at the registry.

3. The advocate averred that they were also yet to receive a copy of the judgement delivered and were not aware whether the file was back at the registry or not. The advocate also deponed that they filed the current application on 29th April 2021 after applying for mapping on the e-filing system which was approved on 28th April 2021. Therefore, the application had been filed without unreasonable delay.

4. It is averred that if the stay of execution was not granted, the Applicant would suffer substantial loss because it was not clear if the respondents would be in a position to refund the awarded amount which was substantive should the intended appeal be successful noting that they had indicated that they were retired and their source of income was unknown.

5. The Applicants are willing to deposit security if the court would so direct pending the outcome of the matter at the Court of Appeal.
6. The Respondents in the undated replying affidavit sworn by Kavin Aggery opposed the application noting that the applicants had not established the loss/ irredeemable damage that they were likely to suffer should they settle the judgement. He also noted that there was an inordinate delay in bringing the application which was filed on 30th April 2021 while the judgement was delivered on 17th October 2019. He also pointed out that the last communication the applicant had with the registry was a letter dated 19th November 2019 and as such their allegation that they had made numerous follow ups to trace the file was unsubstantiated.
7. The Respondent also deponed that the right to appeal should be balanced against the right of the Plaintiffs to enjoy the fruits if their judgement which they had pursued from 2009.
8. He also stated that he could repay the decretal sum should the intended appeal succeed noting that he was a registered owner of properties Donyo Sabuk/ Komarock Block 1/24333 and 24332 co-owned with his son and the said properties could fetch at least Kshs. 7,000,000.
9. In a rejoinder, Henry Omino swore a further supporting affidavit dated 19th July 2021, in which he stated that the replying affidavit should be struck out for being defective since it was undated.
10. He restated that after they sent letters to the registry with no response, they resorted to physical follow ups at the registry and through telephone calls after the Covid-19 pandemic in the country. And that the delay in filing the application was caused by the fact that the applicant never obtained a copy of the judgement until the Court Order dated 3rd May 2021.
11. This application was canvassed by way of written submissions.
12. The Applicants' submissions dated 19th July 2021 outlined the following as issues for determination: Whether the Replying Affidavit is defective for being undated; and Whether the Applicant has met the threshold for grant of stay of execution pending Appeal.
13. On the first issue, it was submitted that the replying affidavit was fatally defective and should be struck. To this end, reference was made to **Section 5** of the **Oaths and Statutory Declarations Act** which provides that ;

...shall state truly on the jurat or attestation at what place and on what date the oath or affidavit is taken or made and supported by the High Court case of Peter Mbugua Wangai vs. Esther Wangui Wangai [2015] eKLR ..” the omission to indicate the date of swearing renders the affidavit as being incurably and fatally defective and valueless” .

The Applicants therefore contend that the application was unopposed and ought to be allowed as prayed.

14. On the second issue, reference was made to **Order 46 Rule 2** of the **Civil Procedure Rules** which provide the conditions to be met for grant of stay of execution pending appeal which he had fulfilled. It was argued that the Applicant would suffer substantial loss if the intended appeal was successful since the Respondent has not disclosed his source of income and there was no evidence that the property he purported to own jointly with his son was still his and it was not sufficient to cover the decretal sum.
15. The Applicants relied on the case of Spectre International Limited v M/S Jondu Enterprises Limited [2021] eKLR where it was stated ;

...In response to that assertion, the Respondent has annexed several title documents as proof that it owns several parcels of land. They are not accompanied by current certificates of search or valuation reports in support of the current value and status of the said properties. We are not persuaded that if the entire amount is paid out and the appeal succeeds, the Respondent will be in a position to dispose of the said properties and refund the money promptly and without much hardship... And German School Society v Helga Olany [2017] KLR ...*The Respondent has exhibited a copy of a title deed to one of her properties, which she says is worth about Kshs.30 million. In the absence of a valuation report showing the market value of the said property and a certificate of official search which would reveal whether there are any encumbrances attaching to the property, we are unable to say that the Respondent had discharged her burden of proof as aforesaid...*

16. It was also submitted that on security of costs, a joint account had been set up by the parties' advocates and the decretal sum deposited therein and as such the orders sought should be granted.
17. The Respondent's submissions are dated 28th July 2021, where it is stated that notwithstanding the provisions of **Section 5** of the **Oaths and Statutory Declarations Act** as highlighted by the applicants, **Order 19 Rule 7** of the **Civil Procedure Rules, 2010** provided that: The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.

18. As such the un-dated affidavit was a curable technicality which courts should not place undue regard to as espoused by **Article 159(2)** of the **Constitution**. To support this argument, counsel referenced the Court of Appeal cases of Kenneth K. Mwangi v City County of Nairobi & 2 others [2017] eKLR in the holding, "... *The Appellant does not dispute the fact that the affidavit was not dated. It must be appreciated that this Appeal was decided on 7th July 2005 before the advent of the current constitution as well as the overriding objective and or oxygen principles that now compel courts to look more to the substance of the case as opposed to technicalities...*" And Toshike Construction Company Limited v Harambee Co-operative Savings & another [2019] eKLR which upheld the holding by the Uganda Court of Appeal Saggu Roadmaster Cycles (U) Ltd [2002] 1 E A 258 "...*the defect in the jurat or any irregularity in the form of an affidavit cannot be allowed to vitiate an affidavit...*". Also cited were the cases of Ethics and Anti-Corruption Commission v Salome

Ludenyi Munubi & 2 others [2020] eKLR and Microsoft Corporation v Mitsumi Computer Garage Ltd & another [2001] eKLR.

19. On whether the stay of execution should be granted, while making reference to **Order 42 Rule 6(2)** of the **Civil Procedure Rules** and the case of **Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR**, it was submitted that the applicants had not shown the substantial loss they stood to suffer if the respondents would not reimburse the decretal sum since the respondents had evidenced that they had capacity to pay the decretal sum should the appeal be successful. Reference was made to the case of **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**.

20. It was argued that the application was brought with excessive delay which had not been satisfactorily explained pointing out that with the Covid-19 pandemic and the introduction of the e-filing, the applicant should have filed the application since a physical court file was not necessary.

21. It was further submitted that the respondents had the right to enjoy the fruits of the judgement as held in the case of **Kenya Railways Corporation v Quicklubes E.A. Limited [2015] eKLR** which cited the Court of Appeal case of **M/S Portreiz Maternity vs James Karanga Kabia**

“... Right of appeal must be balanced against an equally weighty right that of the plaintiff to enjoy the fruits of the judgement delivered in his favour...”

22. On the issue of security of costs, it was submitted that the applicant should be granted a conditional stay that 80% of the decretal sum be paid to the respondent and the 20% remains in the joint account noting that the respondents have been pursuing justice for more than a decade. As such, the application should either be dismissed or be granted conditionally.

Analysis and determination

23. This court having reviewed the application, rival affidavits and submissions finds that the issues for determination are:

i. Should the undated replying affidavit be struck out for being defective?

ii. Whether the application seeking stay of execution of the judgement delivered on 17th October 2019 is merited.

24. This court wishes to commend the fervent submissions put across by the parties' counsels and state that both positions are valid as submitted. However, this court in adjudication of disputes, is moved by a more progressive approach taking into consideration the overriding objective incorporated in **Section 1A Civil Procedure Act** which is **to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes...** and **Article 159(2)(d) of the Constitution** that **justice shall be administered without undue regard to procedural technicalities**. Additionally, this court also takes cognisance that striking out of matters has been shunned as draconian and should be done sparingly if an omission is rectifiable or does not affect the substratum of the suit.

25. In this regard, the court echoes the holding in the Court of Appeal case of **Belinda Murai & 9 others v Amos Wainaina [1979] eKLR where it was stated that:**

“... The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate...”

26. To this end, this court is reluctant to strike out the replying affidavit sworn by the respondent even though the same is not dated. In any event, even if the affidavit was to be struck out, the application in question would not be allowed haphazardly without looking at its merit as was held in the Supreme Court case of **Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR**.

“... as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of course grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted...”

27. I now come to the question of whether an order of stay of execution should be granted. As indicated by the parties, **Order 42 Rule 6(2) Civil Procedure Rules, 2010** highlights grounds which must be satisfied for stay of execution order to be granted, That is;

(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.

28. The Court of Appeal in the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** held that:

“... 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, ... 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...”

29. This court finds that the property exhibited by the respondent is not his alone, he owns it with one Alan George who is not a party in these proceedings. Further, no current search has been availed to show that the respondent still has an interest in the said property. Finally, there is no evidence (i.e, a valuation report) to show that the property is worth the amounts mentioned in the decree.

30. On the issue of undue delay, this court is not convinced that the filing of an application for stay of execution of judgement required the availing of the physical file particularly during this era of e-filing. Be that as it may, the court has stated that every person deserves a day in court. The court has also taken into account that the security has been deposited (as averred by the parties). Further, this court makes reference to the Court of Appeal case of **Butt v Rent Restriction Tribunal [1979] eKLR** where it was held that:

“... It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory...”

31. In the final analysis, this court grants the applicant a stay of execution of the judgment of this Court delivered on 17th October 2019 for a period of **ONE YEAR** from the date of delivery of this ruling.

32. The costs of the motion shall be in the intended appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Owino for the Defendant/Applicant

Mr. Mwangi holding brief for Mucheru for Petitioners/Respondents

Court Assistant: Eddel Barasa