



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT VOI

MISC CIVIL APP NO 7 OF 2016

DONALD MWARANGI & ANOTHER.....APPLICANTS

VERSUS

MEJUMAA NURU MWAKIO.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. The Applicants' Notice of Motion application dated and filed on 18th August 2016 was brought pursuant to the provisions of Sections 1A, 3, 3A, 79G and 95 of the Civil Procedure Act Cap 21 Laws of Kenya, Order 42 (6), Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and all the enabling provisions of the law. Prayers Nos (1) and (4) therein were spent. It sought the following remaining prayers:-

1. Spent

2. This Honourable Court be pleased to grant leave to file Appeal out of time against the entire Judgment delivered by Honourable M.E. (sic) Kadima on 13th July 2016 as per the attached Draft Memorandum of Appeal.

3. This Honourable Court be pleased to order a stay of execution of the Judgment/Decree in Civil Suit No 60 of 2014- Voi entered against the Appellant/applicant by the Honourable M.E (sic) Kadima on 13th July 2016 pending the hearing and determination of the Application/the Intended Appeal.

4. Spent.

5. The costs of this Application be in the cause.

THE APPLICANT'S CASE

2. The Applicants' application was supported by the Affidavit of Joan Oburu that was sworn on 18th August 2016.

3. Their case was that they were not aware that judgment in which they were found hundred (100%) per

cent liable was delivered by Hon E.M. Kadima on 13th July 2016. They stated that immediately thereafter, they applied for a typed copy of the said Judgment and as at the time of filing their application herein, they had not received the same. They attached a handwritten copy of the said Judgment.

4. It was their contention that the stipulated period of thirty (30) days within which they were required to have lodged their appeal expired on 13th August 2016 and that their present application had been brought within a reasonable period of time. They stated that they were ready, willing and able to furnish such security as this court would require.

THE RESPONDENTS' CASE

5. In response to the said application, the 1st Respondent filed a Replying Affidavit that was sworn on 29th August 2016. She averred that the said Joan Oburu swore her Supporting Affidavit without the authority of Directline Assurance Company and that just like the said company, she was not a party to the suit herein. She contended that since no compensation or payment had been made herein, the said Joan Oburu could not purport to depone to facts under the principle of subrogation.

6. It was the 1st Respondent's further contention that the Applicants had not advanced any sufficient reason to explain why they did not file the Appeal having learnt of the delivery of the Judgment in good time and that failure to obtain a typed copy of the proceedings was not a good reason to explain the said delay.

7. In addition, she stated that the Applicants had not demonstrated what substantial loss they would suffer if the stay was not granted and that in any event, the judgment herein was a monetary decree which would not render their appeal nugatory. It was her averment that she required the decretal sum to undergo treatment and that the Applicants had brought the present application in bad faith and had unclean hands.

LEGAL ANALYSIS

8. Both parties made oral submissions. The Applicants submitted that it was not clear from the said Judgment what portion of the decretal sum they were to pay. They pointed out that the Learned Trial Magistrate had on page 5 in the said Judgment apportioned liability at 90%-10% in favour of the 1st Respondent herein while he apportioned liability on a 100% basis against the Defendants. They argued that this was ambiguous as interlocutory judgment had since been entered against the 2nd Respondent.

9. They submitted that the delay in filing their Draft Memorandum of Appeal five (5) days after the stipulated period of thirty (30) days was not inordinate. They also argued that they would suffer irreparable loss if they paid out the decretal sum of Kshs 503,800/= to the 1st Respondent as her financial capability of was unknown.

10. They relied on the case of **Kenya Commercial Bank Limited vs Kenya Planters Co-operative Union [2010] eKLR** where the court therein held that it would have failed in its duty if it did not extend time to file an appeal out of time. They stated that in the case of **Halai & Another vs Thornton & Turpin (1963) Limited KLR 1990**, only a Notice of Appeal was required and not the furnishing of security was required but that they had gone a step further by furnishing security.

11. On her part, the 1st Respondent argued that the Applicants did not require typed proceedings to file a Memorandum of Appeal and that the delay had not been explained, the Applicants' advocates having advised her advocates of the delivery of the judgment on 29th July 2016. She relied on the case of **Joseph Ngigi Ibare vs Myovi James & Another [2016] eKLR** where the court therein found that a day of delay ought to be explained and that only diligent litigants should be assisted.

12. It was her further contention that any delay in disbursing the monies would occasion her great prejudice as she required the money for treatment. She referred the court to the case of **Van De Berg (K)**

Limited vs Charles Osewe Osodo [2015] eKLR where the court therein granted a conditional stay of execution.

13. She further placed reliance on the cases of **Muteti Kisia vs Felix Mwangi Ndegwa [2016] eKLR** and **Kenya Shell Limited vs Kibiri (sic) & Another (1986) KLR** where the common thread was that a court ought to balance the interests of the parties before it and that in her case, the monies were accruing interest and she ought to enjoy the fruits of her judgment. She also referred this court to several other cases that were listed and attached to her List of Authorities dated 29th August 2016 and filed on 5th September 2016 relating to the principles of granting of a stay of execution pending appeal.

14. Notably, the Applicants' Supporting Affidavit was very generalised and sketchy. It did not indicate the date when they became aware of the Judgment herein. However, they had attached a copy of a letter dated 15th August 2016 requesting for handwritten copies of the said Judgment. As this court did not have the lower court file, it could not establish whether indeed parties were aware of the date of the delivery of the said Judgment on 13th July 2016.

15. Be that as it may, the court noted from Exhibit "MNW 1" that was attached to the 1st Respondent's Replying Affidavit that the Applicants' advocates had been aware of the Judgment as early as 29th July 2016. Their advocates had sought a stay of execution of thirty (30) days from the 1st Respondent's advocates to facilitate payment of the said judgment.

16. It was therefore not clear to this court why the Applicants had a change of heart and instructed their advocates to appeal against the entire Judgment herein. What was evident, however, was that they filed the present application almost three (3) weeks from the date of delivery of the said Judgment. This delay was unexplained in the Affidavit of Joan Oburu.

17. Having said so, this court was not persuaded to find that the delay of five (5) days from 13th August 2016 when the appeal herein ought to have been filed to have been so inordinate as to have caused the 1st Respondent any prejudice. While Mulwa J had in the case of **Joseph Ngigi Ibare vs Myovi James & Another** (Supra) held that a day of delay ought to be explained and that only diligent litigants should be assisted, this court was of the respectable view that a court should refuse to grant an order for a stay of execution not only if the delay cannot be explained but if such delay causes prejudice to the opposing party, irrespective whether the said delay is short or inordinate. The additional key consideration is whether the opposing party will suffer prejudice.

18. In the same vein, if there is a delay that is ordinate or not inordinate and is not properly explained but it can be excused without causing prejudice to the applicant, a court should grant an order for stay of execution. In this case, the Applicants had suggested that they could not file a Memorandum of Appeal without typed proceedings, which the 1st Respondent argued were not necessary for them to do so. This court entirely agreed with the 1st Respondent in this respect.

19. Although the Applicants did not express themselves articulately in their Supporting Affidavit to explain the difficulty they had in filing the said Memorandum of Appeal, a perusal of the copy of the handwritten Judgment by this court revealed that the same was not very legible necessitating the need of a typed copy of the said Judgment.

20. This court was therefore of the view that although the Applicants did not adequately explain the cause of the delay, it was evident that the 1st Respondent did not suffer any prejudice or hardship. Indeed, the 1st Respondent had not taken out a Certificate of Costs and Decree at the time the said Applicants filed their present application. If she had suffered any prejudice and/or hardship, then she did not demonstrate the same to this court.

21. Turning to the issue of substantial loss, the Applicants raised a pertinent issue regarding the apportionment of liability. In their Draft Memorandum of Appeal, they had indicated that they would also

be appealing against the quantum that was awarded as they were of the opinion that the same was unreasonably and inordinately high.

22. While this court had due regard to the case law that the 1st Respondent relied upon which was to the effect that a court ought to balance the interests of parties when considering an application for a stay of execution pending appeal, she did not attach any proof of her financial ability or otherwise. In fact, her prayer to be given the decretal monies, even if it was in part, painted a position of financial burden on her part.

23. Releasing part of the payment when the question of liability and quantum has not been resolved would be imprudent for the reason that it would be difficult to determine how much of the decretal sum should be released as the Learned Trial Magistrate arrived at two (2) different conclusions on apportionment of liability in the same decision. Further, there was interlocutory judgment against the 2nd Respondent, an issue he ought to have addressed his mind to at the time of rendering his decision but which he did not.

24. It was therefore evident that if they were to pay the 1st Respondent the whole of the decretal sum, as seen hereinabove, it was not known how they would recover the same from her in the event they were successful on their appeal. That could be deemed to be substantial loss. Indeed, substantial loss does not only connote a particular amount of money. Rather, it alludes to a situation where a successful litigant is likely to suffer hardship in recovering monies he would have paid before an appeal was heard.

25. On the issue of security, the Applicants indicated their readiness, willingness and ability to deposit the decretal sum. This was, however, not going a step further as they had contended because when seeking a stay of execution in the subordinate court or High Court, furnishing of security is mandatory. The position does not, however, obtain when seeking a stay in the Court of Appeal because all that is required at that court is for an applicant to demonstrate that he has an arguable appeal.

26. The case of Halai & Another vs Thornton & Turpin (1963) Limited (Supra) that was relied upon by the Applicants was thus clearly distinguishable from the facts of this case which require that the prerequisites in Order 42 Rule 6 of the Civil Procedure Rules be satisfied.

27. Order 46 Rule 6 (2) of the Civil Procedure Rules, 2010 provides that an applicant must demonstrate the following:-

- 1. Substantial loss may result to the applicant unless the order was made;**
- 2. The application was made without unreasonable delay; and**
- 3. Such security as the court orders for the due performance of such decree or order as may ultimately binding on him has been given by the applicant.**

28. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “**and**”. It connotes that all three (3) conditions must be met simultaneously. From the foregoing, it was evident that the Applicants were able to demonstrate that they had satisfied the requisites of Order 42 (6) of the Civil Procedure Rules, 2010 and that if a stay of execution was not granted to them:-

- 1. Substantial loss could result to them applicant unless the order was made;**
- 2. The application was made without unreasonable delay; and**
- 3. Provide such security as the court would order for the due performance of such decree or order as may ultimately binding on them.**

29. As an *obiter*, the Applicants advocates are reminded to draw their pleadings in a proper manner. In

other words, all the parties' names must be set out in the heading of the pleadings. This court disregarded the omission as Article 159(2)(d) of the Constitution of Kenya mandates courts to administer justice without undue regard to technicalities.

30. Further as the issues that were deponed to in the Supporting Affidavit were within the Applicants' advocates' knowledge, it was not necessary for the deponent therein to have sworn the said Affidavit. Indeed, her averments were a repetition of what her advocates informed her. Notably, this court did not delve into the question of the correctness or otherwise of the deponent swearing the Supporting Affidavit as neither the 1st Respondent's counsel or the Applicants' counsel submitted on the same. It merely appeared as an averment in 1st Respondent's Replying Affidavit.

31. Suffice it to state that the practise of officers of insurance companies swearing affidavits on behalf of their insureds when in applications seeking stay of execution orders pending appeal should be desisted as all pleadings must be drawn in the name of the their insureds as the doctrine of subrogation is not applicable until such time that proceedings are instituted to recover monies they have paid third parties on behalf of their insureds as provided for in their insurance policies.

32. In matters that are not contested such as that of an application a stay of execution pending appeal, it will be prudent if an advocate swears an advocate on behalf of his client if the matter is urgent and the said client is not available.

33. Although the Applicants' pleadings left a lot to be desired, in addition to the provisions of Article 159 (2)(d) of the Constitution, this court was minded of the provisions of Section 3A of the Civil Procedure Act that gives courts inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

34. In the case of Ujagar Singh vs Runda Coffee Estates Limited [1966] EA 263, the court therein invoked its jurisdiction and ordered the preservation of the status quo pending the hearing and determination of the appeal. The court therein observed thus:-

“...It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful...”

35. There were irregularities in the Judgment by the Learned Trial Magistrate. The issue of apportionment of liability will need to be addressed to bring certainty of the said decision. The question of quantum will also have to be determined. Accordingly, having considered the parties' pleadings, affidavits, oral submissions and the case law relied in support of their respective cases, it was the view of this court that it was in the interests of justice that a stay of execution pending the hearing and determination of the intended appeal.

DISPOSITION

36. Accordingly, the upshot of this court's ruling was that the Applicants' Notice of Motion application dated and filed on 18th August 2016 was merited and is hereby allowed in the following terms:-

1. THAT the Applicants are hereby granted leave to file a Memorandum of Appeal out of time against the entire Judgment that was delivered by Hon E.M. Kadima on 13th July 2016 within the next fourteen (14) days from the date of this Ruling i.e. by 10th November 2016.

2. THAT there shall be a stay of execution of Judgment that was delivered by Hon E.M. Kadima on 13th July 2016 pending the hearing and determination of the intended appeal on condition the Applicants shall deposit into an interest earning account in the joint names of

the Applicants' and Respondents advocates the entire decretal sum of Kshs 503,800/= within the next sixty (60) days from the date hereof i.e. by 27th December 2016.

3. For the avoidance of doubt, in the event, the Applicants shall default on either on Paragraph 36 (1) and (2) hereinabove, the conditional stay of execution shall automatically lapse.

4. The Deputy Registrar of the High Court of Kenya Voi is hereby directed to facilitate the typing of the proceedings to enable the Applicants to file their Record of Appeal by 16th January 2017.

5. The matter shall be mentioned on 16th January 2017 to confirm compliance and/or for further orders and/or directions.

6. Costs of the application herein shall be in the cause.

7. Either party is at liberty to apply.

37. It is so ordered.

DATED and DELIVERED at VOI this 27th day of October 2016

J. KAMAU

JUDGE