



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
MISC CIVIL APP NO 8 OF 2016

CHANIA SHUTTLE BUS..... APPLICANT

VERSUS

REBECCA MBOGHO (Suing as Legal Representative of the Estate of JOSEPH

MWANYIKA MBOGHO (Deceased).....RESPONDENT

RULING

1. The Applicant's Notice of Motion application dated 13th August 2016 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 Rule 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 Nderitu on 20th June 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 57 of 2013- Voi entered against the Appellant/applicant by the Honourable Nderitu on 20th June 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 Applicant's application was supported by the Affidavit of Joan Oburu, a Legal Officer of Directline Assurance Company Limited who were the insurers of the Applicant's Motor Vehicle Registration Number KBB 854C, the subject matter of **Civil Suit no 57 of 2013- Voi**. The said Affidavit was sworn on 13th August 2016. Its Written Submissions were dated 19th October 2016 and filed on 24th October 2016.

3. It case was that it was not aware of the judgment in which it was found fifty (50%) per cent liable and

ordered to pay the Respondent Kshs 393,860/= plus costs and interest. It stated that it was furnished with a handwritten copy of the said Judgment pending receipt of the typed copy of the said Judgment.

4. It was its contention that the stipulated period of thirty (30) days within which it was required to have lodged its appeal expired on 20th July 2016 and that its present application had been brought within a reasonable period of time. It 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, on 15th September the Respondent filed a Replying Affidavit that was sworn on 9th September 2016. Her Written Submissions were dated 21st October 2016 and filed on 24th October 2016.

6. It was her contention that the Applicant obtained a copy of the Judgment on 20th June 2016 and supplied her advocate with a copy thereof and consequently failure by the Applicant to obtain a typed copy of the proceedings was not a good reason to explain the said delay. This she said was because it could file its Memorandum of Appeal while awaiting a typed copy of the said Judgment.

7. In was her further averment that the Applicant was guilty of indolence and delay and the filing of the present application two (2) months after Judgment was delivered was an afterthought that was only intended at delaying her from enjoying the fruits of her judgement. She pointed out that it had written to her advocates requesting them not to execute against it as it was organising to effect payment.

8. She therefore urged this court to dismiss the said application with costs to her.

LEGAL ANALYSIS

9. The Applicant submitted that the Respondent would not suffer prejudice if it was allowed to appeal but that instead, it would be prejudicial if it was not granted a stay to exercise its right of appeal. It added that this right of appeal would not deny the Respondent her fruits of judgment but would only delay the same in the event it did not succeed on its appeal. It referred this court to the case of **Tobias Ogany Auma & 5 Others vs Kenya Airways Corporation Ltd [2001] eKLR** where Mbogholi Msagha J rendered himself as follows:-

“...An order of stay of execution does not deprive the decree holder of the fruits of the said decree. It merely delays such an execution in the event the appeal does not succeed, and in a decree such as the one in issue the award can always be compensated by the award of interest...The Defendant has a right of appeal as a matter of right. That right should be exercised.”

10. It argued that it had an arguable ground of appeal as the Learned Trial Magistrate awarded the Respondent, a sister to Joseph Mwanyika Mbogho (hereinafter referred to as “the deceased”), damages contrary to Section 4(1) of the Fatal Accidents Act Cap 32 (Laws of Kenya) which stipulates that every action under the said Act can only be brought for the benefit of the wife, husband, parent and child of the person whose death has been caused.

11. It submitted that it filed its Draft Memorandum of Appeal four (4) days after the forty five (45) days' stay of execution had expired and consequently, there was no inordinate delay.

12. It also argued that if the order for a stay of execution of the Judgment herein was not granted, it would suffer irreparable loss and substantial loss thus defeating and rendering the already lodged appeal nugatory. It pointed out that the Respondent did not deny averments in its Supporting Affidavit that it would be difficult to recover the sum of Kshs 393,860/= from her in the event it was successful on appeal.

13. In this regard, it relied on the case of Jatco Transporters & Tours Agency Ltd & Another vs Jason Njiru Kithinji & 4 Others [2005] eKLR where Ochieng J stated as follows:-

“And as the 5th defendant also did not also place any material before the court from which it could be concluded that they have financial liability to repay the money, in the event that the plaintiffs (sic) objection were to succeed the court cannot make such assumptions. Therefore doing the best that I can in the circumstances I hold the best way to do justice to the parties herein is to grant a stay of execution pending the determination of the objection.”

14. It said that it was ready and willing to deposit the sum of Kshs 393,860/= in court to satisfy the condition of provision of security before being granted a stay of execution pending appeal. It placed reliance on the case of Halai & Another vs Thornton & Turpin (1963) Limited KLR 1990 where the Court of Appeal addressed the three (3) conditions of granting a stay of execution and held that:-

“...this court is not prevented from granting a stay of execution where no substantial loss is established and no security is forthcoming if it seems just to the court for such orders to be made.”

15. It therefore urged this court to consider the aforesaid holding, Order 42 Rule 6 of the Civil Procedure Rules, 2010 and the overriding objectives set out in Sections 1A, 3 and 3A of the Civil Procedure Rules as it would take appropriate steps to prosecute its Appeal with diligence.

16. On her part, the Respondent argued that the Applicant admitted having obtained copies of the handwritten Judgment. However, it had advanced no reason to explain why it filed its Memorandum of Appeal two (2) months after delivery of the Judgment herein.

17. It relied on the case of Patrick Muhindi Kimalu & Another vs Joseph Mutinda Misc App No 129 of 2015 in which the court therein dismissed an application for stay of execution as the applicant therein had failed to give reasons for not lodging an appeal within time and relied on the ground that the court had failed to issue it with a certified copy of the judgment, a similar situation like in this case. She did not attach a copy of this decision for perusal by this court so this court did not consider the same.

18. It is important to note that the conditions of granting a stay of execution pending appeal in the Court of Appeal are very different from those in the High Court. The case of Halai & Another vs Thornton & Turpin (1963) Limited (Supra) 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, 2010 be satisfied.

19. Order 46 Rule 6 (2) of the Civil Procedure Rules under the Applicant’s application was premised provides that before a stay of execution of an order or decree can be granted, 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.

20. 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.

21. Notably, the Applicant's Supporting Affidavit was very generalised and sketchy. This delay was unexplained in the Affidavit of Joan Oburu. This court was at a loss why it failed to appeal within time. Its argument that it was a mere four (4) days after the forty five (45) days stay of execution lapsed only made it appear indolent. It was clear that it filed the present application almost two (2) months from the date of delivery of the said Judgment.

22. The Respondent had indicated that the Applicant had prevailed upon her advocates not to execute. However she did not furnish this court with proof of such communication. She only annexed a copy of her advocates' letter dated 16th August 2016 in which they had threatened to file a declaratory suit.

23. If that was the case, it was not clear to this court whether indeed the Applicant had a change of heart and instructed its advocates to appeal against the entire Judgment herein. This court could not therefore fault the Respondent in contending that this application was intended to delay her from enjoying the fruits of her Judgment.

24. Having said so, this court was of the considered view that a court should refuse to grant an order for a stay of execution if the delay cannot be explained and 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**(emphasis court).

25. In other words, if there is a delay irrespective of whether it is ordinate or not inordinate and it is not properly explained but it can be excused without causing prejudice to the opposing party, a court should grant an order for stay of execution. In this case, the Applicant had suggested that it could not file a Memorandum of Appeal without typed proceedings, which the Respondent argued were not necessary for it to do. This court entirely agreed with her in this respect.

26. However, this court was not persuaded to find that the delay of two (2) months from the date of delivery of the Judgment herein, though unexplained, was so unreasonable and inordinate so as to have caused the Respondent any prejudice. Indeed, she had not taken out a Certificate of Costs and Decree or commenced execution proceedings against the Applicant herein at the time the present application was filed.

27. If the Respondent had suffered any prejudice and/or hardship, then she did not demonstrate the same to this court. It was, however, not clear to this court why she was filing a declaratory suit against the Applicant's insurer as opposed to executing the judgment against the Applicant herein.

28. Turning to the issue of substantial loss, the Applicant was emphatic that the Respondent did not attach any proof of her financial ability or otherwise. It was evident that in the event the Applicant was successful, it was not known how they would recover the same from her in the event it was successful on their appeal.

29. 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.

30. On the issue of security, the Applicant indicated its readiness, willingness and ability to deposit the decretal sum into court. 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.

31. Although as this court observed the Applicant failed to explain the delay in filing its Memorandum of Appeal within the stipulated period of thirty (30) days, it 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.

32. 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 where the regularity of the judgment amongst other issues obtained. 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...”

33. Appreciably, the Applicant raised an arguable point of law whether the Learned Trial Magistrate could award the Respondent damages under the Fatal Accidents Act. It should not therefore be deprived its right of appeal.

34. Accordingly, having considered the parties' pleadings, affidavits, Written 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 be granted.

35. As an *obiter*, the issues that were deponed to in the Supporting Affidavit were within the Applicants' advocates' knowledge. It was therefore not necessary for the deponent therein to have sworn the said Affidavit. The said deponent had averred that she was swearing the said Affidavit by dint of their right of their rights of subrogation under the relevant policy of insurance and at common law, the right to defend, settle or prosecute any claims in the insured's name.

36. Notably, the doctrine of subrogation does not apply until such time that proceedings are instituted to recover monies an insurer has paid third parties on behalf of its insured as provided for in their insurance policies. The practise of officers of insurance companies swearing affidavits on behalf of their insureds in applications seeking stay of execution orders pending appeal should therefore be desisted as pleadings ought to be drawn in the name of their insureds.

37. Where a matter is not contested such as that of an application a stay of execution pending appeal, an advocate may swear an affidavit on behalf of his client if the matter is urgent and the said client is not available. However, the desirable practise ought to be that parties to a suit should swear affidavits.

DISPOSITION

38. For the foregoing reasons, the upshot of this court's ruling was that the Applicants' Notice of Motion application dated 13th August 2016 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 Nderitu on 20th June 2016 within the next fourteen (14) days from the date of this Ruling i.e. by 27th December 2016.

2. THAT there shall be a stay of execution of Judgment that was delivered by Hon Nderitu on 20th June 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 393,860/= within the next sixty (60) days from the date hereof i.e. by 2nd March 2017.

3. For the avoidance of doubt, in the event, the Applicants shall default on either on Paragraph 38 (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 2nd March 2017.

5. The matter shall be mentioned on 6th March 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.

39. It is so ordered.

DATED and DELIVERED at VOI this 13TH day of DECEMBER 2016

J. KAMAU

JUDGE