



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. 6 OF 2014**

**ZADOCK SIMWA ZEBEDEE ..... APPELLANT**

**V E R S U S**

**ERICK WAPANG'ANA T/A MAGHARIBI INVESTMENT MACHINERY ..... RESPONDENT**

**(Appeal arising from the judgment and decree dated 20.11.2012 delivered on 21.05.2013 in Mumias Senior Principal Magistrate's Court in Civil Case No. 9 of 2012)**

**RULING**

1. The applicant/appellant filed his Notice of Motion dated 17/02/2014 through his advocate, M/S Ongoya Wambola Advocates seeking the following orders:-
  1. That this application be certified as urgent and service thereof be dispensed with in the first instance.
  2. That pending the hearing and determination of the application inter partes, there be a stay of execution and all proceedings in Mumias SPMCC No.9 of 2012.
  3. That the time limited for filing the Memorandum of Appeal herein be enlarged and the Memorandum of appeal filed herein be admitted as filed within such enlarged time.
  4. That upon inter partes hearing and pending the hearing and determination of the substantive appeal herein there be a stay of execution and all proceedings in Mumias SPMCC No. 9 of 2012.
  5. That the costs of this application be provided for.
2. The application is premised on 10 grounds set out on the face thereof and is also supported by the averments in the affidavit sworn by Elisha Zebedee Ongoya, Advocate dated 17/02/2014. In the main the applicant contends that after delivery of judgment on 21/05/2013 (though same originally reserved for 19/09/2012) the court file in Mumias SPMCC No. 9 of 2012 went missing and that efforts to obtain a copy of the judgment and proceedings did not bear fruit until much later in the year 2013 and that by that time Mr. E.Z. Ongoya who previously practiced in the firm of Asiema & Co. Advocates who had the conduct of the suit on behalf of the applicant had already left the said firm. That it was therefore difficult for Mr. E. Z. Ongoya Advocate to proceed with the matter on behalf of the applicant who was dissatisfied with the judgment of the learned trial magistrate.
3. The deponent further says that unless the orders sought herein are granted, the respondent, who has already taken out a notice to show cause why execution by committal to civil jail should not be issued against the applicant, is likely to proceed with such execution at great prejudice to the applicant.
4. The application is opposed vide the replying affidavit sworn by Kevin Marisho Luchivya, advocate on 13/03/2015. The respondent contends that there is no good reason why the applicant did not act on time to file appeal after delivery of judgment on 21/05/2012 in the presence of Mr.

- Otinga Advocate who took the judgment on behalf of Mr. E. Z. Ongoya on behalf of the applicant. Further, the deponent of the replying affidavit avers that the applicant has not placed before the court any evidence to show that he applied for proceedings and judgment in respect of Mumias SPMCC No. 9 of 2012, and that on the whole, the instant application is frivolous, vexatious, lacks merit, incompetent and a waste of court's time and resources and is otherwise an abuse of the court process. He prays that the application be dismissed with costs to the respondent.
5. The respondent however says that in the unlikely event that the application is allowed, then the applicant must be ordered to deposit the entire costs of the suit into a joint interest earning account to be opened in the names of the parties' advocates pending hearing and determination of the intended appeal.
  6. In his supplementary affidavit sworn on 24/02/2015, Mr. E.Z. Ongoya states that though Mr. Otinga was present in court on 21/05/2013 when the impugned judgment was delivered, he was there on a totally different matter and that the judgment was delivered only after he had made enquiries about it. Further, that since the conduct of the trial magistrate was less than candid, the applicant ought not to be denied his right of appeal, especially so when the court file was not available even for the filing of any letter of request for proceedings and judgment.
  7. Regarding the issue of security in an application of this nature, Mr. Ongoya averred that the giving of security is not a condition precedent for the filing of an application for stay though it may be one of the conditions to be imposed by the court in granting the application. He also says that the applicant is ready and willing to deposit the taxed costs herein in a joint interest earning account between the parties' advocates should the court so order.
  8. The application was canvassed by way of written submissions. The parties filed and exchanged their written submissions on 26/02/2015 and 13<sup>th</sup> May 2014 respectively. I have carefully read through both sets of submissions.
  9. The instant application is governed by the provisions of **Order 42 Rule 6(2)** of the CPR which provides as follows:-

***“6 (2) No order for stay of execution shall be made under sub rule (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.”***
10. Thus, for the applicant herein to succeed on his application, he must satisfy the court that substantial loss may result to him if the orders sought are not granted. He must also satisfy the court that the application has been brought without undue delay and thirdly, 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. The first question for determination is whether the applicant herein has satisfied all the three conditions as set out above so as to be entitled to the orders sought.
11. On this issue, the applicant has argued that since he did not take part in the process which gave rise to the taxed costs, then the order for stay ought to be allowed, since the taxation of the costs took place in total violation of the principles of natural justice. The applicant also submits that he is ready and willing to have the taxed costs either deposited in court or in a joint interest earning account.
12. The applicant has relied on the provisions of **Section 1A** and **1B** of the Civil Procedure Act to buttress his argument that the applicant herein is entitled to the orders sought. The two sections provide as follows:-

***“1A. The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”***

***1B. For the purposes of furthering the overriding objective specified in section 1A, the***

*court shall handle all matters presented before it for the purposes of attaining the following aims:-*

- a. *the just determination of the proceedings;*
- b. *the efficient disposal of the business of the Court; and to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”*

13. Counsel for the applicant also relies on the provisions of Order 50 Rule 6 of the Civil Procedure Rules for his proposition that the law is on the side of the applicant on the prayer for extension of time within which to file the intended appeal. The rule provides as follows:

*“6. Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”*

14. The respondent on the other hand contends that having failed to comply with the provisions of **section 79G** of the Civil Procedure Act then the applicant is not entitled to the prayers sought. The section reads as follows:-

*“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.*

*Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”*

15. The respondent argues that the applicant has no intention of appealing against the impugned judgment but is only interested in defeating justice and denying the respondent the fruits of the judgment obtained in the lower court. He also contends that despite being served with the respondent's bill of costs, on or about 10/09/2013, which was duly received by his advocates, the applicant's advocates did not take any action till on or about 17/02/2014 when the respondent was in the process of execution that he (applicant) woke up. The court has been asked to dismiss the application with costs.

16. The respondent also submits that the applicant has miserably failed to meet the conditions set out under Order 42 Rule 6 (2)(b) of the Civil Procedure Rules (supra), and in particular, that the applicant has not indicated in his application what substantial loss he is likely to suffer if the orders sought are not granted.

17. Thirdly, the respondent submits that the draft appeal does not raise any reasonable grounds and that as such it would be a waste of court's time to allow the applicant to go on with his intended appeal. The respondent also submits that that in any event, the motorcycle, the subject matter of the suit in the court below has long been released to the owner and that the intended appeal has very slim chances of success.

18. Finally, the respondent submits that the costs which are in dispute were awarded to the respondent after due process and that the applicant's counsel though served with the Bill of Costs failed to turn up to participate in the same. Further that whether or not the applicant participated at the hearing of the Bill of Costs the final decision on the amount of costs to be awarded rested with the taxing master. For this proposition, counsel relied on the case of **Francis Kabira –vs- Nancy Wambui & Another – Nairobi Court of Appeal Civil Appeal No. 29 of 1996** in which the learned Judges of Appeal held that a stay cannot be granted in respect of costs. Counsel thus submits that since the issue in the present matter is execution of costs, the stay should not be granted.

19. I have now carefully considered the application as filed, the replying affidavit, the submissions and the law and now is the time to say whether or not the law is on the side of the applicant in

- respect of the orders sought. In my considered view, I find that the applicant has not satisfied this court as to the conditions for the granting of the orders sought. I agree with the submissions of the respondent that a stay order cannot be granted in respect of costs. Throughout the pleadings and the submissions by the applicant, there is no indication that the applicant desires to appeal against the judgment of the trial court. For this reason, I do not find merit in the application.
20. It is also on record that the Bill of Costs was served upon the applicant's counsel as far back as 10/09/2013, yet it was not until 17/02/2014 that the instant application was filed. I do not think that the application was filed without undue delay. The applicant is guilty of inordinate delay. I also find that the applicant has not demonstrated to the satisfaction of this court what substantial loss will be suffered by him if the order sought is not granted. The issue of substantial loss is of paramount importance to the court when considering applications of this nature. Having failed to demonstrate what substantial loss he is likely to suffer, the application must fail.
21. It is also trite law that a court will not grant a stay of execution in monetary decrees unless there are special features such as the regularity of the judgment, the fact that the amount payable under the decree is substantial and the fact that the applicant has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful. In the instant case, there is no appeal in the first place, and secondly there is no proof of any of the special features mentioned in the case of **Singh –vs- Runda Estates Ltd. [1960] EA 263**.
22. The final point I wish to make is that the purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his inalienable right of appeal is not tampered with. For this holding see **Consolidated Marine –vs- Nampijja & Another – Civil Application Nairobi 93 of 1989** (unreported). In the instant case, it is not disputed that the subject matter of this appeal was released to the respondent long before the application was filed. It is also clear to the court that the applicant has not indicated that he intends to appeal against the judgment of the trial court, but only against the taxed costs.
23. For the reasons above stated I find that the instant application both on the prayer for stay of execution and the prayer for leave to appeal out of time has no basis and lacks merit. The same is hereby dismissed in its entirety with costs to the respondent.
24. Orders accordingly.

**Delivered, dated and signed in open court at Kakamega this 18<sup>th</sup> day of March 2015**

**RUTH N. SITATI**

**JUDGE**

In the presence of

Mr. Shivega for Elisha Ongaya for Applicant

Mr. Luchivya (absent) ..For Respondent

Mr. F. Juma.....For Court Assistant