



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO.136 OF 2014

MARGARET MWIHAKI WANJAU.....APPELLANT

VERSUS

JOSEPH MUIRURI MUGO.....RESPONDENT

RULING

Introduction

1. On **6th October, 2014** the Appellant (Applicant) brought the notice of motion dated **25th September, 2014** seeking, among other orders, stay of execution or enforcement of the judgment delivered on **17th March, 2014** and the decree or consequential orders obtained in respect thereof pending the hearing of the intended appeal or further orders of this court; stay of proceedings in **Thika CMCC 419 of 2012** pending the hearing and determination of the intended appeal or further orders of this court and review and/or variation of the order of the lower court of **23rd June, 2014** to the extent that she be allowed to deposit in court part of the decretal sum as security (the applicant proposes to deposit Kshs. 400,000/= in court being the amount she can afford). In the alternative, the applicant prays that she be allowed to deposit the title deed for title No. **Ngenda/Githunguchu/T.23** in place of the decretal sum.
2. The application is premised on the grounds that Judgment in Thika CMCC 419 of 2012 was delivered on 17th March, 2014 in favour of the respondent; that the applicant's application for stay of execution of the judgment and decree of the lower court was allowed on condition that she deposits the entire decretal amount in court. The applicant contends that the said condition imposes hardship on her in that owing to her economic status and advanced age, she is not in a position to meet the said condition within the time granted (30 days); that her plea for review of the order of the court to allow her deposit alternative security was dismissed by the lower court and that she is the owner of the parcel of land known as Ngenda/Githunguchu/T.23 located within Kiambu County, in respect of which she is willing to deposit the title documents in lieu of the decretal amount.
3. Terming the conditions imposed by the lower court too harsh, the applicant likens the conditions with denial of a chance to appeal. Maintaining that she intends to appeal against the decision of the lower court, the applicant explains that the application has been brought without unreasonable delay and that the intended appeal has high chances of success.
4. The applicant further contends that whilst a denial of the orders sought will render the appeal nugatory and occasion her irreparable loss, no prejudice will be occasioned on the respondent.
5. In support of the application, the applicant swore the affidavit filed alongside the application dated **25th September, 2014** in which she has reiterated the grounds thereon and annexed the following documents in support of the application:-Memorandum of appeal marked as **MMW-1**; Letter to the

Deputy Registrar of this court requesting copies of typed proceedings and judgment as **MMW-2**; Copy of title deed and certificate of official search marked **MMW-3** and valuation report in respect of the property whose title is proposed to be deposited as alternative security).

6. The application is opposed through the grounds of opposition dated **13th October, 2014** where it is contended that an appeal cannot operate as a stay of execution under **Order 42 Rule 6** of the Civil Procedure Rules; that the application is a scheme aimed at denying the respondent the fruits of his judgment and that no new issues have been raised in the application. Further that the application is brought under the wrong provisions of the law; is *res judicata* and that the appeal has no chances of success. It is also contended that the applicant will not suffer any prejudice and/or irreparable/substantial loss if the orders sought are denied and that the applicant is guilty of delay in making the application and expediting the appeal.

Submissions

7. When the application came up for hearing on **2nd March, 2015** counsel for the applicant, **Mr. Kamau**, informed the court that the applicant had been granted stay on condition that she deposits the entire decretal sum in court within thirty days. Reiterating the contention that the said conditions are harsh on the applicant who does not have a steady income, counsel urged the court to allow the orders sought in the application.

8. Concerning the respondents contention that the application is *res judicata*, he submitted that any party aggrieved by the decision of the lower court is allowed to seek stay in the High court. He denied the allegation that there has been delay in lodging the application. Referring to the principles of justice espoused in **Articles 49, 50 and 159** of the Constitution and the decision in the case of **African Safari Club vs. Safe Rentals Ltd (2010) eKLR**, he further submitted that under the principle of proportionality, the court ought to balance justice against hardship and that the conditions set for stay are not exhaustive.

9. On his part, counsel for the respondent **Mr. Mwangi**, stated that he could not comment on prayers number 2 and 3 seeking stay pending hearing of an intended appeal because he does not know what the intended appeal is about. With regard to the order for review, he submitted that, that order cannot issue because this court has not given any order capable of being reviewed. He pointed out that the prayers for review were canvassed before the lower court and denied and contended that those orders are *res judicata*, and incapable of being granted. On the principle of proportionality vis-a-vis hardship, he submitted that the said principle cannot cure the defect in the application.

10. Contending that the intended appeal has not being annexed to the application, Mr. Mwangi submitted that the application is without merit and urged the court to dismiss it with costs to the respondent.

11. In a rejoinder, Mr. Kamau explained that the applicant has annexed the Memorandum of Appeal to the applicant's supporting affidavit and a letter seeking typed proceedings and judgment. For that reason, he maintained that it is clear which appeal is being referred to. He explained that proceedings at the lower court are yet to be supplied and reiterated that the appeal has high chances of success.

Issues for determination

12. I have considered the pleadings and the oral submissions by the respective counsels and I find the issues for determination to be;

- i) Whether the application is *res judicata* the application filed at the lower court?
- ii) Whether this court can issue the order of review given that it is not the court that issued the order sought to be reviewed?
- iii) Whether the applicant has made a case for issuance of the orders sought, or any of them?

iv) What orders should the court make?

The Law applicable to the application:-

13. As pointed out above, the applicant seeks a number of orders, namely, stay of execution or enforcement of the judgment delivered on 17th March, 2014 and the decree or consequential orders obtained in respect thereof pending the hearing of the intended appeal or further orders of this court; stay of proceedings in Thika CMCC 419 of 2012 pending the hearing and determination of the intended appeal or further orders of this court and review and/or variation of the order of the lower court.

14. The various orders sought in this application are provided for under different sections of the Civil Procedure Rules. For instance, an order of stay of execution is provided for under **Order 22 Rule 22**; stay pending appeal **Order 42 Rule 6**; review or variation of orders is provided for under **Order 45**.

15. Whereas the current application is brought under **Order 42 Rule 6** and **Order 51 Rule 1**, the applicant has sought prayers that can only be granted under other provisions of the law for instance, the Order for review or variation of the order can only be dealt with under **Order 45**. That notwithstanding, under **Article 159** of the Constitution as read with **Section 1A** of the Civil Procedure Act, this court is enjoined to administer justice without undue regard to procedural technicalities. **Section 3A** of the Civil Procedure Act, on the other hand, donates power to this court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. The Section provides as follows:-

“3A. Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

16. Addressing the question of stay of proceedings generally, **Gikonyo J.**, in the case of **Lucy Waithera Kimanga & 2 others v. John Waiganjo Gichuri (2015) e KLR** stated:-

“The legal considerations in an application for stay of proceedings have been enunciated in a host of judicial decisions which I need not multiply. Except I can cite some few, say, Daniel Walter Rasugu Nbi Hccc No 15 of 2006 ; Global Tours & Travel Limited; Nairobi HC Winding Up Cause No.43 of 2000; and Kenya Power & Lighting Company Limited vs. Esther Wanjiru Wokabi [2014] eKLR. The guiding legal principles gathered from these cases may be summarized as follows:-

- a) **The decision whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice.**
- b) **The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted.**
- c) **In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. In considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the *prima facie* merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”**

The Honourable judge went to say....” **The *locus classicus* authority is the finding of Madan JA (as he then was) in the case of Butt v The Rent Restriction Tribunal (supra) stay of execution. The Applicant for stay of proceedings pending appeal must provide specific details and particulars of the loss he is likely to suffer if the stay is not granted. It is not enough to merely state that substantial loss will result, or that justice would be put into disrepute, like the Applicant in the instant case. The Respondent/Applicant has not shown how he is likely to suffer if his application is dismissed. His appeal is unmerited. It is the shareholders who will suffer out of the mismanagement of the companies. See decision by Havelock. J. in Bai Lin (K) Ltd & 2 others v Zingo Investments**

Limited & another [2014] eKLR where he relied on the holding in *Machira v. East African Standard* (No. 2) (2002) 2 KLR 63, where Kuloba J. found;

“In handling applications for stay of further proceedings or execution, one of the fundamental procedural values is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him a success at any stage....In order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavits or other evidential material that substantial loss may result...In this kind of application for stay, it is not enough for the applicant merely to state that substantial loss will result. He must provide specific details and particulars...Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”

[11] See also decision by Odunga J on substantial loss in Republic v. The Commissioner For Investigations & Enforcement 'Ex-Parte' Wananchi Group Kenya Limited [2014] eKLR, where he relied on the case of Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63, where Kuloba J. also held that;

“...to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court...”

17. With regard to the instant application it is, inter alia, submitted that the application is *res judicata* the application prosecuted in the lower court.

18. In determining whether the current application is *res judicata* the one filed in the lower court, one needs to consider the provisions of **Order 42 Rule 6(1)**, under which the current application is brought. Under the said Section of the law (Order 42 Rule 6) any person aggrieved by an order of stay made by the court from whose decision an appeal is preferred may apply to the appellate court to have such order set aside.

19. This is so whether or not the application brought in the lower court was allowed or disallowed. See **Order 42 Rule(1)** which provides as follows:-

“(1) No appeal or second appeal shall operate as 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 been made to consider such application and to make such order thereon as may be 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.” (emphasis supplied).

20. From the foregoing provisions of the law, it is clear that a party aggrieved by an order of stay made by the court from whose decision the appeal is preferred, like in the instance case, is allowed to apply to the appellate court to have such order set aside. Such an application, if brought under **Order 42 Rule 6** will not be caught up by the doctrine of *res judicata*, as contended by counsel for the respondent.

21. Although the applicant has used words or expressions which make the application appear to be governed by the provision of **Order 45** on review, under which this court does not have mandate to

review and set aside the order of the lower court unless appealed from, noting that the current application is brought under **Order 42 Rule 6**, I take the words review and variation of the orders to be based on the premise that this court has power to consider the application and if satisfied that there is sufficient cause for setting the orders aside, to do so.

22. In my view, nothing stops this court from granting the orders sought in this application if it is satisfied that it is in the interest of justice to do so. The only rider to issuance of those orders is that the court must be satisfied that-

- a. **Substantial loss may result to the applicant unless the order is made;**
- b. **The application has been made without unreasonable delay;**
- c. **Such security as the court orders for the performance of such decree or order as may ultimately be binding on him has been given by the applicant. See Order 42 Rule 6(2).**

23. According to the pleadings/documents filed in this case, the order of the lower court appealed from was granted on 23rd June, 2014. The applicant sought review of the decision of the lower court but the application for review was not granted. Although it is not clear when a decision was made in respect of the application for review; taking note that the orders sought to be reviewed were made on 23rd June, 2014 and the current application made on 6th October, 2014, I am satisfied that the current application was made without unreasonable delay.

24. On whether the applicant will suffer substantial loss if the order of stay of execution is not granted, although the applicant has not detailed or particularised the loss she would suffer, as was stated in the case of **Butt v The Rent Restriction Tribunal** quoted in the case of **Lucy Waithera Kimanga & 2 others v. John Waiganjo Gichuri**(*supra*); noting that the subject matter of the appeal is land, I am satisfied that unless a stay of execution is granted, the applicant may suffer substantial loss in that she may lose her rights of use and/or possession of the suit property pending the hearing and determination of the appeal.

25. On the question of Security, I note that the applicant has offered to deposit Kshs. 400,000/= in court and/or to deposit the title deed for Title No. Ngenda/Githunguri/T.23 valued at Kshs.5,400,000/=.

26. Although that offer for security is objected to by the respondent who contends that the applicant is capable of raising the entire decretal sum, being of the view that the requirement of security is not meant to occasion hardship or punish a person who has preferred an appeal but to secure the rights of the respondent, in the circumstances of this case, I am satisfied that the security proposed by the applicant will adequately cover the respondents' interest should the appeal be determined in his favour.

27. In view of the foregoing, I find the application by the applicant to be merited. Consequently I set aside the order of the lower court and substitute it with an order for deposit of Kshs. 400,000/- in court. In addition, the applicant shall deposit the Title deed of the property offered as security in court. The applicant must comply with the orders as to security within 30 days from the date hereof, failing which the respondent shall be at liberty to execute.

28. Each party to bear their costs for this application.

Dated, signed and delivered at Nyeri this 16th day of April, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Ms Kahinga holding brief for Gathiga Mwangi for the respondent

No appearance for the appellant

Lydia - Court Assistant