



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 6 OF 2015

DONALD MAGANGA MWACHIOFI..... APPELLANT

VERSUS

RUTH SAMBO SHUMA (SUING AS THE ADMINISTRATOR

OF THE ESTATE OF ELIAS SHUMA MWAKIRETI)

.....RESPONDENT

RULING

THE APPLICATION

1. By a Notice of Motion dated 29th April 2015, the appellant seeks principally a stay of execution of the judgment of the Voi Senior principal Magistrate's Court (Hon. S. M. Wahome, SPM) in SPMCCC No. 80 of 2015 in which the Court order which found the appellant to be in unlawful possession of the suit property parcel of land LR 1956/357 Voi Municipality in a judgment delivered in the absence of the parties on the 22nd April 2015. An order of stay of execution was granted by this Court (Kasango, J.) on 30th April 2015 and has since been extended from time to time in the course of hearing and determination of the application.

2. Upon an earlier application dated the 7th April 2015 for stay of proceedings pending appeal pending appeal from the refusal of an adjournment by the trial and directions that submissions be taken for delivery of judgment on 20th April 2015, the appellant obtained orders staying the taking of submissions towards the preparation of the judgment in terms as follows:

"ORDERS

1. ***THAT*** the Application to be served and hearing on 13/04/2015 at 2.30p.m. in Mombasa High Court.
2. ***THAT*** the Submission in Voi SPMCC No. 80 of 2013 are stayed until further orders of the Court.

GIVEN under my hand and seal of this Honourable Court this 10th day of April 2015."

3. The application for stay of proceedings which also sought leave to appeal was argued and ruling reserved. However, before the ruling was delivered by this Court, counsel for the respondent informed the Court that the trial Court had gone ahead and delivered its judgment in the matter on the 22nd April 2015 in the absence of the parties and it was therefore contended that the application for stay of

proceedings pending appeal from the refusal of the adjournment had been overtaken by events.

4. The matter was adjourned for counsel for the appellant to confirm the delivery of the judgment to take further steps as she may be instructed by the appellant.

5. The appellant subsequently filed the Notice of Motion of 29th April 2015 to which the Counsel for the Respondent filed grounds of opposition dated 3rd June 2015. Upon it being pointed out by the Court that there was no appeal from the judgment but only from the refusal of adjournment before judgment was delivered, the appellant filed a Memorandum of Appeal dated 9th July 2015.

6. The application of 29th April 2015 was then heard with counsel – Ms. Salma Ramadhan for the appellant and Mr. Mwakireti for the Respondent making oral submissions on 16th July 2015 and ruling was reserved for 31st July 2015.

DETERMINATION

7. The Court has considered the pleadings and submissions by the parties in this matter, and for the reasons set out below, determined that a for stay of execution of the judgment of the trial Court must be stayed pending appeal upon terms in accordance with the provisions of Order 42 rule 6 of the Civil Procedure Rules and the principles for the grant of stay of execution pending appeal. Order 42 rule 6 (2) of the Civil Procedure Rules provides the principles for the grant of stay of execution pending appeal as follows:

“(2) No order for stay of execution shall be made under subrule (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.”*

8. In addition to the test for stay of execution pending appeal under Order 42 of the Civil Procedure Rules, the High Court, as an appellate Court, has adopted the common law test of arguability of the appeal adopted in appeals to the Court of Appeal under the **Erinford** Principles [so called from the leading decision of **Erinford Properties Ltd. v. Cheshire County Council** (1974) 2 ALL ER 443, Megarry J. in considering an application for injunction pending appeal laid down that although the Court ought to grant an injunction pending appeal where ‘when a party is appealing, exercising his undoubted right of appeal, the Court ought to see that the appeal if successful is not nugatory’ it would be wrong to grant an injunction pending appeal where the appeal is frivolous. See also the application in Kenya of **Erinford** in **Madhupaper International Ltd. v. Kerr** (1985) KLR 846].

Whether the appellant has an arguable case or serious issues to be presented to the appellate Court.

9. The first question to be addressed on the issue of arguability of the appeal is whether in fact there is an appeal on the basis of which an application for stay of execution **pending appeal** may be founded. Although the rules for appeal to the High Court do not expressly so provide it would appear that unlike in the Court of Appeal where a notice of appeal suffices, an appeal to the High Court must be signified by an appeal filed in accordance with Order 42 rule 1 (1) of the Civil Procedure Rules by a Memorandum of Appeal which provides as follows:

“1. (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.”

Whether there is an appeal

10. Although the Memorandum of Appeal dated 9th July 2015 is filed in the same file as the earlier Appeal against refusal of adjournment was initially filed, it is an irregularity that can simply be corrected administratively by filing the later Appeal under a different cause number. Moreover, being an appeal against a **judgment** of the subordinate court it is appealable as of right in terms of section 65 of the Civil Procedure Act, which provides as follows:

“65. Appeal from other courts

*(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, **an appeal shall lie to the High Court—***

(a) Deleted by Act No. 10 of 1969, Sch.;

*(b) **from any original decree or part of a decree of a subordinate court, other than a magistrate’s court of the third class, on a question of law or fact;***

(c) from a decree or part of a decree of a Kadhi’s Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.

(2) Deleted by Act No. 10 of 1969, Sch.

(3) Deleted by Act No. 10 of 1969, Sch.”

11. Of importance in terms of Order 42 rule 6 (1) of the Civil Procedure Rules is that an appeal be filed, and as at the time when the application was argued there was an appeal duly filed in manner of the Memorandum of Appeal dated 9th July 2015. Indeed, as provided in Order 42 rule 6 (4) of the Civil Procedure Rules, in appeals to the Court of Appeal a Notice of Appeal given in accordance with the Rule of that Court is sufficient for purposes of an application for stay of execution pending appeal.

Whether appeal is frivolous

12. It is clear from the judgment that the trial Court was aware of the order of the High Court restraining the taking of submissions because in the judgment the Court states as follows:

“I have carefully considered the pleading, and the evidence on record. The defendant obtained orders that restrained the Court from relying on the submissions and we are bound by the order from the High Court.”

Yet the Court proceeded to prepare and deliver judgment in the case!

13. From the first four grounds of appeal as set out in the Memorandum of Appeal, the appellant questions the jurisdiction and propriety of the trial Court in proceedings to deliver judgment after the High Court had stayed the taking of submissions of the parties towards the judgment, and asserts that the trial Court could not properly find that its taking of submissions was stayed by the High Court and yet proceed to deliver judgment in the matter. The appellant states in the said grounds (1 - 4) of the Memorandum of Appeal that:

“MEMORANDUM OF APPEAL

- 1. The learned magistrate gravely erred in law and in fact by proceeding and delivering judgment on the matter on the 22/04/2015, ignoring/despite clear High Court Orders staying submissions on the matter until further orders of the Court, thereby misdirecting and misleading itself completely and acting in contempt, as a result making a judgment that ab initio stands to be irregular, illegal, null and void (ultra vires).*
- 2. The learned magistrate gravely erred in law and in facts in finding that he is bound by the Orders of the High Court, but non the less went ahead and ignored the same orders by the said High*

Court and deliver judgment in spite clear staying orders.

3. *The learned magistrate gravely erred in law and in facts in interpreting that stay of Submissions until further orders of the court, only applied to stay of the submission and the Court was therefore free to deliver judgment in absence of submission.*
4. *The learned magistrate completely misdirected itself in failing to have in mind/account and apply the clear principle of law; being; submissions follow judgment, thus stay of submission automatically stays judgment and the term “until further orders of the court” clearly intimated all happenings on the matter were stayed “until further orders of the court” and as a result acting irregularly/illegal and in complete disregard of the fact that nothing regular/legal can come out of irregular/illegal doings/actions/finding.”*

14. The appellant has an arguable case in the very serious question to be put before the appeal Court - whether the trial Court may ignore an order for stay of taking of submissions as a step before preparation of judgment to proceed to deliver judgment under the pretext that the preparation delivery of then judgment was not affected by the order. It appears absurd to suggest as the judgment appears to do that the taking of submissions is a step in the proceedings for its sake and to its own end and not a means or step towards the eventual determination of the matter by judgment in the case. It is definitely arguable whether the taking of submissions before judgment is an independent step in the proceedings which can be side-stepped and judgment prepared and delivered by a trial Court.

15. The taking of submissions appear to be a mandatory step unless parties confirm that they do not wish to make any submission and they by consent request the Court to pronounce judgment based on the evidence adduced before it. This appears to be the directive given by the rules of the Court as to hearing in Order 18 rule 2 of the Civil Procedure Rules as follows:

“2. Unless the Court otherwise orders—

*(1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin **shall state his case** and produce his evidence in support of the issues which he is bound to prove.*

*(2) The other party shall then state his case and produce his evidence, and may then **address the Court generally on the case. The party beginning may then reply.***

*(3) After the party beginning has produced his evidence then, if the other party has not produced and announces that he does not propose to produce evidence, **the party beginning shall have the right to address the Court generally on the case; the other party shall then have the right to address the Court in reply**, but if in the course of his address he cites a case or cases the party beginning shall have the right to address the Court at the conclusion of the address of the other party for the purpose of observing on the case or cases cited.”*

16. In the circumstances, without prejudice to the finding of the Court that eventually hears the appeal, this Court is not prepared to hold that the appeal against the judgment of the trial Court delivered on the 22nd April 2015 is frivolous; the appeal does present serious questions for consideration by the appellate Court.

17. It is also a matter of some importance that the appeal will afford an opportunity for the guidance of Magistrate’s Courts by the High Court as an appellate Court as to how to deal with orders of stay made by the High Court against certain steps, directions or orders in proceedings before them in the interest of certainty in the law and practice and as well as in understanding and effective work relations between the trial and appellate Courts. It would appear that in this case, the trial Court could be some ingenuity in interpretation of an order for stay issued against it proceed to do exactly the same thing that the order for stay sought to stop.

18. If such a situation were allowed to prevail, the litigants would always be at a loss as to whether and to what outcome an order of stay of a step in the proceedings issued by an appellate Court against the trial Court will be obeyed by the trial Court. Litigants would have to wait and see what the trial Court makes of the orders issued against it pending an appeal, and determine whether to file a subsequent appeal, and so forth. That is recipe for chaos in the judicial system and the sooner it is corrected the better for the due administration of justice.

Whether the appellant will suffer substantial loss if stay is not granted

19. The judgment of the trial Court found that the appellant is possession of the suit property unlawfully and in the execution of that judgment proceedings for the eviction of the appellant may be taken any time unless stay of execution of the judgment is granted pending the hearing of the appeal. That would be substantial loss to the appellant, who would be ejected from the suit property on which he alleges to have lived for 30 years. The Court makes no finding as to the appellant’s right or entitlement to the suit property but the very prospect of eviction for the land is substantial loss.

Whether the appellant has given security

20. It is the duty of the Court in granting a stay of execution to call for provision of security as a term of the grant of order for stay in compliance with the requirements of Order 42 rule 6 (2) of the Civil Procedure Rules. The Court will therefore make an order for provision of suitable security in the circumstances of the particular case.

ORDERS

21. The Court having found that the appellant’s appeal has an arguable case or serious questions to be put before the appellate Court, the Memorandum of Appeal may, in the interests of justice that a meritorious appeal be heard notwithstanding an irregularity as to its registration in the Court register, properly be filed as Civil Appeal No. 6B of 2015, with the earlier appeal against the refusal for adjournment becoming Civil Appeal No.6A of 2015, and it so ordered.

22. There shall be a stay of execution of the judgment of the Senior Principal Magistrate’s Court at Voi in Civil Case No. 80 of 2015 pending the hearing and determination of the Appeal herein.

23. The stay of execution pending appeal is granted on condition that the appellant gives security for the due performance of the such decree as may ultimately be binding on him by giving to Court within the next seven (7) days an undertaking in writing and on oath made by the appellant to vacate the suit property within 30 days of an order for possession that may be made by the appellate Court or by the trial Court upon dismissal of the Appeal.

24. The prayers in the Notice of Motion for the setting aside of the judgment of the trial court will be determined upon hearing of the Appeal and the costs of the application will be costs in the appeal.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 31ST DAY OF JULY 2015.

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JUDGE

In the presence of: -

..... for the Appellant

..... for the Respondent

.....- Court Assistant.