



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO.93 OF 2014

NATIONAL BANK OF KENYA LTD - APPELLANT

VERSUS

ALFRED OWINO BALA - RESPONDENT

RULING

The respondent herein **Alfred Owino Balla** was an employee (*chief teller*) in the appellant bank. The events proceeding the termination of the Respondent's employment in the Appellant's bank were that the Respondent was arraigned in court and charged with the offence of **stealing by servant** vide **Kisii CMCR No.258 of 2010** whereby the Respondent was alleged to have stolen **Ksh.424,530.00** which money came into the Respondents custody by virtue of being an employee of the Appellant. Consequently, the Respondent was then prosecuted vide a criminal proceeding until 17th January 2012 when the Respondent was acquitted of the charges under **Section 210 of the Criminal Procedure Code Chapter 75 Laws of Kenya**.

Pursuant to his acquittal, the Respondent commenced malicious prosecutions proceedings against the Appellant seeking compensation of wrongful arrest and unlawful confinement. The trial court hearing the matter entered judgment in favour of the respondent. The Appellant aggrieved by the judgment and decree of the lower court filed a Memorandum of Appeal dated 13th August 2014 and filed it in court in the even date.

Simultaneously with the above appeal, the Appellant also filed an application in the trial court for stay of execution against the judgment and decree of the lower court. The trial court on hearing the stay of execution application ordered that the Appellant deposits the decretal sum in a joint interest earning account which was to be nominated by both parties. In addition to this the trial court set a 21 day time line which the said decretal sum was to be deposited in the joint interest earning account by the Appellant. However, the Appellant failed to deposit the said decretal sum in a joint interest earning account within the timelines set by the lower court. The Appellant then again applied to the trial court for extension of time to deposit the decretal sum but the said application was dismissed by the trial court on 15th January 2015.

The Appellant has now come to this court vide a Notice of Motion dated 15th January 2015 filed under **Section 1A, 3A & Section 63(B) Civil Procedure Act, Order 42 Rule 6 (1)** of the **Civil Procedure Rules** seeking:-

1) Spent.

2) THAT this Honourable Court be pleased to grant a stay of execution of the Judgment and Decree issued by the subordinate Court in Kisii Chief Magistrate's Court Civil Suit No.210 of

2012 on 31st July 2014 pending the hearing and determination of this application.

3) THAT this Honourable Court be pleased to grant a stay of execution of the Judgment and Decree issued by the subordinate court on 31st July 2014 in Kisii Chief Magistrate's Court Civil Suit No.210 of 2010 pending the hearing and determination of the Appeal filed by the Applicant in the High Court of Kenya at Kisii, Civil Appeal No.93 of 2014.

4) THAT a date for inter-partes hearing of this application be given.

5) THAT the costs of this application be provided for.

The above application is premised on the affidavit of one Caleb Owuonda the Kisii Branch Operations Manager of the Appellant bank whereby he has deponed by acknowledging that a judgment was read and delivered in Kisii CMCC Civil Case No.210 of 2012 on 31st July 2014 in the Respondent's favour. Consequently, they applied for a record of typed and certified copies of proceedings of the judgment and decree but have not yet been supplied with the same. That notwithstanding, that they applied for stay of execution before the trial court, the same was read on 25th September 2014 and granted albeit on condition that the Appellant deposits the same within 21 days of the said date in an interest earning account in the joint names of the advocates of Appellant and Respondent herein and that in default of the said condition, execution to issue forthwith against the Appellants.

He further deponed that the Appellant on its part moved with due dispatch in achieving the opening of the subject account on 11th November 2014 albeit after expiry of the time limited by the court but nevertheless Appellant moved into and deposited in the said account the decretal sum and costs in the sum of Ksh.1,440,785/=. He further stated that the Respondent on the other hand with the time fixed for deposit having expired moved to levy execution against the appellant's goods. Meanwhile, the Appellant on 27th October 2014 filed before the trial court an application for extension of time *ex post facto* for compliance with the conditions of stay of execution issued on 25th September 2014. That the trial court on its part having on 28th October 2014 temporarily stayed execution pending hearing and determination of the Appellant's application for extension of time, delivered a ruling on 15th January 2015 wherein it dismissed the Appellant's application for time extension and dismissed the Appellant's application with costs.

The Appellant has further deponed that he now faces imminent execution against and to the detriment of its assets, business, interests and invaluable good reputation whilst its appeal herein is still pending hearing and while it has already deposited the decretal sum and costs herein in the joint account in the names of its advocates and the Respondent's advocates.

He has further contended that the Respondent's auctioneers have indeed already within an hour of the delivery of the court's ruling moved to the branch, intent on carrying away the Appellants goods notwithstanding that the proclamation period was interrupted by the stay granted by the lower court on 28th October 2014. He has further deponed that the appeal filed herein by the Appellant is an arguable one, has prima facie high chances of success and that the Appellant stands to suffer substantial loss and harm, through the loss of the decretal amount herein and accrued costs in the event that the same is paid to the Respondent and Appellant's appeal succeeds. He also contends that the Appellant company stands to suffer substantial and probably irrecoverable loss unless an order of stay of execution is made in that if the decree is executed and eventually the appeal succeeds, it would well be impossible to retrieve the decretal amount from the Respondent who is not, in comparison with the applicant, a banking institution of great repute and good standing. He also depones that the Appellant's appeal further risks being rendered nugatory and pathless if the subject matter of the appeal being inter alia the cash damages awarded to the Plaintiff/Respondent is allowed to be heard and utilized by the Plaintiff while the applicant ventilates its yet to be exhausted right to be heard at appeal.

Lastly, the Appellant has deponed that the application is brought without unreasonable delay and that the appellant has already albeit out of time complied with the foresaid trial court's condition for the granting of stay and is willing to furnish such security and fulfill such further reasonable conditions as the

Honourable Court may deem fit to order in the context of this application.

The above application was opposed by the Respondent's statement of grounds of opposition and replying affidavit both dated 26th January 2015.

In the statement of grounds of opposition the Respondent advocate M/S Ogutu-Mboya has stated the following:-

- 1. The instant Notice of Motion Application is pre-mature, misconceived and otherwise bad in law.**
- 2. The Appellant/Applicant herein had hitherto sought for and obtained orders of Stay of Execution in respect of the Judgment and Decree of the Subordinate Court rendered on the 31st day of July 2014, whose terms and/or conditions, the Appellant/Applicant failed to satisfy and/or comply with within the set timeline. Consequently, the Appellant/Applicant herein, is guilty of abuse of the Court Process.**
- 3. Having failed to comply with and/or satisfy the terms and conditions of the Order of Stay of Execution granted by the Subordinate Court on the 25th day of September 2014, the Appellant/Applicant herein sought for extension of time, which was declined.**
- 4. In the circumstances, the Appellant/Applicant herein ought to have appealed against the order of the Subordinate Court declining the extension sought. In this regard, the instant application is calculated and/or meant to defeat the Orders of the Subordinate Court rendered on the 15th day of January 2015.**
- 5. In any event, given the nature of the Orders of the Honourable Court granted on the 15th day of January 2015, which have not been appealed against, this Honourable Court is devoid and/or divested of jurisdiction to entertain the subject application.**
- 6. The instant Application otherwise constitutes and/or amounts to an appeal, albeit through the back door against the Orders of the Subordinate Court. Consequently, the application herein is informed and/or replete with Mala-fides.**
- 7. In any event, the Appellant/Applicant has neither tendered nor supplied any evidence of substantial loss, whatsoever and/or howsoever. In the circumstances, the instant application does not meet and/or satisfy the established threshold for granting stay of execution pending an appeal.**
- 8. The instant application does not meet and/or capture the conditions envisaged pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010.**
- 9. The Judgment and Decree sought to be stayed was delivered on the 31st day of July 2014 and hence the instant application has been made and/or mounted with unreasonable delay. In this regard, the application is defeated by laches.**
- 10. In any event, the instant Notice of Motion does not disclose any reasonable cause of action.**
- 11. Besides, the Respondent has a valid and legal Judgment and same is therefore entitled to appropriate and/or benefit from the suit Judgment.**
- 12. At any rate, the instant Application is otherwise devoid of merits, whatsoever.**

In his replying affidavit dated 26th January 2015 sworn by the Respondent herein Alfred Owino Bala the Respondent has deponed that as a consequence by the Appellant application for extension of time being dismissed, it was incumbent upon the Appellant to challenge the dismissal order by way of an appeal to

the High Court but however, no such appeal has been filed whatsoever. Thus he now contends that since no appeal has been filed against the ruling of the trial court dismissing the application for extension of time the instant application constitutes an attempt to defeat the orders of the trial court. Hence, he has termed the above application by the appellant an appeal albeit through the back door against the orders made on the 15th January 2015.

The Appellant further contends that this court is denied of jurisdiction to entertain and grant the orders sought by the Appellant, that it was also incumbent that the Appellant supplies the Honourable Court with evidence of substantial loss which is the cornerstone of every application for orders of stay of execution of a decree pending the hearing and determination of appeal and as such, no evidence has been established and laid out by the Appellant.

The Respondent has further contended that the fact that the Appellant has mounted an Appeal and that the said appeal has chances of success does not provide a basis for granting stay of execution pending Appeal and hence the success of the appeal so far mounted will only reverse the award and hence the Appellant shall be entitled to refund which he is able to do. Therefore, according to the Respondent the Notice of Motion for stay of execution, does not meet the minimum threshold, for granting an order for stay of execution pending appeal.

When the matter came before me on 10th March 2015 it was agreed that the above application be argued by way of written submissions. Both counsels representing each of the above parties have now filed their written submissions and I have read them. After considering the above Notice of Motion by the Appellant, the replying affidavit by the Respondent and the written submissions filed by the respective advocate for each party the following are the issues of determination:

- 1) Does the High Court have jurisdiction to issue the stay of Execution Order after the lower court rejected the Appellant's application to extend time to enable them file security for costs?**
- 2) Does the Appellant deserve the prayers he seeks for in his application?**

In Lochab Transport Limited v Teresia Wanoari & Another (2015] eKLR Meoli J, in answering the issue of whether the high court had jurisdiction entertain an application for stay of execution which had been rejected earlier by the lower court observed:-

"with regard to the legal objection raised by the Respondent, it does seem to me that this court does exercise both original and appellate jurisdiction with regard to applications for stay pending execution. Order 42 Rule 6(1) contains the words:-

‘whether the application for such stay shall have been granted or refused by the court appealed from the court to which the appeal is preferred shall be at liberty to consider such application and make such order thereon as way to it seem just

There is before this court an appeal filed by the applicant in respect of the substantive decision of the lower court. On the authority of Githunguri vs Jimba Credit Corporation Ltd (No.2) [1988] 838 it seems that the existence of the memorandum of appeal clothes this court with a separate original jurisdiction under Order 42 Rule 6(1) to consider a similar application to the one heard in the lower court. It matters not therefore that no appeal has been filed in respect of the specific decision on the application in the lower court. Similarly, the jurisdiction of the High Court in this case was invoked when the substantial appeal a fresh pleading separate from the suit in the lower court was filed. It is true that the application for stay of execution was allowed with conditions in the lower court. The wording in Order 42 Rule 6(1) however does not preclude the applicant from approaching this court as it has done.

I would venture to add that the wording to Order 42 Rule 6(1) of the Civil Procedure Rules

effectively grants the same jurisdiction to this court as an appellate court as Rule 5 (2) (b) does in the Court of Appeal. To entertain an application for stay whether or not the same has already been heard by the lower court and dismissed. The only salient difference is that in the case of the High Court the rule makes it clear that it matters not whether the earlier application for stay in the lower court has been allowed or rejected in the lower court. That is my reading of Order 42 Rule 6(1).

It suffices in my opinion in this case, in view of the nature of the application before me, that there is an existing substantive appeal against the judgment of the lower court to insist in this case that the applicant must first file a separate appeal on the ruling of the lower court, apart from the judgment would in my view not only lead to confusing duplication of proceedings in respect of the same matter but also cause delay.

In the circumstances of this case, I consider that driving the applicant from the seat of justice when there exist a substantive appeal, and in disregard of the full import of Order 42 Rule (6) (1) would amount of raising a technicality, namely, the filing of an appeal on a supplemental matter that actually touches on the appeal where substantial appeal already exists, above purpose and substance. There may arise in certain cases allegations of abuse of procedure but that must be established?

I completely concur with the above observations by Meoli J, and disagree with counsel for the Respondent on his submission that this court lacks jurisdiction to entertain the above application for stay of execution pending appeal. This court as noted above therefore has the necessary jurisdiction to entertain the present application for stay pending appeal.

Since I have established that this court indeed possess the necessary jurisdiction to entertain the Appellants application, I now move to the second issue of determination which is the conditions for allowing stay pending appeal.

The relief of stay or execution pending appeal is governed by **Order 42 Rule 6** of the **Civil Procedure Rules** the relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say judiciously and upon defined principles of law not capriciously or whim socially. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under **Order 42 Rule 6** of the **Civil Procedure Rules** that:

- a) The application is brought without undue delay.**
- b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and**
- c) 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.**

Was the Appellant application timely?

This application for stay was made timeously *i.e.* on the very day that the lower court declined to extend the Appellant's time lines for depositing security for costs. Hence the Appellants advocate once their prayer for extension of time lines to deposit security of costs was declined, on that very day *i.e.* 15th January 2015, they proceeded to this court and filed an application of stay of execution therefore, their application was filed without any delay whatsoever.

b) Substantial loss occurring.

Substantial loss occurring to the Applicant is the cornerstone of the jurisdiction of the High court in granting stay of execution there is an ample judicial authority on this issue. In the case of **Kenya Shell**

Limited vs Benjamin Karuga Kigibu & Ruth Wairimu Karuqa (1982 -1988) KAR 1618 where the Court of Appeal stated that;

"It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay."

Substantial loss in the essence of **Order 42 rule 6** has been described by Ogola J, in **Tropical Commodity suppliers Limited (supra)** that:

".....substantial loss does not represent any particular mathematical formula. Rather it is a qualitative concept it refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal..."

And also in the case of **Bunqoma HC Misc. Application No.42 of 2011 James Wangalwa & Another vs Agnes Maliaka Cheseto** that:

"The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the essential interests of the Applicant as the successful party in the appeal. This is what substantial loss would entail..."

In the instant case the amount of decree is about Ksh.1,440,785/= the Appellant who is the judgment debtor deponed that if the decree is executed and eventually the appeal succeeds, it would be well be impossible to relieve the decretal amount from the Decree Holder (*Respondent*) who is not, in comparison with the Appellant a banking institution of great repute, good standing and a person of means.

Furthermore, the Appellant contended that the applicant risks being rendered nugatory and pointless if the subject matter of the appeal being inter alia cash damage awarded to the Respondent is allowed to be had and utilized by the Respondent, whilst the applicant ventilates its yet to be exhausted right to be heard at appeal. In my humble view the appellant as correctly deponed is a financial institution and has constant cash flow therefore they are highly likely to raise Ksh.1,440,785/= while as the Respondent who was a former employee of the Appellant may find it very hard to raise the said amount should he be allowed to access the fruits of his decree and judgment in the lower court pending the appeal before this court. Furthermore, I also agree with the Appellant's deponement that should this court disallow their prayers on stay of execution it is invariable that should their appeal succeed before this court the same can be most likely be rendered nugatory as the subject of the appeal would have already been awarded.

With that said, the Appellant in my view has succeeded to prove the issue of substantial loss should the decree of the lower court be released to the Respondent.

On security for costs, this matter as has already been stated above originated from the lower court which had already granted stay pending appeal on condition of the Appellant depositing Ksh.1,440,785/= within 21 days. The Appellant not being able to deposit the said amount within the said 21 days applied for extensions of such period to deposit the said amount on 27th October 2014. The lower court certified the said matter urgent and temporarily stayed the execution on 28th October 2014 pending hearing and determination of the Appellant's application. Meanwhile, the Appellant opened the subject joint interest earning account in the names of the two advocates representing the parties on 31st October 2014 and on 11th November 2014 wired into and deposited the decretal amount of the decretal sum. That notwithstanding, the lower court went ahead and dismissed the Appellant's application for extension of time to deposit the decretal sum on 15th January 2015.

In my humble view, this was an unreasonable move by the trial court. The fact that it had given a temporary stay of execution order pending for it to consider and hear both parties meant that the Appellant's Advocate must have brought to the lower Court's attention the fact that the decretal sum had already been deposited and hence they had complied with the lower Court's order.

Be as it may, the above application for stay was filed in this court after the decretal sum had already been deposited in a joint interest account. Therefore it is safe for me to observe that the security for costs in this matter has already been deposited.

I will therefore allow the above application on the following conditions:

1. A stay of execution is hereby issued on the judgement and Decretal issued by the subordinate Court in **Kisii Chief Magistrate's Court Civil Suit No. 210 of 2012** on 31st July 2014 pending the hearing and determination of the Appeal filed by the Appellant in the High Court of Kenya at Kisii, **Civil Appeal No.93 of 2014.**
2. The Appellant is given a period of 30 days to set his appeal before the High Court at Kisii.

Dated, signed and delivered in open Court at Nyamira this 27th day of November, 2015.

HON. C.B. NAGILAH

JUDGE

In the presence of:

Fredrick Ondigo hold brief for Nyachoti

Onchwang'i for the Respondents

Omayio —Court Clerk