



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 15 OF 2013

(Being an application for stay of execution of the decree pending hearing of the application inter-partes and hearing and determination of the appeal)

JOSEPH MAKARIOS APPLICANT/APPELLANT

VERSUS

BENARDICATO ESALAMBO1ST RESPONDENT

JOSHUA ANDALA 2ND RESPONDENT

RULING

Before me is an application brought by way of Notice of Motion dated 16/6/13 filed by M/S Kakai Mugalo & Company advocates on behalf of the appellant. It was filed on 20/9/13 under **Section 3** and **3A** of the Civil Procedure Act (Cap, 21) as well as **Order 42 rule 6** of the Civil Procedure Rules 2010. The application has three prayers, one of which has been spent as follows -

1. (spent)
2. That there be a stay of execution of the decree herein pending hearing of this application inter-partes and pending hearing and determination of Kakamega HCCA. No. 15 of 2013.
3. That costs of this application be provided for.

The application has grounds on the face of the Notice of Motion. The grounds are that the applicant has an arguable appeal with high chances of success; that he has challenged the judgment of the court delivered on 18/1/13; that the respondents' bill of costs has been assessed and execution will take place any time; that the said bill of costs was allowed on 31/5/13 at Kshs.73,035/=; that if the execution proceeded, the appeal would be rendered nugatory; that it was in the interest of justice that the orders sought be granted.

The application was filed with a supporting affidavit sworn by the applicant on 26/6/13. It was deponed *inter alia* that the applicant had been aggrieved by the decision of the court issued on 18/1/13 and had instructed an advocate to appeal. That a memorandum of appeal had been filed on 22/2/13. That the judgment of the trial court was unfair in view of the grounds set out in the Memorandum of Appeal.

The application is opposed. It was canvassed by way of written submissions.

In submissions, counsel for the applicant stated that the two bills of costs for the respondents were taxed at Kshs.73,045/= and Kshs.11,305/= respectively, and that execution was eminent. Counsel added that the appeal was arguable with high chances of success. If the taxed costs were paid by the applicant and

the appeal succeeded, the applicant would have minimal chances of recovering the same from the respondents. Counsel relied on the case of **Butt vs Rent Restrictions Tribunal – Nrb. Court of Appeal Civil Application No. 6/79** wherein the court explained the discretionary power to grant stay of execution. Counsel also relied on a case of **Savings & Loan (K) Ltd. Vs Odongo – 1987 KLR 294** where the Court of Appeal stated that the court has inherent jurisdiction to grant stay of execution orders. Counsel argued that the applicant herein had met the threshold for grant of stay of execution.

The 1st respondent **Benedicto Salamba** filed his submissions in person. He argued that the applicant was just using delaying tactics by file numerous appeals and applications. He stated that this application was meant to delay justice in the matter. That the body of his late nephew, Jackson Angweye had remained in the mortuary at Kakamega Provincial Hospital for long and was now almost a skeleton of bones. He urged the court to dismiss the application.

The 2nd respondent through his counsel Wilfrida Osodo filed written submissions. Counsel submitted that the applicant had made numerous applications. At one time, his appeal was heard but he filed an application to withdraw the same on 26/12/12. He then, on the same day, filed an application in the lower court seeking stay of execution and review of the lower court's orders. On 18/1/13 the lower court dismissed the application. It was from this dismissal that the present appeal and application were filed. In counsel's view, it was clear that the applicant had filed a frivolous case, and instead of accepting defeat, has decided to engage the respondents in an endless chain of litigation. Counsel stated further that the initial judgment in the suit had not been vacated or set aside after the appellant withdrew his initial appeal.

This is an application for stay of execution. It is an application for stay of execution of the decree herein which arises from the judgment of the subordinate court in Kakamega CMCC No. 19 of 2011. The judgment was delivered on 22/6/12.

From the documents filed in the application, it is evident that the present application was only made after a ruling was delivered on a request by the appellant to review the judgment of the subordinate court was dismissed on 18/1/13. The appellant has now come to court through his application after filing a Memorandum of Appeal to that ruling on 22/2/13.

The considerations to be taken by a court in an application for stay of execution are listed under **Order 42 Rule 6 (1) and (2)** of the Civil Procedure Rules, which state as follows -

“6 (1) No appeal or second appeal shall operate as a stay of execution of 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 being made, to consider such application and to make such order thereon as may to it deem 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 an order set aside.

2. **No order for stay of execution shall be made under (1) unless -**
 - a. **that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay;**
 - 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.”**

As submitted by counsel for the applicant, the trial court or the appellate court has jurisdiction at its discretion to grant stay of execution of a decree or of an order.

In this regard, I agree with what was stated in the case of **Butt vs Rent Restrictions Tribunal** and the

case of **Savings & Loan Ltd -vs- Odongo** supra cited by the applicant's counsel. This court as the appellate court has jurisdiction to deal with the present application.

The provisions under **Order 42 rule 6 (1)** and **(2)** list certain requirements which must be fulfilled by an applicant in an application for stay of execution of a decree. Firstly, it is clear from **rule 6 (1)** that the filing of an appeal against a decree or order does not in itself operate as a stay of execution of that decree or order. The appellant/applicant has therefore to make a separate application for stay of execution in addition to filing an appeal.

Rule 6 (1) envisages that stay of execution may only be granted of execution against a decree or order appealed from. It provides in the relevant part – as follows:-

***“6 (1) No appeal or second appeal shall operate as a stay of
execution of proceedings under a decree or ... order
appealed from except in so far as the court appealed
from may order,.....”***

The underlining is mine

The applicant herein has filed an appeal against the decision of the subordinate court declining his request to have the judgment of that court reviewed. He has however applied herein for stay of execution of the judgment on which he has not appealed. In my view, from my reading of **rule 6 (1)** above, the applicant could only ask for stay of execution against the decision upon which he has appealed. He has only appealed herein against the decision declining the review of the judgment. Stay of execution can therefore only be considered against the decision on his request for review of judgment. Having not appealed against the substantive judgment, the law does not allow him to ask for stay of execution of that judgment.

It follows from the above that this application is incompetent and misconceived and not supported by the law. It seeks to stay a judgment or decree not appealed against. It has no merits. It serves no purpose for me to go into considering the perimeters for such an application under **rule 6 (2)** of **Order 42**, I will dismiss the same.

Even if this application had related to the ruling on the request for review, in my view it would not succeed. The ruling of the subordinate court delivered on 18/1/13 cannot be stayed. It was a dismissal of a request to review the judgment. There was no substantive order made in the ruling directed at the appellant. There would therefore be no basis for the applicant applying for stay of that order or ruling.

In conclusion, I dismiss the application herein with costs to the respondents.

Dated and delivered at Kakamega this 3rd day of April, 2014

George Dulu

J U D G E