



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO.140 OF 2013

BETWEEN

GABRIEL OWEKE ODONGO APPELLANT

AND

MILLICENT AJODE ODOYO 1ST RESPONDENT

TRADE RESOURCE INTERNATIONAL LIMITED 2ND RESPONDENT

(Being an appeal from the ruling and order of Hon. Anne Onginjo (CM) dated 20th September 2013 in the original Kisii CMCC No.460 of 2012)

RULING

1. The appellant herein Gabriel Oweke Odongo filed a Notice of Motion dated 18th October 2013 brought under **Order 42 Rule 6** and 7 of the **Civil Procedure Rules, Sections 1A, 1B** and **3A** of the **Civil Procedure Act** and **Article 159** of the **Constitution of Kenya 2010** seeking the following orders:-

1. *The application herein be certified and the same be heard ex parte in the first instance.*
2. *There be interim stay of execution of the decree and order dated 20th September 2013 in the original suit Kisii CMCC No.460 of 2012 pending the hearing of this application inter partes.*
3. *The honourable court be pleased to grant an order of stay of execution of the judgment, decree and order dated 20th September 2013 in the original Kisii CMCC No.460 of 2012 pending the hearing and determination of this appeal.*
4. *That the warrants of attachment and sale in Kisii CMCC No.460 of 2012 be set aside and/or lifted and the appellant's attached motor vehicle be released to the appellant pending the hearing and determination of this appeal.*
5. *The costs of this application do abide the appeal.*
6. *Such other and/or further orders as this honourable court may deem just and expedient to grant.*

2. The application is anchored in the applicant's supporting affidavit sworn on 23rd October 2013. It is also supported by the grounds set out on the face of the application, the gist of which is that the appeal raises pertinent issues of law and fact and thus has overwhelming chances of success. The applicant also avers that since the insurers are under statutory management it would be impossible for the respondent to deposit the said amount. The applicant states that she is ready and willing to abide by any other condition as security for stay of execution, and in particular is ready and willing to deposit the logbook of the attached motor vehicle.

3. The application for stay is opposed vide a Replying Affidavit sworn by Millicent Ajode Odoyo on 20th November 2013. There is also a Statement of Grounds of Opposition dated 20th November 2013 and filed in court on the same day. The grounds of opposition filed pursuant to **Order 51 Rules 15 and 16** of the **Civil Procedure Rules** are the following:-

1. *The instant Notice of Motion Application is pre-mature, misconceived and otherwise bad in law.*
2. *The Orders of Stay of Execution sought over and in respect of the decree, issued by the Subordinate Court, has been sought for, in the absence of any Appeal, against the said decree. In the premises, the Order of Stay to that extent has been made in vacuum.*
3. *The ruling and the Orders of the Honourable Chief Magistrate, rendered on the **20th day of September 2013**, were in the negative. Consequently, the said Orders cannot attract and/or accrue an order of stay of execution pending Appeal in the manner sought or at all.*
4. *The Orders appealed against touch and/or concern exercise of Judicial Discretion. In the premises, the Appeal under reference, which has been filed by the Appellant herein and which anchors the instant Application, is devoid of legal basis and/or foundation.*
5. *The execution sought to be stayed has since been levied and the attached motor vehicle, to wit motor vehicle registration Number **KBH 190 T**, has admittedly been sold and/or disposed of vide Public Auction. In this regard, the Application has been overtaken by events.*
6. *The instant Application does not capture and/or satisfy the Essential and Pre-requisite Conditions envisaged under the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules, 2010**.*
7. *The instant application has been made with undue and inordinate delay, which delay has not been explained. Consequently, the appellant/applicant is guilty of laches.*
8. *The appellant/Applicant herein was granted favourable Orders by the Honourable Chief Magistrate, but however, same chose to ignore and/or disregard the said Order. Consequently, the instant application amounts to an abuse of the due process of the court.*
9. *Besides, the appellant/applicant has concealed and/or failed to disclose material and relevant facts unto the honourable court, inter alia, the fact that the Order of Stay, granted **NAIROBI HCC NO.465 OF 2011 (O.S.)**, lapsed and/or extinguished on the 16th day of September 2012.*
10. *In any event, the Appellant/Applicant is non-suited.*
11. *The Orders issued on the **20th day of September 2013** and which are sought to be stayed have long lapsed and are now non-existent. Consequently, the stay sought is in vain and/or futility.*
12. *The instant application constitutes and/or otherwise amounts to an abuse of the due process of Court.*
13. *The instant application is otherwise devoid of merits, whatsoever.*

4. When the parties appeared before me on 30th October 2013, they entered into a partial consent, inter alia, allowing an interim order of stay of execution or further execution of the decree issued vide Kisii CMCC No.460 of 2012 and the order dated 20th September 2013 respectively, pending the hearing and determination of the instant application. It was also acknowledged and admitted by the parties vide the said consent that the appellant's motor vehicle Reg. No. KBH 190T hitherto attached by M/s Odongo Investments was indeed sold vide a public auction. The parties also agreed to canvass the instant application by way of written submissions which submissions were duly filed and exchanged within the set time frames. I have carefully read through the submissions together with authorities in support by each party.

5. Upon reading the submissions, the following are the issues to be determined by this court:-

1. *What requirements are to be met by an applicant seeking stay of execution?*
2. *Has the appellant/applicant met the stipulated requirements?*

6. **Order 42 Rule 6 (1) and (2)** of the **Civil Procedure Rules** provides:-

“6(1) No appeal or second appeal shall operate as a 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 referred shall be at liberty, on an application being made to consider such application and to make such order thereon as may 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.

(2) No order of 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.”

7. It is instructive to note that under the above cited provision, an applicant seeking stay of execution must satisfy the court as to all the three conditions namely demonstration that substantial loss may result if the order sought is not granted; that the application has been brought without undue delay and thirdly that there is an offer of security.

8. In Cosmas Kawelu –vs- Kabuito Constructors [2014] e KLR Mbaru J observed, and I agree with the observation that:-

“Looking at the other substantive issues raised by respondent in seeking stay herein I note the granting of stay of execution pending appeal by the High Court is governed by Order 42 Rule 6 of the Civil Procedure Rules. It is grantable at the discretion of the court on sufficient cause being established by the applicant. The incidence of the legal burden of proof on matters which the applicant must prove lies with the applicant. See Halsbury Laws of England Vol.17 paragraph 14:-

“Incidence of the legal burden ... in respect of a particular allegation, the burden lies upon the party for whom the substantiation of the particular allegation is essential of his case sufficient cause being a technical as well as a legal requirement will depend entirely on the applicant satisfying the court that :-

- a. Substantial loss may result to the applicant unless the order is made;
- b. The application has been made without unreasonable delay; and
- c. Such security as the court orders for the due performance of the decree or order may ultimately be binding on the applicant has been given by the applicant.”

9. With regard to substantial loss occurring in law, I do not think that the mere fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, amounts to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, does not in itself amount to substantial loss under **Order 42 Rule 6** of the **Civil Procedure Rules**. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. That is what substantial loss would entail. This question of substantial loss was aptly discussed in the case of Silverstein V. Chesoni [2002] 1 KLR 867 and also in the case of Mukuma V. Abuoga [1988] KLR 645. In both of these cases, the Court of Appeal, while noting that whether or not to grant stay of execution is a matter of discretion of the court hearing the application emphasized the centrality of substantial loss thus. It was stated in the Mukuma case that substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

10. It must also be pointed out that a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however is that this court must judiciously exercise its discretion under **Order 42 Rule 6** of the **Civil Procedure Rules**. Where an appeal has been filed the court is obliged to consider the issues outlined in the appeal or draft memorandum of appeal. This does not exist in this case. There is no appeal lying before any court so that this court has no idea of the legal issues to be addressed on appeal.

11. The other limbs set out under **Order 42 rule 6** are that of security deposit and in this case the respondent offers to deposit the entire decretal amount in court. The other issue for consideration is whether there has been delay in presentation of this application. It is the court that orders the kind of security the applicant should give as may ultimately be binding on such applicant in an application for stay so as to ensure discretion of the court is not fettered. Even where a party has acted expeditiously all the aspects with regard to stay must be looked at together and none in exclusion of the other.

12. In the instant case, the chief magistrate decreed terms and conditions the appellant had to comply with before benefiting from the discretion of the court. However, the appellant has failed to meet the conditions set by the Hon. Chief Magistrate to deposit the decretal sum in a fixed deposit account in the name of the advocates on record.

13. Thus I agree with learned counsel for the respondent/plaintiff that failure to comply with the conditions set by the chief magistrate means that the situation reverts to the one before obtaining the issuance of the aforesaid orders.

14. Secondly, the appellant/applicant has not shown that there was a valid order of stay in existence during the period of Moratorium issued against M/s Blue Shield Insurance Company Limited at the time when the original suit was heard and judgment rendered. Thus it is my humble view that the appellant/applicant has not shown/established sufficient cause of granting an order for stay of execution pending appeal.

15. Thirdly, the appellant/applicant has not availed any evidence to this court of the substantial loss he will suffer if the stay order is not granted. The only evidence the appellant has adverted to is that the respondent cannot compensate the appellant for the loss. On this contention Mbaru J in the **Cosmas Kawelu case** (supra) stated:-

“However being indigent, a man of straw is poor looked at alone is not an enough sufficient reason for an applicant to base an application for stay on. The man of straw that indigent person and poor respondent in this case, being the claimant had a judgment of this court. This remains a valid judgment until overturned by a Court on appeal which is not the case here.”

The judgment by the learned Chief Magistrate therefore remains valid until overturned on appeal.

16. In the circumstances therefore, the notice of motion by the appellant dated 20th October 2013 is lacking in merit and the same is dismissed with costs to the 1st respondent.

Dated and delivered at Kisii this 29th day of August, 2014

R.N. SITATI

JUDGE

In the presence of:-

M/s Khan & Associates (absent) for the Appellant

Mr. Minda for Oguttu Mboya for the 1st Respondent

N/A for the 2nd Respondent

Mr. Bibu - Court Assistant