



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Civil Appeal 30 of 2011

CASTY MAUGI BORE.....APPELLANT/APPLICANT

VERSUS

TERESIUS KIMATHI MUKIRIRESPONDENT

R U L I N G

The applicant in his application dated 11th November, 2011 brought under Order 42 rule 6(6) of Civil Procedure Rules and S1(A) (B) and 3A of Civil Procedure Rules seeks orders under prayer 2 of the Notice of Motion as follows:-

1. *That the Honourable court be pleased to order stay of execution in this matter pending the hearing and determination of this application.*

The application is based on the following grounds on the face of the Notice of Motion.

(a) *That the objector/applicant properties have been wrongly and unlawfully proclaimed.*

(b) *That the objector is not a party to this suit.*

(c) *That there is an existing moratorium in force by the liquidator of M/S Standard Assurance Co. Ltd over claims where the said insurance had covered which affects this suit.*

The application is supported by the applicants' affidavit dated 11th November, 2011. The applicant avers that he was not a party in CMCC NO.405 of 2007 and was not adjudged to meet the judgment thereof.

That the respondent instructed M/S Quickline Auctioneers to proclaim the applicant's properties namely cattle and household goods to meet judgment in CMCC 405 of 2007 illegally and unlawfully. The applicant further avers that though he related to the judgment debtor in CMCC 405 of 2007 the properties proclaimed are private and personal properties of the applicant. That applicant lodged an objection to attachment which was disallowed hence this appeal.

That he had at the same time filed an application for preservative orders dated 10/3/2011 which the applicant claims is yet to be allowed. That whilst applicant's application was pending he avers that respondent once again instructed the auctioneers to proclaim his aforesaid properties which he claims is

illegal and unfair as they are already served. He attached the proclamation which he marked "CMBI". The applicant avers that he is in extreme of being deprived of his properties unprocedurally and illegally unless court intervenes. The applicant states further that there is no indication or prove that the judgment debtor is the owner of the proclaimed properties, as the said properties the applicant claim to be his are distinct from anything belonging to the judgment debtor in CMCC No.405 of 2007.

The applicant further aver that the respondent even appreciates that the judgment debtor cannot be attached at the moment in view of the moratorium declared by the statutory manger M/s Standard Assurance Co.Ltd. which is conceded insured the judgment debtor's motor vehicle at the time of the accident. The applicant referred to respondent's affidavit annexure "CM32" confirming under paragraph 5 the existence of a moratorium in favour of M/S Standard Assurance Co. Ltd. The applicant avers the insurance is the one which is liable to pay the judgment-debtor but respondent is hell bent on pursuing the applicant in spite his pending appeal.

The respondent filed replying affidavit dated 21st November, 2011 in opposition of the applicant's application. The respondent averred that the applicant has refused to disclose her relationship with judgment-debtor in Meru CMCC 405 of 2007 and what her alleged properties were doing at the appellant's home.

The respondent further aver the applicant knew there were no orders for stay of execution but waited until the auctioneers proclaimed the sale and the delay remains unexplained.

The application is challenged as an afterthought and applicant has slept on the application which was brought up after a long and unexplained delay. The respondent state that the applicant is indolent, capricious and is guilty of laches.

Mr. Kaimenyi advocate in his oral submission relied on grounds set out in the application and applicant's affidavit and added that appellant has demonstrated that he has arguable appeal and that the respondent has not shown the attached goods belong to judgment-debtor.

Mr. B. G. Kariuki advocate strongly opposed the application and relied on the replying affidavit of the respondent. Mr. B. G. Kariuki Advocate argued that the appeal was incompetent as an appeal arising out of Order 22 rule 51 and 52 of Civil Procedure Rules requiring leave of the court is required to file an appeal. He referred me to order 43 of Civil Procedure Rules and Section 75 of Civil Procedure Act. He submitted no leave was sought and obtained. He also referred me to Order 42 rule 6(2) of Civil Procedure Rules and argued that this court cannot grant orders of stay of execution unless court is satisfied:-

- 1) That substantial loss may result to the applicant if stay of execution is not granted.**
- 2) That application has been made without delay.**
- 3) That the application must offer security.**

He submitted the three conditions have not been satisfied. He also relied on an affidavit filed earlier on 21/3/2011 and urged the court to dismiss the application.

I would at this stage like to refer to the order under which the application is based. The application before me dated 11th November, 2011 is brought under Order 42 rule 6(6) of Civil Procedure Rules and not under Order 42 rule 6(2) of the Civil Procedure Rules.

Order 42 rule 6(6) of Civil Procedure Rules provides:-

"(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."

My understanding of Order 42 rule 6 (6) of Civil Procedure Rules is that it is applicable immediately judgment or an order is made and is a temporary injunction pending institution of an appeal from subordinate court provided the procedure for instituting an appeal has been complied with.

In cases where stay of execution after filing appeal is required the applicant is expected to make an application under Order 42 rule 6(2) of Civil Procedure Rules, which provides:-

“(2) No order for 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.”

I would at this stage like to state that the court is in agreement with submission by counsel for the respondent that before court can grant orders of stay of execution of judgment or decree in an appeal the applicant must satisfy the following conditions:-

- 1. That substantial loss may result to the applicant if stay is not granted.***
- 2. That application has been made without unreasonable delay.***
- 3. That applicant must furnish security.***

In this case the application is not brought under Order 42 rule 6(2) of Civil Procedure. I am aware that under Order 51 rule 10(1) of Civil Procedure Rules no application shall be refused merely by reason of a failure to state the order relied upon.

Under Order 51 rule 10(1) of Civil Procedure Rules it is provided:-

“10. (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.”

The order sought in this application is of temporary nature in which the applicant is seeking stay of execution pending hearing and determination of appellant’s application dated 10/03/2011 and this court cannot grant prayers under order 42 rule 6(2) of Civil Procedure as the same has not been sought.

I further note the conditions for granting stay as set out under Order 42 Rule6(2) of Civil Procedure Rules have not been satisfied.

Under Order 43 of the Civil Procedure Rules the appeal against orders made under Order 22 rule 51 and 52 of Civil Procedure Rules do not lie as of right.

Under Section 75(1) (h) of Civil Procedure Act it is provided:-

“75. (1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—

(h) any order made under rules from which an appeal is expressly allowed by rules.”

The applicant has failed to establish that he has arguable appeal, because the appeal filed arises out of dismissal of an application brought under Order 22 rule 51 and 52 of Civil Procedure Rules, from which appeal do not lie as of right and no leave was sought. The appeal was filed without leave and I do not see

any appeal that can be said to be arguable. The applicant's appeal in view of the above stated matters is frivolous and has no merits.

I cannot see how the refusal to grant stay would render the appeal that does not lie as of right nugatory nor can it be said that the applicant would suffer substantial loss.

The application was filed eight(8) months later after filing of Memorandum of Appeal on 11/3/2011. I find there was unreasonable delay and security has been offered.

In the circumstances the applicant's application dated 11th November, 2011 is dismissed with costs of the application to the respondent.

DATED AND DELIVERED AT MERU THIS 15TH DAY OF FEBRUARY, 2012

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:

1. Mr. Mbaabu w/b for B. G. Kariuki advocate for respondent.

2. Mr. G. Anampiu for applicant (absent)

J. A. MAKAU

JUDGE