



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 255 of 2012

CHARLES BUNDI OKARO.....APPELLANT/APPLICANT

VERSUS

NATIONAL INDUSTRIAL CREDIT BANK LIMITED.....RESPONDENT

RULING

The Appellant has moved this Court by way of Notice of Motion dated 17th July 2012 in which the appellant seeks the following the following orders:

- a) That the Honourable Court be pleased to certify the matter herein as urgent and the same be heard ex-parte in the first instance due to its nature.**
- b) That the Honourable court be pleased to grant a stay of the execution of the ex-parte decree of the subordinate court dated the 4th day of May 2006 and all its consequential orders pending the hearing of this application inter-partes.**
- c) That the Honourable court be pleased to grant a stay of the execution of the ex-parte decree/order of the subordinate court dated the 4th day of May 2006 and all its consequential orders pending the hearing and determination of the appeal herein.**
- d) That costs be provided for in favour of the applicant.**

The application is supported by an affidavit sworn by **Charles Bundi Okari**, the appellant herein on 17th July 2012. According to the appellant, following the entry of ex parte judgement against him on 4th May 2006, he applied for setting aside the said judgement which application was dismissed on 1st March 2012. According to him, he was not served with the hearing notice or at all and yet he had repaid the loan in full and therefore had arguable defence. In dismissing the application, the subordinate court ignored the cardinal principles of law that a party willing to be heard ought to be heard and therefore his appeal has high chances of success. He further deposed that he changed his legal representation from **Abincha and Co Advocates** to **Nyangoro and Co. Advocates** which firm closed their offices without informing him or handing over his file to him. Later he was misinformed that the suit had been determined in his favour by a secretary from that firm and he did not bother to follow up the issue till 15th January 2012 when Court Bailiffs went to his home with warrants of arrest. He later confirmed that warrants had indeed been issued against him. According to him if the orders are not set aside, he will be arrested any time now against the spirit and letter of the recent authorities under the new Constitution and the balance of convenience militates towards the grant of the orders sought.

The application was opposed by way of a replying sworn by **Henry Maina**, the respondent's Manager Legal Services, on 25th July 2012. According to the deponent, the applicant is guilty of laches and the same is vague as to the decision being appealed against. According to him there is no evidence that the appeal has been filed and that the application is meant to obstruct justice since the payment of the decretal sum will not cause irreparable loss to the applicant as the respondent is a solvent financial institution capable of repaying the decretal sum in the event that the appeal succeeds. In his view the appeal has no chances of success since the judgement was regularly entered on 4th May 2006. It is further deposed that the amount in the plaint is based on a binding Hire Purchase Agreement entered into between the Respondent and the Appellant and that arrest and detention in prison remains as one of the modes of execution of a decree under the Civil Procedure Act and does not offend against the Applicant's Constitutional rights. According to him the payment of the decretal sum does not render the appeal nugatory and the appellant has not demonstrated that he stands to suffer irreparable loss if the decretal sum is paid. In any case, it is deposed that the applicant has not offered to furnish security for the due performance of the Decree as may be ordered by the Court as required by law.

In the submissions filed on behalf of the appellant it is submitted that the appellant was not served with the Notice to Show Cause or Notice of entry of judgement and that the Court has unfettered discretion to set aside ex parte judgement. It is further submitted that the committal to civil jail in enforcement of a Civil debt is unconstitutional. It is further submitted that the amount being executed for is by any standards a huge figure yet the appellant has disclosed that he has triable issues.

On the part of the respondent it is submitted that the appeal is against the decision delivered on 1st March 2012 but was filed on 23rd May 2012 outside the 30 days period limited by section 79G of the Civil Procedure Act for appealing and is therefore incompetent and orders of stay cannot be issued to the appellant. It is further submitted that no substantial loss is likely to be occasioned to the appellant if the stay is not granted since the respondent is a very solvent financial institution of good repute and is in a position to repay the decretal sum and citing **Kenya Shell Limited vs. Kibiru & Another [1986] KLR 410** it is submitted that it is not normal in monetary decrees for the appeal to be rendered nugatory, if payment is made. Further contrary to the provisions of Order 42 rule 6(2)(b) of the Civil Procedure Rules no security has been offered by the Appellant and hence the application ought to fail. It is further submitted that the appellant took six years before making an application to set aside the judgement and no reasonable explanation has been given for the delay. It is therefore submitted that the conditions for grant of stay of execution have not been fulfilled and ought to be dismissed.

Having considered the application, the affidavits in support as well as in opposition thereto, as well as the submissions, this is the view I form of the matter. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules under which the court is to be satisfied that substantial loss may result to the applicant unless the order is made; that the application has been made without unreasonable delay; and 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.

Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent have to be considered. In **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do

justice in accordance with the law and to prevent abuse of the process of the court”.

It is not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted since by granting stay would mean that the *status quo* should remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be done if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay. See **Kenya Shell Ltd vs. Benjamin Karuga Kibiru** (supra).

In this case, there is no allegation at all that the respondent will be unable to repay the decretal sum if the same is paid over to the respondent. The appellant has however raised the issues with respect to the denial of his right to a hearing yet he had arguable defence. Whereas those are issues relevant to an application for setting aside judgement, those are not necessarily conditions stipulated under Order 42 rule 6(b) aforesaid although the Court in the exercise of its discretion whether or not to stay execution is, pursuant to sections 1A and 1B of the Civil Procedure Act, no longer restricted to the conditions under Order 42 rule 6(2) aforesaid. That does not mean that the conditions stipulated under Order 42 rule 6(2) are no longer relevant. Those conditions have to be seen in light of the overriding objective.

The appellant's case is further that warrants have been issued against him in contravention of the provisions of the Constitution. Whereas the scope of this ruling does not allow me to discuss the Constitutionality of section 38(d) of the Civil Procedure Act suffice it to say that the issue whether or not that section is Constitutional can be appropriately taken up in another forum rather than in an application for stay of execution pending appeal since the appeal the subject of the present application is not directed towards the order for committal to civil jail.

That leads me to the next issue. The subject of the appeal herein is the decision dismissing an application for setting aside judgement. Save for the order for costs, that order was not a positive order and hence incapable of being executed. Such an order it has been held cannot be the subject of a stay pending appeal. See **Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63.**

However, the appellant has sought to go round this by seeking stay of the ex parte decree and therein lies another obstacle. In the appeal which forms the basis of this application, appellant is not seeking to overturn the ex parte decree. Therefore his application to the extent that it seeks a stay of execution of the decree not the subject of the instant appeal further renders the application incompetent. A party cannot seek to stay an order against which an appeal is not directed. See **Muhamed Yakub & another vs. Mrs Badur Nasa Civil Application No. Nai. 285 of 1999.**

The foregoing coupled with the fact that the appeal is patently filed out of time without an indication whether extension of time has been sought and granted disentitles me to find that there is substantial loss likely to be occasioned if the application is not granted.

On the second condition which is also mandatory, there is absolutely no offer of security coming from the appellant in satisfaction of the said provision in absence of which no stay can be granted. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay. However, the offer for security must come from the supplicant for stay. See **Carter & Sons Ltd. vs. Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997.**

In the result the appellant has failed to satisfy me on the mandatory conditions for grant of stay pending appeal under Order 42 rule 6(2) of the Civil Procedure Rules.

Consequently, the application dated 17th July 2012 lacks merit and the same is dismissed with costs.

Dated at Nairobi this 24th day of October 2012

G.V. ODUNGA
JUDGE

Delivered in the presence of:

Miss Were for Mr Mokuu for the applicant/Appellant

Mr Wambua for Mr Kabaiku for the respondent