



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE**

Civil Appeal 18 of 2007

ALFRED WEKESA KIZITO =====APPELLANT

V E R S U S

NICK WAFULA WALELA =====RESPONDENT

R U L I N G

This is an application for stay proceedings and of execution in **WEBUYE SPMCC NO.421 of 2006** pending the hearing and determination of appeal.

It is common ground that the lower court had granted judgment in favour of the respondent herein, for damages amounting to Kshs.121, 360/=.

It is also common ground that the applicant herein did make an application before the lower court, for setting aside the *exparte* judgment. That application was dismissed, prompting the application before this court.

As far as the applicant was concerned, his appeal had high chances of success, as the lower court had failed to give effect to the rules of natural justice, which stipulate that a party should not be condemned unheard.

When Mr. Nyakundi, advocate for the applicant made that submission, the court inquired from him how the court would be expected to give consideration to the question regarding the appeal's chances of success, whereas the applicant had not placed the proceedings or ruling before me.

Mr. Nyakundi sought an adjournment, with a view to obtaining the said proceedings, so that he could place them before the court.

In response, Mrs. Wanyama, advocate for the respondent said that if any adjournment was to be granted, the court should not issue any interim orders. In her view, the grant of any interim relief to the applicant would be to reward an application which was otherwise incompetent.

In the face of those remarks, Mr. Nyakundi said that he should be given an adjournment;

“ if this court feels that it is in the interests of justice for it to look at the proceedings.”

In the court's ruling, on the issue of the adjournment, I stated that;

“ . . . this court has absolutely no intention of imposing any requirements on the applicant.

In other words, there is no need for an adjournment which the applicant appears to be saying, has been imposed on him, by this court.”

When the applicant continued to press forward with his application, he submitted that an order for stay would not prejudice the respondent, as the award of Kshs.121, 360/= did not constitute monies that would be taken from his pocket.

The applicant submitted that if stay was refused, he would suffer substantial loss because if his appeal did succeed, he would be unable to recover the money from the respondent. That would therefore render the appeal nugatory.

On his part, the applicant was ready and willing to deposit the decretal sum in court, as a pre-condition for the stay. Having done so, the applicant believes that he should then be permitted to exercise his right of appeal, without fearing that the said appeal could be rendered nugatory.

As far as the applicant was concerned, the respondent had not demonstrated his ability to refund the decretal amount, in the event that the money had been paid to him, and later the appeal was successful.

The applicant also faulted the replying affidavit, on the grounds that it had been sworn by the respondent's advocate. It was the applicant's view that the only person who could have sworn an affidavit setting out factual matters about the respondent's financial ability, was the respondent himself.

In answer to the application, the respondent submitted that the applicant had failed to demonstrate that his appeal had high chances of success.

The respondent also submitted that the applicant did not show that if stay was not granted, he would suffer substantial loss. As far as the respondent was concerned, it was not enough for the applicant to say that he would suffer substantial loss. In his view, the applicant had to demonstrate the loss.

Another point that was made by the respondent was that in a case in which there was a decree for payment of money, such as in this case, the applicant needed to demonstrate that the amount involved was so colossal that if the appeal were to succeed after he had paid out the money, the respondent would be unable to recompense. The respondent submitted that it was the obligation of the applicant to prove that the respondent would be unable to repay the money.

The respondent also submitted that the applicant should have provided this court with copies of the proceedings and ruling of the application which had been canvassed before the lower court. The said proceedings and ruling would then have enabled this court to appreciate the reasons why the lower court had rejected the application before it.

As the applicant did not make available the said proceedings and ruling, the respondent describes the application herein as an empty shell, which should therefore be dismissed with costs.

Finally, the respondent said that he would be prejudiced by an order for stay of execution, as he would be unable to enjoy the fruits of the judgment, yet the applicant had not shown why the respondent should be so deprived.

I have given due consideration to the foregoing submissions, as well as to the authorities cited by the parties. First, I wish to make it clear that in my considered view, the only way that the court could be called upon to formulate a meaningful assessment of the chances of success of an appeal, is by providing the court with the ruling or judgment which is to be challenged in the appeal. If the proceedings were available, it would also be useful to provide the same.

It is only after the court had perused the said decision that it could appreciate the alleged strengths or

weaknesses thereof, in the light of the contentions that the appeal against it was or was not likely to succeed.

Therefore, as the applicant herein did not provide the court with the judgment, ruling or proceedings, in respect of which he has lodged an appeal, this court is unable to make an informed assessment of the chances of success, of the said appeal.

In the case of ***PATANI & ANOTHER V PATANI [2003] KLR 518***, the Court of Appeal held that an applicant for a stay of execution had to demonstrate that he has an arguable appeal and that the same would be rendered nugatory if a stay is not granted.

In the case of ***KENYA SHELL LIMITED V KIBIRU & ANOTHER [1986] KLR 410*** at page 413, the Hon. Hancox J.A (as he then was) said;

“ The record of the proceedings, though applied for, is, in the nature of things, not yet available, so it is equally impossible to assess the chances of the success of the appeal, which are stated in the affidavit in support of the present motion to be overwhelming.”

Notwithstanding the absence of the record of proceedings, the Hon. Hancox J.A said that;

“ It is also true to say that, in considering an application for a stay, the court doing so must address its collective mind to the question of whether to refuse it would, as Mr. Kwach urges, render the appeal nugatory.”

In that case, the learned judge made an express finding of fact, that;

“ The first respondent is a man of substance, with a good position and prospects.”

Therefore, the court held that there was no justification for holding that there was a likelihood that the respondents will not repay the decretal amount if the appeal is successful and that the appeal will thereby be rendered nugatory.

In the same case, the Hon. Platt Ag. J.A. (as he then was) held that;

“ It is usually a good rule to see if order XLI 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 corner stone of both jurisdictions for granting a stay. That is what has to be prevented.”

And the Hon. Gachuhi Ag. J.A. (as he then was) said, at page 417;

“ It is not sufficient by merely stating that the sum of Kshs. 20,380.00 is a lot of money and that the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted.”

In the two authorities cited above, the Court of Appeal was considering applications for stay of execution, pursuant to Rule 5 of that Court.

It is my understanding of the law that it is under rule 5 of the Court of Appeal rules that the court is required to consider the degree of possible success in the appeal.

As the Hon. Platt J.A. held above, substantial loss is the corner stone in both jurisdictions, of the Court of Appeal and of the High Court. Otherwise, the High Court is to be guided by Order 41 rule 4 of the Civil Procedure Rules.

Pursuant to the provisions of Order 41 rule 4 (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.”

In my understanding of that rule, the respondent was right to have said that the burden of proof rested upon the applicant, to show that he would suffer substantial loss.

In the case of ***MACHIRA T/A MACHIRA & CO., ADVOCATES V EAST AFRICAN STANDARD (NO.2) [2002]2 KLR 63***, the Hon. Kuloba J. held that the applicant was under a duty to do more than merely repeating to the court, words of the relevant statutory rule or general words used in some judgment, if he is to show that he would suffer substantial loss. At page 67 of that law report, Kuloba J. went on to say;

“ Commonly, the applicant may obtain a stay of further proceedings or execution, if he shows facts which point to a conclusion that to allow execution or further proceedings to go ahead before appeal is concluded would let an impecunious party to pocket and squander or pilfer what may be needed in restitution if the appeal succeeds and is allowed.”

In this case the applicant has not simply repeated the words of any statutory provisions or of some judgment or ruling. He has said that the respondent was awarded Kshs. 121, 360/= as damages, in an exparte judgment. He has also said that the respondent may not be able to refund that amount, in the event that the appeal succeeds.

Having made those assertions, this court is satisfied that in the event that the respondent were unable to refund the sums in issue, the applicant would suffer substantial loss. To borrow the words of the Hon. Kuloba J., the applicant has shown facts which point to a conclusion that if execution is allowed before the appeal is concluded, the applicant would suffer substantial loss.

That is the conclusion that I have arrived at because the respondent failed to rise up to the challenge, by demonstrating that he was a man of means.

Once the applicant put forth the assertion that the respondent would be unable to repay the money in question, the respondent ought to have taken cue from the case of ***KENYA SHELL LIMITED V KIBIRU & ANOTHER [1986] KLR 410***, which was an authority cited by him, to demonstrate his ability to repay. As he did not do so, I find that it is more probable than not that if the decretal amount was paid out now, the respondent may be unable to repay it, in the event that the applicant's appeal were to ultimately succeed. If that were to happen, the applicant would suffer substantial loss, thus rendering the appeal nugatory. In the words of Platt J.A. (above-quoted), that is what has to be prevented.

The applicant has offered to deposit the money, as security. Once the money is so deposited, it would be immediately available to the applicant, in the event that the appeal failed. In the circumstances, although the applicant may not immediately access the fruits of the judgment, I hold the considered view that the interests of justice are best served through an order for stay of execution until the appeal is heard and determined. Accordingly there shall issue forthwith a stay of execution in ***WEBUYE SRMCC NO.421/2006*** until the appeal is heard and determined. As a condition for the sustenance of that order, the applicant shall deposit the decretal amount in court within the next TEN (10) DAYS from to day. The

applicant shall also deposit in court, the taxed costs, within TEN (10) DAYS of taxation. In default of any of the two deposits, execution may issue.

Finally, the costs of the application shall abide the outcome of the appeal. It is so ordered because I believe that it is only fair that if the appeal were to fail, the respondent who would have been kept out of the fruits of the judgment should also benefit from the costs of the application that served to keep him from the decretal amount. If on the other hand, the appeal were to succeed, the applicant would have shown that the order for stay of execution was justified in every sense.

Dated and Delivered at Kitale, this 26th day of November, 2007.

FRED A. OCHIENG

JUDGE