REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO.147 OF 2001

PAUL NDETI MUASYA ……..APPELLANT

V E R S U S

MOHAMED ABDULRAHIM……RESPONDENT

R U L I N G

The Appellant in this application, applies for a stay of execution and release of the Appellant's attached goods in execution of the decree, pending the hearing and determination of the appeal pending in this court. A stay pending the hearing of this application inter partes was granted by me on 14.11.2001 ex parte. The application was heard inter-partes on 19.12.2001.

During the hearing Mr. Otieno for the Respondent raised and argued a preliminary point of law which needed to be determined before the main application for stay could be argued and determined. To save time I ordered the parties to argue the main application as well so that I would make final rulings together. If the preliminary objection succeeded, it might dispose of the main ruling altogether and that would be the end of the application. If it does not succeed, then this court would proceed to make a finding in respect of the main application.

The preliminary point of law was as follows:-

That the Applicant/Appellant who has come to this court under Order 41 rule 4(1) of the Civil Procedure Rules, should first have made his application for stay to the subordinate court that made the judgment that the Appellant is appealing against. That it is only if the lower court refused the application for stay that the Appellant would be entitled to now make a fresh application for stay in this court. That in so far as the Applicant/Appellant did not make such application to the lower court, then this court should not hear or entertain him here. Mr. Otieno also raised a second legal preliminary point:- that the Applicant's application for stay is not accompanied with a certified copy of the judgment to be appealed against. So in those circumstances, Mr. Otieno argued, the application is incompetent and should be dismissed forthwith. Mr. Mwaniki had to reply. He stated that while earlier, the Applicants were under obligation to first apply to the court appealed from for a stay, the provisions of Order 41 rule 4(1) have now been amended to the effect that the Applicant who wants stay may straight away go to the court to which the appeal is made for stay. He added further that while it is convenient and proper to attach the lower court proceedings to the application for stay, it is not imperative or fatal for good reasons not to do so. He added, in his case, he could not do so because the lower court records had not been availed to him.

I have considered the submissions of both counsel. It is my opinion and finding that earlier before an amendment was brought on Order 41 rule 4(1) it was an imperative requirement that the Appellant who

seeks a stay of execution must first apply to the court which made the decree that is being appealed from. The relevant words were:-

> *"……..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 seem just, but application shall in every case be made in the firs t instance to the court from whose decree or order the appeal is taken ; and any person aggrieved ……."* (underlining mine).

The amendment brought to this sub-rule has removed the underlined part of the rule. It is my view that the intention of the amendment was to give Applicants freedom, where circumstances dictate, to apply directly to the court to which the appeal is intended or made, otherwise the amendment would become meaningless or pointless. Pointless amendments, with all respect to Mr. Otieno have not been brought to my attention. I hold therefore that the first point of preliminary objection must be rejected.

In respect to the second issue, I do agree with Mr. Otieno that it is important that the proceedings and decree appealed from should be attached to the application for stay. Not only is it convenient to the appeal court to have the records attached, but in some cases, the success of the application may depend on it. As stated by the Court of Appeal in the case of **NYAKIBA WILLIAM MORURI –vs- JANE KEMUNTO NYAKIBA** in Court of Appeal Civil Application Number 79 of 1999 (UR 30/99) at pg.3:-

> *"……. It is the responsibility of the applicant to establish that he has an arguable appeal. That cannot be done unless and until he places before us suffi cient material to enable us determine that point. Mr. Nyakundi for applicant has conceded that in the instant application, save for the application and judgment of the superior court, there is no record of the proceedings before the superior court. The i mportance of the proceedings, ……is that the intended two main attacks against the judgment of the superior court, would lack merit if this court had the record of the proceedings and evidence adduced in the superior court. Evidence that would show, that the applicant has other sources of income.……*
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> *But, as argued by Ms. Karua, this court, in the absence of the evidence ……..cannot come to any conclusion ……and thereby reach the finding that this would be a point worth canvassing on appeal. We are of the view that there is insufficient material placed before us upon which to conclude that the applicant has an arguable appeal to canvass in the intended appeal."*

Having so stated however, it is my view and finding that failure to attach the said records is not imperative and is only convenient to the court. It is not necessarily fatal to the application itself in every case but is of great importance in helping this court to come to the right decision and even more important to the applicant in making a finding in the applicant's favour where he relies upon the record to show that his appeal has good chances of success. I say no more in that respect. The Respondent's second preliminary point accordingly also fails and thus allows this court to proceed to make a finding as to whether the Applicant's application should or should not be allowed.

Mr. Mwambi for the Applicant/Appellant came to this court under Order 41, rule 4(1) and Order 21, rule 22 as well as S.3A of the Civil Procedure Act. The stay applied for is from the intended sale of the goods of trade attached in execution of a decree of the lower court. The application is supported by an affidavit of the Applicant. The goods attached formed the only goods of trade of the Applicant. If appeal succeeds, argues Mr. Mwambi, the chances of recovering the same or the proceeds from the sale there from are remote and the Respondent has not assured court by an affidavit that he is not a man of straw. The appeal, it is further argued, is grounded on grounds which are sound and which have high chances of success. He makes a reference to the Memorandum of Appeal.

To this submission, Mr. Otieno for Respondent states that the application should, fail because:-

a) The applicant has not demonstrated that he will suffer irreparable or substantial loss if the application is not allowed

b) That he has not offered any security and this is an automatic bar to the granting of stay.

c) That if the appeal succeeds it would be rendered nugatory.

d) That the execution targeted by applicant is only a second one in a series as the first one partly succeeded and the applicant did not oppose same.

e) That the Respondent has sworn a replying affidavit to the effect that he is a man of means as he conducts, to the full knowledge of the applicant, a substantial business in Mombasa.

It must be noted at this stage that what is known of the lower court case that is to be appealed from, is what is based on the affidavits of the parties filed in support or against this application. The lower court records are not available as the Applicant explained that they had not been availed to him by the lower court. When earlier deciding the preliminary point as to the importance of the lower court records being attached to this kind of application, I stressed the importance of attaching such records to the application and demonstrated that sometimes the availability or nonavailability of same may be decisive to the issue either way. I hold that in this application, the fact that such records are missing, (and it does not matter whose fault it is) is clearly going to affect this application very negatively.

The principles upon which this court grants a stay under Order 41 rule 4(1) are now, I think, settled. They include, first, the fact that the appeal should not be frivolous; that is to say, whether the appeal has arguable issues and two, that the appeal if successful should not be rendered nugatory if a stay is not granted. Recent rulings of the Court of Appeal suggest that in dealing with the second limb of this rule of application, the court would need to weigh the claims of both sides. The balance of convenience overall is carefully considered and where it is in favour of the Applicant, the stay is granted.

In this application, has the appeal got arguable issues or is it frivolous? The Applicant has not given me adequate material upon which this court should decide the point. While I sympathize with the Applicant who may not have been at fault in acquiring the lower court records, I nevertheless cannot fairly answer the issues in a vacuum. It was imperative for me to examine the grounds of appeal against the background of the evidence in the judgment and lower court proceedings. No such proceedings were availed to this court. Even where in a similar application a judgment of the lower court alone was availed, the court still held that there was no sufficient materials or record upon which the court could make such a decision (See Court of Appeal Civil Application No.79 of 1999 – Nairobi earlier cited). I, similarly, so hold.

On the second issue as to whether or not the Applicant's appeal will be rendered nugatory if the application for stay is not granted, I hold that the issue arises only when there is an arguable appeal.In view of my finding that there is no sufficient material to decide whether there is an arguable appeal, this question or limb of the principle does not arise. For what it is worth, however, the meager facts from the affidavits tend to establish that the Applicant had failed to file his defence at the lower court upon which an ex parte judgment was entered against him. The judgment stands until set aside or is reviewed. It has never been set aside. The decree therein has been partly executed by the Respondent and the Respondent's effort to appeal was only provoked due to the earlier attachment of Applicant's properties in execution which were eventually sold and part of the decree settled. The execution now targeted by the Applicant is a second one. The Respondent has sworn that he is a person of means and that he will be in a position to pay back the value of the attached goods, if the appeal succeeds.

The Applicant has not denied the fact, effectively. Will the appeal be rendered nugatory if the stay is not granted? I hold that the opposite is the likely position. I further advice that the Applicant should have made an effort to salvage his attached goods by depositing the outstanding amount instead of leaving same to go into waste while in storage.

The upshot of all the above canvassing is that the application for stay of execution is refused and dismissed with costs to the Respondent. The Applicant may, if he so wishes, seek for an early date of hearing of the appeal.

It is so ordered.

Dated and delivered at Mombasa on the 18th day of February, 2002.

D.A. ONYANCHA

J UD G E

Ruling delivered in the presence of:-

……for Applicant

……for Respondent