



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC APPEAL CASE NO. E013 OF 2020

HEZEKIAH ONG'UNDI.....APPELLANT/APPLICANT

VERSUS

DANIEL OJIJO ODHIAMBO.....RESPONDENT

RULING

Applicant's Case

The Appellant, Hezekiah Ong'undi has filed an appeal from the ruling and or order of Hon. P. N. Gesora Chief Magistrate delivered on 27/10/2020 in Kisumu CM ELC No. 447 of 2018. The appellant appeals on grounds that the Learned Chief Magistrate erred in law and in fact by failing to allow the Appellant's application dated 17th August 2020 that sought setting aside of the ex parte judgment delivered on 10th January 2020 and leave to appear and defend the suit.

Moreover, that the Learned Chief Magistrate erred in law and fact by dismissing the Appellant's application dated 17th August 2020 contrary to the tenets of access to justice and fair hearing as provided for in the Article 48 and 50 of the Constitution of Kenya 2010 and also be failing to exercise his discretion in a judicious manner contrary to the provisions of Article 159 (2) thereby driving the appellant from the seat of justice.

The appellant contests further that the Learned Chief Magistrate erred in law and fact by disregarding the Appellant's application and submissions and in giving undue weight to the submissions of the Respondent thereby arriving at a wrong finding to the detriment of the Appellant and in failing to consider all the issues presented before him to enable him make an informed decision.

It is the appellant's further contention that the Learned Chief Magistrate erred in law and in fact in failing to evaluate the Appellant's draft statement of defence and appreciate that it raised triable issues.

The appellant prays that the appeal be allowed by having the interlocutory judgment, the proceedings and the judgement delivered on the 10th January 2020 and all consequential orders made thereafter unconditionally set aside and the Appellant be allowed leave to enter appearance and defend the suit by the Respondent in Kisumu CM ELC NO. 447 OF 2018. The costs of this appeal be awarded to the Appellant.

The genesis of the appeal is a ruling by the Chief Magistrate Court Kisumu dismissing an application to set aside proceedings, Judgment dated 10/1/2020. The Learned Magistrate found that the appellant was served to enter appearance and plead. Moreover, the court found that there was no iota of defence to enable the court to set aside the Judgment.

However, what is before the court now is not the appeal but the application dated 3/11/2020 seeking orders that while pending the hearing and determination of this appeal, there be an Order for stay of the execution and/or enforcement of the judgment delivered by Honourable R.K. Ondieki, SPM dated 10th January 2020 in KISUMU Chief Magistrates ELC NO. 447 Of 2018- Daniel Ojijo Odhiambo Vs Hezekiah Ong'undi. The applicant further prays that costs of this application be proved for.

The application is based on grounds that the Respondent filed a suit in KISUMU CM ELC NO. 447 OF 2018 sometimes in October 2018 and claim to have served the Appellant with summons on the 14th June 2019, though the Appellant states that he was never served. Service of the pleadings and summons to enter appearance was never effected upon the appellant as per Order 5 of the Civil Procedure Act and rules. The Respondent applied for judgement on or about the 31st July 2019 and thereafter fixed the matter for formal proof.

The Respondent testified on the 10th January 2020 and final judgment delivered on the same day at 11.30 a.m. Upon obtaining judgment, the

Respondent applied to execute by way of committing the Appellant to civil jail in default of settling the debt totalling Kshs. 6,406,374.10/-.

No Notice of Entry of judgment was equally served upon the Appellant to make them aware of the judgment entered against them ahead of any execution proceedings, thereby giving them an opportunity to Appeal the said judgment.

The appellant, having not been served with summons to enter appearance or pleadings filed an application dated 17th August 2020 wherein he sought to set aside of the ex parte judgment delivered on 10th January 2020 and leave to appear and defend the suit.

By a ruling delivered on the 27th October 2020, the application dated 17th August 2020 was dismissed and the Respondent is proceeding with execution and has served on the Appellant a notice to appear in court on the 5th November 2020 to show cause why he should not be committed to civil jail for failure to pay the judgment award.

The Appellant has a defence to the Respondent' claim, which defence raises vast triable issues and the Appellant should not be condemned unheard.

The execution process being undertaken of the judgment is equally invalid for the same reasons, apart from the fact that the Respondent is unlawfully executing the same, without filing or otherwise serving the Appellant with the requisite mandatory Ten (1) Days' Notice of Entry of Judgment as contemplated under the provisions of Order 22 Rule 6 of the Civil Procedure Rules, thus rendering the foregoing execution process unlawful.

The Appellant has a legitimate right to defend himself in these proceedings and have a determination of the dispute herein on merits.

The Appellant herein faces unfair execution proceedings based on a decretal sum unjustly and irregularly awarded to the Respondent who intentionally withheld material facts from this Honourable Court and who have come to Court with unclean hands.

Unless interim orders of stay of execution is granted immediately to stop the execution process by the Respondent, this application for stay of execution together with the Appellant's appeal which is already filed shall be rendered useless and meaningless, because whatever success the Appellant may achieve on the appeal, would be of no meaning or use rather than mere academic value.

Unless interim orders of stay of execution is granted immediately to stop the execution process by the Respondent, the result would be far reaching, by completely denying the Appellant an opportunity at all to be heard in the subordinate court suit, and would render the Appellant to have been condemned unheard without any legitimate opportunity to ventilate its undeniable Statutory and Constitutional right to defend himself from the reliefs sought by the Respondent in the subordinate court suit, as set out in the plaint.

The right to defend oneself, and have a suit determined on merit, in any judicial proceedings, which the Appellant has sought in this instant application, has been elevated and accorded the status of an unqualified and an unlimited fundamental right in the supreme law, being the Constitution of Kenya, under articles 21 (1), 25 (c), 47 (1), 48 and 159 (2) (d) thereof, which as a right granted by the Constitution of Kenya, cannot legitimately be taken away in the manner undertaken by the Respondent.

The Appellant has high chances of success on the appeal, and as disclosed in the preceding paragraphs, the Appellant stands to suffer substantial loss in the event that the application for stay of execution is not granted, and the appeal eventually succeeds, which would render the success of the appeal of no meaning since the substratum of the appeal will have, most probably, been lost in the manner that the Appellant has apprehended as shown above.

It is the interest of justice to grant the reliefs sought so that the Appellants appeal herein can be determined with a fair chance of preserving the status quo such that in the event of success in the appeal, the success would not be rendered useless.

Respondent's Case

Daniel Ojijo Odhiambo the respondent herein states in reply that he is the holder of the decree in Kisumu Chief Magistrates Court ELC NO 447 of 2018. He states that the applicant herein was served with the plaint and but never entered appearance consequently judgment was entered against him and the matter proceeded for formal proof on the 10th of January 2020 when also judgment was delivered. The affidavit of service shows that he was accordingly served with summons to enter appearance. The respondent states that the applicant does not have a defence and therefore there are no triable issues and that the appeal has no chances of success. The application is meant to frustrate the applicant and to prevent him from enjoying the fruits of the judgment.

The respondent prays that in case the court is inclined to grant the orders the applicant to be ordered to deposit security of half the decretal amount and that the other half to be deposited in court.

DETERMINATION

Order 42 Rule 6 provides that:

“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 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, 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 for stay of execution shall be made under subrule (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.

Therefore, the conditions for grant of Stay of execution pending appeal that the application should be filed without unreasonable delay and that there must be evidence of substantial loss if the stay of execution is not granted. Lastly, that the applicant has furnished 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 this case the ruling was delivered on 27/10/2020. The Memorandum of appeal was filed on 4/11/2020 approximately 8 days after the ruling. The application for stay of execution pending appeal was filed on the same date. I do find that there was no inordinate delay in filing the appeal.

In *Butt vs. Rent Restriction Tribunal* [1979], the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

As to what substantial loss is, it was observed in *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. 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 ... the issue of 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.”

The court, in *RWW vs. EKW* [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

On the issue of substantial loss, I do find that this is the corner stone of granting stay pending appeal. On the issue of substantial loss, the courts should consider the financial power of both the applicant and the Respondent so that in case of the success of the appeal by the appellant the same should not be rendered nugatory and that the respondent will not be able to refund the decretal sum. In this case the applicant has not demonstrated that if the decretal amount is paid to the respondent he will be unable to refund. Conversely there is no evidence that the respondent will be able to refund the money if the appellant succeeds on appeal.

The courts are also called upon to consider sufficient cause. The court should also balance the scales of justice and grant an order with a less risk of injustice.

The court ought to consider the overriding objective of the law and grant an order that favours the overriding intention. It is the business of the court to ensure that Justice is done.

I do find that the appellant has satisfied this court that he is entitled to the grant of stay pending appeal as he has sufficient cause for the orders to be granted as he has a right to be heard on the allegations that he was condemned in the lower court without being heard and that he was not served with the summons to enter appearance.

The last condition is on security. I do find that for stay of execution to be granted the applicant should provide such security that will be ordered by the court. I do grant stay of the execution and/or enforcement of the judgment delivered by Honourable R.K. Ondieki, SPM dated 10th January 2020 in KISUMU Chief Magistrates ELC NO. 447 Of 2018- Daniel Ojijo Odhiambo Vs Hezekiah Ong'undi on condition that the applicant does deposit half the decretal sum in court. Costs of the application in the appeal.

DATED AT KISUMU THIS 24th DAY OF MARCH, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE