



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC APPEAL NO. 27 OF 2019

SAMMY MUTHENGI KITE.....APPELLANT/APPLICANT

VERSUS

VERONICA MUTOLA KALUSI.....RESPONDENT

RULING

1. The application for determination is dated 26th November, 2019 filed by the Appellant/Applicant under certificate of urgency on 28th November, 2019. It is brought under Order 22 Rule 22, Order 42 Rule 6 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act and all other enabling provisions of the Law.

2. The Applicant seeks the following Orders:

i) Spent.

ii) That pending the hearing and determination of this application, this Honourable Court be pleased to order a stay of execution of the Judgment of Hon. Principal Magistrate L.N. Wasige (Mrs) delivered on 1st October, 2019 in Makindu SPMCC No. 18 of 2014. [SPENT]

iii) That this Honourable Court be pleased to order a stay of execution of the Judgment of Hon. Principal Magistrate L.N. Wasige (Mrs) delivered on 1st October, 2019 in Makindu SPMCC No. 18 of 2014 pending the hearing and determination of the appeal herein.

iv) That the costs of this application to abide in the appeal.

3. The application is supported by the affidavit of Sammy Muthengi Kite, the Appellant/Applicant, sworn on the same day. The basis of the application is that the Applicant is dissatisfied with part of the Judgment of the Lower Court subsequent to which he has filed the Appeal herein. He further deposed that the Respondent has already taken out the decree and the certificate of costs which she is desirous of executing. The said costs amount to Kshs. 118, 280/= . That the Appellant is a man of meager means and shall have utmost difficulty raising the said costs. That the Respondent is a woman of straw and if the Appellant was lucky enough to meet the costs, he would have difficulties recovering the amount back should this appeal succeed. That the appeal raises arguable issues and will be rendered nugatory if stay is not granted.

4. The application is opposed by Veronica Mutola Kalusi, the Respondent herein, vide the Replying affidavit sworn on 21st January, 2020. She deposed that the Applicant never sought stay of execution of the judgment at the lower court when he was represented by counsel. That the Applicant has not paid the

decretal amount thus being greatly prejudiced for the non-compliance. That the filing of an appeal cannot operate as a stay. That the application is an abuse of the court process.

5. The parties duly filed their respective submissions as per the directions issued on 28th January, 2020. The prerequisite conditions for a grant of the orders sought herein are well spelt out under Order 42 Rule 6 (2) of the Civil Procedure Rules (2010). These are:

i) That substantial loss may result to the Applicant unless the order is made;

ii) That the application has been made without unreasonable delay;

iii) That security has been given by the Applicant for the due performance of the decree as may ultimately be binding on him.

6. On substantial loss, the Applicant's contention is that the Respondent has taken out the decree and the certificate of costs which she is desirous of executing and the costs amount to Kshs. 118,280/=. That since the Appellant is a man of meager means, he shall have utmost difficulty raising the said costs. That the Respondent is a woman of straw and if the Appellant was lucky enough to meet the costs, he would have difficulties recovering the amount back should this appeal succeed. The Applicant relies on ten authorities in support of his application. Since only two authorities have been annexed to the submissions, I will disregard the other eight. The two are; **Victory Construction -Vs- BM (A minor suing through next friend one PMM) [2019] eKLR**; and **HE -Vs- SM [2020] Eklr**.

7. In her submissions, the Respondent reiterated that the Applicant has not demonstrated the prerequisite conditions for the grant of the Orders being sought. That the filing of an Appeal cannot operate as a stay of execution of the lower court's judgment. Lastly, she asserted that she has been greatly prejudiced because of the non-compliance with the judgment. No authorities have been relied on.

8. In determining whether the Applicant has satisfied the requirements of Order 42 Rule 6 (2) of the Civil Procedure Rules 2010, this Court's discretion is guided by the Court of Appeal decision in **Butt -Vs- Rent Restriction Tribunal [1982] KLR 417** where it was held as follows:-

"1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. 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 that appeal court reverse the judge's discretion.

3. 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.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

9. On the aspect of delay, it is noted that judgment of the lower court was delivered on 1st October, 2019. The Appellant then filed a Memorandum of Appeal on 29th October, 2020 and the application herein was filed on 28th November, 2020. That is a span of about two months. In my view, the length of time from

the date of delivery of the Judgment to filing of the formal application was not so inordinate as to avert this Court's discretion.

10. On substantial loss, I find that the Applicant has not demonstrated in clear terms the nature of substantial loss he is likely to suffer should stay not be granted. I have not seen evidence of threatened execution of the decree by the Respondent. By merely stating that he is a man of meager means and that the Respondent is a woman of straw, the Appellant has barely discharged the evidentiary burden attached thereto.

11. For that reason, I am minded to agree with Platt Ag. J.A. (as he was then) when he held as follows in **Kenya Shell Ltd -Vs- Kibiru [1986] KLR 416:**

“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 cornerstone of both jurisdictions for granting a stay. That is what has to be prevented.”

12. Lastly, the Applicant has not convinced this Court of his ability to abide by such order for security as this Court may order in his application. He submitted that this Court ought to waive the requirement for security altogether in view of the economic hardship facing the parties.

13. Given that the Respondent has an undoubted right to enjoy the fruits of her judgment, I deem that there is sufficient cause to uphold that right. Accordingly, I shall grant prayer No. 3 of the application on condition that the Applicant shall deposit the decretal amount in the sum of Kshs. 118,280/= into an interest earning account in the joint names of the Advocates on record within forty-five (45) days hereof. In default, the Respondent shall be at liberty to execute.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 19TH DAY OF APRIL, 2021.

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HON. MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi