



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELCA NO. 16 OF 2018

(FORMERLY NKR. ELC 55 OF 2012)

STEPHEN MWIHIA MARAGARA.....APPELLANT

VERSUS

MWANGI KAMURARA (suing as legal representative of the estate of

MWANGI KAMURARA MATHIGI (deceased)..... RESPONDENT

RULING

A. INTRODUCTION

1. By a judgment dated and delivered on 21st September, 2020, the court allowed the Appellant's appeal against the ruling and order of **Hon. S.N. Mwangi (SRM)** in **Nyahururu MC L&E Case No. 341 of 2018**. The learned Magistrate had granted an interim injunction against the Appellant at the interlocutory stage whose effect amounted to a mandatory injunction or eviction order. The appellate court (Hon. M.C. Oundo J) allowed the said appeal by the judgment of 21st September, 2020 and set aside the interim injunction. The Respondent was ordered to bear costs of the appeal.

2. Being aggrieved by the said judgment the Respondent filed a notice of appeal intimating his intention to appeal to the Court of Appeal. There is, however, no indication of the substantive appeal having been filed.

B. THE RESPONDENT'S APPLICATION

3. By a notice of motion dated 4th December, 2020 expressed to be based upon **Sections 3A, 75, 78 & 79G of the Civil Procedure Act (Cap. 21) Order 42 Rule 4 of the Civil Procedure Rules 2010 (the Rules), and all enabling provisions of the law**, the Respondent sought a stay of taxation of the Appellant's bill of costs dated 28th September, 2020 and execution on costs pending the hearing and determination of the intended appeal to the Court of Appeal.

4. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Respondent on 4th December, 2020. The Respondent contended that he had preferred an appeal to the Court of Appeal against the judgment and decree of this court dated 21st September, 2020 and that the award of costs was one of the grounds of appeal. It was contended that if taxation and execution were allowed to proceed, he might suffer substantial loss since the Appellant may not be able to refund the costs should the intended appeal succeed. The Respondent further contended that unless the stay sought was granted, his intended appeal, if successful, might be rendered nugatory.

C. THE APPELLANT'S RESPONSE

5. The Appellant filed a replying affidavit sworn on 11th January 2021 in opposition to the said application. It was contended that the application was fatally defective, bad in law, and otherwise an abuse of the court process. It was further contended that the Respondent had not satisfied the requirements for the grant of stay pending appeal; that there was undue delay in filing the instant application; that the application was premature since costs had not been taxed; and that the intended appeal had no chances of success. Consequently, the court was asked to dismiss it with costs.

D. DIRECTIONS ON SUBMISSIONS

6. When the application was listed for *inter partes* hearing on 15th February, 2021, it was directed that it shall be canvassed through written submissions. The parties were granted 14 days each to file and serve their respective submissions. However, the record shows that both

parties filed their submissions on 26th April, 2021.

E. THE ISSUES FOR DETERMINATION

7. The court has considered the Respondent's notice of motion dated 4th December, 2020 together with the supporting affidavit and exhibits thereto, as well as the Appellant's replying affidavit in opposition thereto. The court is of the opinion that the following issues arise for determination herein:

(a) Whether the Respondent has satisfied the requirements for granting stay pending appeal.

(b) Who shall bear costs of the application.

F. ANALYSIS AND DETERMINATION

(a) Whether the Respondent has satisfied the requirements for granting stay of execution pending appeal

8. The court has considered the submissions and material on record on the issue. The Respondent submitted that he had satisfied all the requirements for the grant of an order of stay pending appeal in the instant application. He relied on the cases of **Butt v Rent Restriction Tribunal [1979] eKLR**; **Josephine Koki Raymond v Philomena Kanini Maingi (personal representative of Maingi Musila Mutava (deceased) and Another [2018] eKLR**; and **Focin Motorcycle Co. Ltd v Ann Wambui Wangui & Another [2018] eKLR** in support of his application.

9. On the other hand, the Appellant contended that the Respondent had failed to satisfy the legal requirements for the grant of stay pending appeal. The Appellant relied upon the cases of **Tom Ojienda & Associates v Mumias Sugar Co. Ltd & Another [2018] eKLR** and **Doris Awino Abira Vs M.I. Wafula & Co. advocates [2021] eKLR** in opposition to the application.

10. The Respondent's application is essentially grounded upon **Order 42 Rule 6 (2) of the Rules** which stipulate as follows:

“(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”.

11. In the case of **Halai & Another v Thornton & Turpin (1963) Ltd [1990] KLR 365**, the Court of Appeal held that the jurisdiction of the High Court to grant a stay under **Order 42 rule 6** of the **Rules** was fettered by at least 4 conditions, namely:

(a) The applicant must establish sufficient cause.

(b) The applicant must demonstrate the risk of substantial loss unless stay is granted.

(c) The applicant must furnish security for due performance of the decree should the appeal eventually fail.

(d) The application must be made without unreasonable delay.

12. An application for stay of execution of a decree usually raises two competing interests in the administration of justice. There is the right of the successful litigant to enjoy the fruits of his judgment on the one hand. On the other hand, there is the right of the unsuccessful litigant to pursue his right of appeal without the risk of the outcome being rendered merely academic and nugatory. The court has a duty to balance these competing but legitimate interests hence the need to adhere to the set down principles for granting a stay pending appeal.

13. The court has considered the material on record on the question of substantial loss. The Respondent's contention was that if the costs of the appeal are taxed and paid then he shall suffer substantial loss and his intended appeal to the Court of Appeal shall be rendered nugatory because the Appellant may not be able to refund the costs once paid.

14. The court has noted that costs is not the only issue which the Respondent intends to canvass before the Court of Appeal. In fact, it is not the main issue. The main question in the appeal will be whether or not this court erred in law in setting aside the interim order of injunction which had been granted by the Magistrates' court.

15. The Court of Appeal considered the meaning of the phrase 'nugatory' in the case of **Stanley Kangethe Kinyanjui v Tony Keter & 5 others [2013] eKLR** and held, *inter alia*, that:-

“ ix) The term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd v Norlake Investment Ltd [2002] 1EA 227 at page 232.

x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if not reversible whether damages will reasonably compensate the party aggrieved.”

16. The court does not see how the pending appeal can be rendered worthless, futile, invalid or trifling if the stay sought is not granted. The court is not satisfied that the payment of costs of the appeal is irreversible. The costs will be paid in monetary terms and most likely in Kenyan currency. As was held in the case of **Kenya Shell Ltd v Karuga & Another[1986] eKLR**, it is not usual for execution to render an appeal in a money decree nugatory unless it is demonstrated that the decree holder would not be in a position to refund the decretal amount.

17. Although the Respondent alleged in the application that the Appellant would be unable to refund the costs, the court is of the opinion that such allegation was merely speculative and without any factual basis. This is because the quantum of costs remains unknown to date. The Appellant was simply awarded costs of the appeal and the quantum was left to be taxed by the taxing officer of the court. The Appellant’s bill of costs is yet to be taxed. No one can tell if the amount will be a small sum, a modest sum or huge amount. It is, therefore, premature and speculative for the Respondent to assume that the Appellant shall be unable to refund whatever amount will be taxed. The court is, therefore, not satisfied that the Respondent has proved the risk of substantial loss or the intended appeal being rendered nugatory in the absence of a stay.

18. The court has considered the material on record on whether or not the instant application was filed without undue delay. There is no doubt that the impugned judgment was delivered on 21st September, 2020. There is also no doubt that the instant application was filed on 4th December, 2020. The Respondent’s explanation for the delay was that he was waiting to be furnished with a stamped copy of the notice of appeal he had filed in the instant appeal file which he received on 14th October, 2020. However, the material on record indicates that the notice of appeal was dated and signed on 5th October, 2020. The reverse side of the notice further indicates that it was received by an agent of the Respondent’s advocate on 12th October, 2020 and not 14th October, 2020. So, it is clear that the Respondent was quite economical with the truth.

19. The court is not satisfied that the Respondent has given a reasonable and satisfactory explanation for the delay for at least two reasons. First, a stamped copy of a notice of appeal is not a prerequisite for filing an application for stay under **Order 42 of the Rules**. Second, even after receipt of the stamped notice of appeal on 12th October, 2020 the Respondent did not file the instant application until 4th December, 2020.

20. The court does not accept the Respondent’s alternative explanation that he did not file the application expeditiously because there was no judge available to hear the application at Nyahururu. The court is aware that Hon. Justice M.C. Oundo’s transfer took effect from 30th October, 2020. The court is further aware that the replacement judge reported on 2nd November, 2020. In any event, the judiciary always makes arrangements for urgent applications to be handled in the event that the station judge is not available. The court, therefore, finds and holds that there was undue delay in filing the instant application and that no satisfactory explanation was rendered for the delay.

(b) Who shall bear costs of the application

21. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful litigant should not be awarded costs of the appeal. Accordingly, the Appellant shall be awarded costs of the appeal.

G. CONCLUSION AND DISPOSAL

22. The upshot of the foregoing is that the court finds no merit in the application for stay pending appeal. Accordingly, the Respondent’s notice of motion dated 4th December, 2020 is hereby dismissed with costs to the Appellant.

23. It is so ordered.

Ruling Dated and Signed in Chambers at Nyahururu this 10th day of June 2021 and delivered via Microsoft Teams platform.

In the presence of:

Ms. Wanjiru Muriithi for the Appellant

No appearance for the Respondent

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Y. M. ANGIMA

JUDGE