



REPUBLIC OF KENYA

IN THE ELC COURT

AT MOMBASA

ELC. CIVIL APPEAL NO. 47 OF 2021

GIBSON MWENDO MWANGEMI.....APPELLANT

VERSUS

JOYCE KALUKI MUINDE.....RESPONDENT

RULING

1. Before the Honorable Court is the Appellant/Applicant's Notice of Motion Application dated 18th August, 2021 filed on 19th August, 2021 following a judgment delivered on 13th July, 2021 by the Subordinate Court against the Appellant/Applicant and in favour of the Respondent and a Memorandum of Appeal dated 10th August, 2021 filed before this court on 16th August, 2021. The Applicant/Appellant herein sought for the following orders:-

a. Spend

b. That there be a temporary stay of execution pending the hearing and determination of the application.

c. That there be stay of execution pending the hearing and determination of the Appeal.

2. The afore said application is supported by the grounds and the 10 Paragraphed supporting affidavit of GIBSON MWANDO MWANGEMI the Appellant sworn and dated on 18th August, 2021 (Hereinafter referred to as "The Supporting Affidavit"). He deposed that the aforesaid judgment against him and in favour of the Respondent was delivered through virtual means. He held that he was apprehensive the Respondent had already been in the process of execution and would execute the decree at any time to his utter detriment. As a result he feared he would suffer irreparable loss should that take place.

3. Being aggrieved by the aforesaid judgment, the Appellant/Applicant lodged an appeal before this court by filing a Memorandum of Appeal dated 10th August, 2021 and filed on 16th August, 2021. He reiterated that should the intended execution by the Respondent take place and the orders denied then the appeal would be rendered nugatory and Otiose.

4. It was his deposition that the Respondent had already demanded payment and threatened to execute as per an attached letter dated 10.8.2021 authored by the Respondent's Advocates should a sum of Kshs. 619, 225.00 not have been paid up to them. The Appellant averred that the Respondent had been engaged in an illegality by combining alleged arrears of rent with the costs of the case from the Subordinate trial court. He held that the subject of the proceedings constituted his only source of livelihood and urged court to grant the orders as sought as the Respondent would not suffer any prejudice as instead it is him who stood to suffer irreparable loss if the execution took place and orders not granted. He urged Court to have the appeal be admitted, heard and finally decided on its merits.

5. In summary, he deposed that on 18th August, 2021 he moved court during the summer recess by filing the application ex – parte and was granted a 30 days temporary stay of execution of the decree and judgment pending the inter - partes hearing on 27th September, 2021. On the 27th September, when parties appeared for inter partes, court directed that the same be canvassed by way of written submissions for the expeditious sake of disposing it. The Appellant/Applicant was granted leave to file a Supplementary affidavit to respond to the issues raised by the Respondent from the Replying affidavit. On 12th October, 2021, the Appellant/Applicant filed the said Supplementary affidavit dated 7th October, 2021 (Hereinafter called "The Supplementary Affidavit").

II. The Respondent's Case

6. The application was opposed by the Respondent. Upon being served, the Respondent prepared and filed on 24th September, 2021 a 14 paragraphed Replying Affidavit sworn by the Respondent – JOYCE KALUKI MUINDE and dated 14th September, 2021 (Hereinafter

referred to as “The Replying Affidavit”). By opposing the said the prayers sought, she deposed that the said application was a mere tactic to frustrate her from enjoying the fruits of the afore stated judgment delivered in her favour by the lower trial court.

7. It was her assertion that the Appellant had failed and/or ignored the court’s orders issued on 13th June, 2018 requiring him to be depositing the rental income of the business premises from the month of January to 2018 until the full hearing and determination of the suit. Instead, it was only on 6th August, 201 that the Appellant had only deposited a paltry sum of Kenya Shillings Fourty Two Thousand (Kshs. 42,000/=) being a three (3) months rental income. Hence, the Respondent held that the Appellant been in arrears a sum of Kenya Shillings Two Hundred and Ninety Four Thousand (Kshs. 294,000/=) as at September, 2021.

8. The Respondent urged the Appellant to deposit the said amount in arrears in Court and/or in joint account of the Advocates herein to be as security for costs as a condition to be considered for being granted the orders of stay of execution as sought by the Appellant/Applicant. She held that she had been suffering economic hardship for the past six (6) years since 2015 as she had been unable to garner any gains from the subject matter of the appeal which the Appellant/Applicant continued to occupy and conducted his business without paying but only engaged her in unnecessary litigation.

9. The Respondent prayed that the said application by the Appellant/Applicant be dismissed as being an a front to justice she reiterated that the Appellant/Applicant be compelled to deposit the arrears as stated above.

III. THE SUBMISSIONS

10. On 27th September, 2021 in the presence of all the parties, court directed that the application be disposed off by way of written submission.

A. The Submissions by the Appellant

On 12th October, 2021, the Appellant/Applicant’s Advocates – the law firm of Messrs. F.M Mwawasi & Company Advocates filed their written submissions dated 7th October, 2021. The Learned Counsels submitted that the application was premised on the fact that the Appellant/Applicant’s filed Appeal ran the risk of being rendered nugatory and otiose unless the stay of execution orders were granted as prayed. They were apprehensive that the Respondent had already embarked in the process of the execution and would execute any time. Further, they asserted that the Appellant/Applicant stood to suffer substantial and irreparable loss which had been his only source of livelihood. The Advocates informed court that the Appellant/Applicant ran a business in the suit premises and that the Respondent had irregularly combined arrears rental income with the costs of the case in the lower court which had been an irregularity.

11. To buttress their case, they relied on the High Court decision of *HCCC (Kakamega) – Civil Appeal No. 20 of 2020, HE – Versus – SM (2020) eKLR* where the court held:-

“The purpose of an application for stay of execution pending 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.....”

The upshot of all this they prayed to be granted the orders as sought with costs.

B. The Submission by the Respondent.

12. On 5th October, 2021, the Advocates for the Respondent the law firm of Messrs. Okanga & Company Advocates filed their written submissions. The Learned Counsels argued that their main grounds for opposing the Appellant/Applicant’s application were twofold:- firstly, that the Appellant had failed to comply with the court orders made on 13th June, 2018 directing him to be depositing rents in Court pending the hearing and determination of the suit and secondly, todate being rent arrears amounting to a sum of Kenya Shillings Five Hundred and four Thousand (Kshs. 504, 000.00) from the year 2013 todate and had only deposited a paltry of Kenya Shillings Fourty Two Thousand (Kshs. 42, 000.00) in court.

13. The Advocates argued that the Appellant/Applicant by his conduct had demonstrated his total disregard for the court’s orders by failing to obey it as directed and despite being in occupation of the Respondent’s premises and conducting business there depriving her of her livelihood. For these reasons, they urged court not to use its discretionary power to grant the stay of execution of the lower court’s decree and dismiss the application with costs. To support their case, they relied on the provisions of Order 42 Rule 6(1) and (6) of the Civil Procedure Rules and the decision of *Victory Construction Versus B.M (Minor suing through next friend one PMM), High Court (Machakos) Civil Appeal No. 19 of 2019.*

IV. Analysis and determination.

14. I have carefully read and put into account all the filed pleadings, the submissions, authorities relied on and the relevant provisions of the appropriate and enabling laws. In order to arrive at an informed decision, this honourable court has framed the following issues for its determination. These are:-

a. Whether the Appellant have fulfilled the fundamental requirements of being granted stay of execution as set out under Order 42 rule 6 (1) & (6) of the Civil Procedure Rules?

b. Who will bear the Costs of the application.

ISSUE No. 1 - Whether the Appellant have fulfilled the fundamental requirements of being granted stay of execution as set out under Order 42 rule 6 (1) & (6) of the Civil Procedure Rules?

15. Ideally, the purpose of an application for stay of execution by any applicant is with an aim to preserve the subject matter in dispute so that the right of the Appellant/Applicant is safeguarded. See the case of *Consolidated Marine – Versus - Namprijad An. Civil Appeal No. 93 of 1989* Nairobi where court held that:-

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.

In saying so, it is imperative to critically assess the legal spectrum of this aspect. The legal substratum for granting stay of execution is anchored in these provisions of law. These are:-

Order 42 Rule (6) (1) of the Civil Procedure Rules entitled *“Stay in Case of Appeal”* hold inter alia:

“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 an 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”.

While the provisions of Order 42 rule (6)(6) of the CPR which provides:-

“Notwithstanding anything contained in Sub-rule (1) of the rule the High Court shall have power in exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from the sub-ordinate Court or tribunal has been complied with.

16. On this issue of granting of stay of execution pending appeal, there are plethora of decided cases and hence a well set out principles based on precedents. For instance, below are the leading ones. In the Civil Appeal *No. 107 of 2015 – Masisi Mwita –VS_ Damaris Wanjiku Njeri [2016] eKLR* where the court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of “Halal & Another –VS- Thornton & Turpin Ltd. where the Court of Appeal Gicheru J.A., Chesoni & Coker AG 1A) held that: “The High Courts discretion to order stay of execution of its order or Decree is fettered by three (3) conditions namely:- Sufficient Cause, substantial loss would ensue from a refusal to grant stay the Applicant must furnish security, the application may be made without unreasonable delay. In addition the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakolo –VS- Straman E.A. Ltd.[2013] as follows:-

“In addition the Appellant must prove that if the orders sought are not granted and his Appeal eventually succeeded them the same shall have been rendered nugatory”. These twin principles go hand in hand and failure to prove one dislodges the other. The court notes with great humility the Plaintiff/Applicant agrees with it by citing the case of Vishram Rouji Halal – VS- Thrornton & Turpour Civil Appeal No. 15 of [1990] KLR 365,

And in the *Canvass manufacturers Ltd. –VS- Stephen Reuben Korunditu Civil application No. 158 of 1994 [1994] LLR 4853* – where the court held that:-

“Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised” Further in the case of “Stephen Wanjiku –VS- Central Glass Industries Ltd. Nbi) HCC No. 6726 of 1991 the court held that:-

For the court to order a stay of execution there MUST be:-

- i. Sufficient cause;**
- ii. Substantial loss**
- iii. No unreasonable delay.**
- iv. Security and the grant of stay is discretionary.**

17. It is evidence from the above provisions of law that the court has discretion to issue an order of stay of execution. However, the said discretion must be exercised judicially and not capriciously. In exercising its discretion, court should therefore always opt for the lower

rather than the highest risk of injustice. The court is to weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that the successful party is not impeded from enjoying the fruits of judgement. Always, there is need for equal level footing or playing ground.

18. Despite of these principles, courts have also argued that the four (4) principles above are not binding on this court in view of the overriding principles (or what has been termed as the Oxygen rule) being the courts inherent powers as founded under the provisions of Sections 1, 1A, 3, 3A of the CPA and Section 3 of the Environment and Land Court Act No. 19 of 2012. These inherent powers emphasise on having land dispute being justly, expeditiously, proportionately and assessible determination of dispute without impending on to undue technicalities. While considering whether to grant the orders for stay court has to weigh all these considerations without taking the risk of leading to undesirable or absurd outcome.

19. Furthermore, based on the above clear four (4) principles, this court will then proceed to determine whether the Appellant/Applicant herein has satisfied the required standard for granting of stay orders pending appeal as follows:-

Firstly, the Appellant/Applicant must show that they will suffer substantial loss. Apparently, this seem to be the main issue out of the four set out principles. There must be empirical or documentary evidence of the substantial loss to support the contention and not just in face value.

20. On matters pertaining to this case, while making a determination of the Appellant/Applicant application dated 18th August, 2021, it has taken into account that it is not the practice of the courts to deprive the Respondent, being the successful litigant of the fruits of her litigation from the judgment entered in her favour.

21. The Judgement in this case was delivered against the Appellant/Applicant on 13th July, 2021. Through his Learned Advocates, he held that the filed Appeal ran the risk of being rendered nugatory and otiose unless the stay of execution orders were granted as prayed in the application. They held that the Respondent had already embarked on the process of the execution through the demand letter by the Respondent's Advocates dated 10th August, 2021 and would execute any time. Further, they asserted that the Appellant/Applicant stood to suffer substantial and irreparable loss which was his only source of livelihood. He asserted that he ran a business in the suit premises and that the Respondent had irregularly combined arrears rental income with the costs of the case in the lower court which was irregular. To proof this, the Appellant/Applicant drew court's attention to a copy of the afore mentioned letter by the Respondent's Advocate demanding from the Appellant/Applicant a sum of Kenya Shillings Six Nineteen thousand, Two Twenty Five Hundred (Kshs. 619, 225.00) and giving a seven days ultimatum notice to have had the said sum paid up failure to which execution of the Judgement to take effect. Clearly, although demand letters are intention to act, this can not be underrated at all. Often they are actualized to the chagrin of the recipients. Therefore, on this limb, the court is fully satisfied and confirms that the Appellant/Applicant may suffer any substantial loss if the orders sought are not granted.

22. Secondly, the Appellant/Applicant must satisfy court that the notice of motion application was made without **undue and unreasonable delay**. This court has noted from the time the of delivery of Judgement on 13th July, 2021, the Memorandum of Appeal dated 10th August, 2021 was filed on 16th August, 2021 and the notice of motion application dated 18th August, 2021 seeking for stay of execution and was filed on 19th August, 2021. Therefore, as the facts speak for themselves, this court finds that there was no inordinate delay as envisaged in law in filing this application by the Appellant/Applicants.

23. Thirdly, on the issue of security for costs, it is noted that the bone of contention is rental arrears from the year 2013 todate amounting to a sum of Kenya Shillings Five Hundred and Four Thousand (Kshs. 504, 000.00) hence a liquidated amount. Be that as it may, in all fairness, all facts remaining constant, this court directs that the Appellant/Applicant to provide a security for costs being a sum of Kenya Shillings two hundred and fifty Thousand (Kshs. 250, 000.00) within the next 30 days from this date hereof to be held in an interest earning joint account by the Advocates of the parties herein being the law firms of Messrs. Mawasa & Co. Advocates and Messrs. Okanga & Company until the appeal is heard and determined.

24. In view of the afore going terms, that I direct that the notice of motion application dated 18th August, 2021 by the Appellant/Applicant be and is hereby allowed. To expedite the matter, the appeal to be fixed for pre – trial conference in the next 45 days from todate. I further direct that, failure to comply with the said orders, the application will be deemed to have been dismissed with costs and the execution to issue accordingly.

The Costs of this application to be in the cause.

IT IS SO ORDERED.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 19TH DAY OF OCTOBER, 2021

HON. JUSTICE L.L. NAIKUNI

JUDGE

(ELC- MOMBASA)

In the presence of:-

M/s. Yumna – the Court Assistant

M/s. Okumu Advocate holding brief for Mr. Mwawasa for the Appellant/Applicant.

Mr. Okanga Advocate.....for the Respondent