



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CIVIL APPEAL NO. E001 OF 2020

ANITA KAARI NJERU.....APPELLANT

VERSUS

STELLA KABURU (SUING AS LEGAL REPRESENTATIVE

OF THE LATE ALFRED MURITHI RUFUS).....RESPONDENT

RULING

INTRODUCTION

1. By an application dated 5th/10/2020, the Applicant **ANITA KAARI NJERU** seeks an order for **a stay of execution of the judgment and decree issued in CHUKA CMCC NO. 87 OF 2019** by Hon. Njoroge (CM).

2. The Application is supported by grounds on the face of the application and the Affidavit of **ANITA KAARI NJERU** sworn on the 5th/10/2020.

3. The applicant vide his Notice of Motion application dated 5th/10/2020 expressed to be brought under Order 42 Rule 6(1) & (2) of the Civil Procedure Rules sought orders: -

i. That the application be certified urgent.

ii. That pending the inter partes hearing of this application, there be a stay of execution of the judgement and decree issued in CHUKA CMCC NO.87 OF 2019.

iii. That pending the hearing and determination of this application and the appeal, there be a stay of execution of the judgment and decree issued in CHUKA CMCC NO.87 OF 2019.

iv. That costs of the application do abide the outcome thereof.

4. The application is premised on the grounds set out on the face of the application and is supported by the affidavit sworn by the applicant in support of the application. The Applicant has set out the following grounds in support of the application:

i. That the applicant's application seeking to set aside the interlocutory judgement entered in CHUKA CMCC NO.87 OF 2019 was dismissed in a ruling delivered on 23rd.9.2020.

ii. That the applicant was aggrieved by the lower court's decision and has preferred appeal.

iii. That substantial loss will inevitably result to the applicant unless the order sought herein is made.

iv. That the applicant is ready and willing to provide security for the due performance of the decree in the form of a bank guarantee.

v. That the instant application has been made promptly and without unreasonable delay.

5. On the 6th/9/2020 the court ordered that the matter be certified urgent and further that the Application be served for interpartes hearing.

6. The Application was opposed vide the Respondent's Replying Affidavit dated the 9th/10/ 2020 in which the Respondent sought for its dismissal with costs for being an abuse of the Court process and an attempt to deny her the fruits of her judgement.

7. On the 19th /10/2020 the parties confirmed filing and service of affidavits on the respective parties and further to that, the parties did seek for direction from court for the matter to be canvassed by way of written submissions. The court proceeded to order that the matter be canvassed by way of written submissions.

8. The Appellant's written submissions were filed on the 27th/10/2020 while those of the Respondent filed on the 28/10/2020.

9. On the 5th /11/2020 the parties confirmed filing of their respective submissions and a ruling date was issued.

APPLICANT'S CASE

10. The Applicant's present application was supported by her Supporting Affidavit filed on the 5th /10/2020.

11. The Applicant depones that the respondent obtained an interlocutory judgement in the lower court for a total sum of Kshs. 1,806,136.60 only.

12. She filed an application before the trial court seeking to have the interlocutory judgement set aside to no avail.

13. It is her case that the amount involved is colossal and if the respondent is allowed, to execute. She will be rendered destitute. It is her contention that if stay is not ordered the appeal will be rendered useless as the respondent will not be in a position to refund the decretal sum.

14. The applicant further informed court that she could provide a bank guarantee as security pending the determination of this application.

15. The Applicant relied on the decided cases in **Maxam Limited v Heinseken East Africa Import Company Limited [NRB HCCC 29 of 2016]** and **Dilpack (K) Limited v William Muthama Kitonyi [Machakos HCCC 142 of 2013]** to submit that she had complied with all the conditions stipulated therein to secure the orders of stay execution.

16. She therefore urged this court to allow the present application.

RESPONDENT'S CASE

17. The Respondent filed a replying affidavit in response to the applicant's notice of motion.

18. She stated that judgment was entered in her favour against the Appellant in CMCC No. 87 of 2019.

19. She urged the court to order the applicant to release half of the decretal sum as a condition for stay of execution.

20. She termed the application an abuse of the court process that was intended to deny her fruits of her judgment.

21. It is her contention that this Court should not sacrifice procedure at the expense of satisfying an offending party.

22. The Respondent submitted that the court should balance the different interests between a successful litigant not being denied her fruits of judgement and an unsuccessful litigant exercising her right of appeal.

23. The Respondent relied on the decided cases in Titus Muiruri Doge v Kenya Cannery Limited [1990] eKLR and **Amal Hauliers Limited v Abdul Nasir Abubakar Hassan** to submit that she had complied with all the conditions stipulated therein to secure the orders sought.

24. On that account the Respondent prayed for the application to be dismissed with costs to her.

ANALYSIS AND DETERMINATION

25. I have carefully considered the application. The applicant seeks orders of stay of execution of the judgement of the lower court and to appeal against the Order of the Hon. Njoroge (CM) made on the 29th/9/2020. The issue which arises is stay of execution.

26. The law on stay of execution pending Appeal is found in **Order 42 Rule 6 of the Civil Procedure Rules** which stipulates as follows:

[Order 42, rule 6.] Stay in case of appeal.

6. (1)" No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 ;

(c) 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.”

27. The grant of stay of execution is a discretionary power that must also take into account the fact that the Court ought not to make a practice of denying a successful litigant the fruits of their judgment.

28. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how discretion should be exercised 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, 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.”*

29. The courts are now obliged to give effect to the overriding objective in the exercise of its powers under the **Civil Procedure Act** or in the interpretation of any of its provisions. Section 1A(2) of the **Civil Procedure Act** “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

30. On the flipside, this does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective.

31. The same is pinned in our constitution vide Article 159 (2) (d) which stipulates that justice shall be administered without undue regard to procedural technicalities.

32. The purpose of stay of execution is to preserve the substratum of the case. In the case of **Consolidated Marine. vs. Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)**, the 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”.

33. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma vs Abuoga (1988) KLR 645** where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

34. In the case of **Charles Wahome Gethi vs. Angela Wairimu Gethi [2008] eKLR**, the Court of Appeal held -

“... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”

35. The Court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the Appeal so that the appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of her judgment.

36. In the case of Mohammed Salim T/A Choice Butchery –vs- Nasserpuria Memon Jamat (2013) eKLR, the court upheld the decision of M/S Portreitz Maternity –vs- James Karanga Kabia Civil Appeal NO. 63 OF 1997 and stated that:

“That right of appeal must be balanced against an equally weighty right that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right”

37. In the application at hand, the Applicant argues that should the judgment debtor executes, then she would be rendered destitute.

38. On the second condition, I find that it was not in dispute that the impugned judgment was delivered on the 23rd/9/2020 respectively, wherein the Applicant applied for stay of execution in the trial court which application had been denied thus resulting into the filing of the present Application on the 5th/10/2020 which was after a period of about 1 month. Given that in the present times and from the month of March, 2020 the Covid-19 Pandemic has affected the normal operations of relatively every field of life; I am inclined to find that the said application is brought without undue delay.

39. On the last condition as to provision of security, I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that she must furnish security. In this case, the Applicant herein has provided a bank guarantee as a security.

40. The court in Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & Another [2018] eKLR held that: -

“... Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay...”

41. In the case at hand, the Applicant argues that the Respondent is a woman of straw in that she may not be in a position to refund the decretal sum should the appeal succeed. The court in Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991, reasoned that, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income. Suffice to state that the Respondent, at this moment, is the successful party and in order to deny her the fruits of her success, it is upon the Applicant to prove that she is unlikely to make good whatever sum she may have received in the meantime.

42. In the case of Aron C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates the court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

43. Notably, every person is entitled as envisaged under Article 50 of the Constitution of Kenya to have a fair trial. The said Article 50 of Constitution of Kenya provides as follows: -

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

44. It therefore follows that every person ought not to be shut out from accessing court or having his day in court.

45. The Applicant further argued that she ought not be punished for happenings that were beyond her; and that he should not be condemned unheard given that her appeal has a chance of success.

46. I find that the decretal sum is colossal and if stay is not ordered the applicant is likely to suffer substantial loss. The applicant has established the threshold for the grant of the order of stay of execution.

CONCLUSION

47. I find that the application dated 5th of October, 2020 has merits. I order as follows:-

- i. There be stay of the execution of the judgment/decreed issued in **Chuka CM. CC 87/2019** pending hearing and determination of the appeal.
- ii. The Applicant shall execute a bank guarantee in the sum of **Kshs.1,806,136.60** as security within 30 days from today.
- iii. If the order is not complied with, the order of stay shall lapse and the respondent be at liberty to execute.
- iv. Costs in the cause.

Dated, signed and delivered at Chuka this 4th day of March 2021.

L.W. GITARI

JUDGE

4/3/2021

Ruling has been delivered in open court

L.W. GITARI

JUDGE