



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 61 OF 2011

JIMMY MUSYOKI KILONZO.....APPELLANT

VERSUS

JOHN KYALO KILONZO.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. Vide a notice of motion dated 18.02.2020 and filed on 19.02.2020 under certificate of urgency and supported by affidavit of John Kyalo Kilonzo, the Applicant seeks the following orders:

a. Spent

b. Spent

c. There be stay of execution of judgement issued on 5th of February 2020, the decree herein and all consequential orders pending hearing and determination of the appeal in the Court of Appeal.

d. The costs of the application be provided for.

2. The application has been brought under Order 51 Rule 1 and Order 42 Rule 6 of the Civil Procedure Rules, 2010 and section 1A, 1B and 3A of the Civil Procedure Act on the grounds that;

a. A judgement was entered in favour of the Appellant against the Respondents.

b. Being aggrieved by the said judgement, he has lodged an appeal against the whole decision by filing a notice of appeal.

c. The appellant has threatened to attach his property in execution of the judgement issued herein.

d. Unless the orders sought are granted then he will suffer substantial loss and the appeal rendered nugatory.

e. The application has been made timeously.

3. To further support his application, he has annexed a letter to the Deputy Registrar dated 12.2.2020, notice of appeal dated 12.2.2020 and a draft memorandum of appeal.

4. The Appellant in response filed grounds of opposition as follows;

a. The 1st respondent has not exhibited a validly filed Notice of Appeal and therefore the application is incompetent, misconceived, bad in law and an abuse of this Honourable court process.

b. The Applicant has not demonstrated merit in the application and has not offered to give security for due performance of the decree herein.

c. The applicant ought to deposit the judgement sum in court.

d. Costs awarded to the appellant in the court's judgment dated 5.2.2020 are yet to be taxed and the allegation of an imminent execution of the court's decree is without basis.

e. The Honourable court's orders cannot be given in vain and should be dismissed with costs.

5. The Appellant also filed a replying affidavit on 11.12.2020 in which he reiterates the contents of the grounds of opposition save to add that the 1st Respondent has not demonstrated that he will suffer substantial loss should the orders sought be disallowed and that the appeal is an attempt to keep the Appellant in court.

6. Parties agreed to dispose of the application by way of written submissions.

7. A perusal of the record shows that only the Appellant filed his submissions on 11.12.2020 in which he submits that the 1st Respondent has not demonstrated that he will suffer substantial loss should the orders sought be disallowed. Further that he will not suffer any loss and is only hell bent on keeping the Appellant from enjoying the fruits of judgement. He opines that the court has jurisdiction to order that the Applicant pays security for due performance of the decree on condition that the said amount is paid before the orders takes effect. He relies on **order 42 Rule 6 of the Civil Procedure Rules,2010 and the cases of Equity Bank Limited vs Taiga Adams Company Limited Civil Appeal No.72 of 2000 and Northwood Service Limited vs Mac& More solution Limited [2015]eKLR.**

8. I have looked at the application, the responses thereto, the submissions on record, the record itself, authorities cited and the law and find the only issue for determination is whether the Applicant has satisfied the grounds for granting stay of execution pending appeal.

9. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under **Order 42 rule 6(2) of the Civil Procedure Rules,2010** which provides as follows:

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

10. The Applicant for stay orders must therefore demonstrate that;

a. Substantial loss may result to the applicant unless the order is made.

b. The application has been made without unreasonable delay.

c. The applicant is ready to provide security for the due performance of the decree that may be binding upon him.

11. This was discussed in the Court of Appeal case of **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365.** where it was held that:

whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 42 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court is no longer limited to the foregoing provisions. The courts are now enjoined 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. According to 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.

12. On the issue of substantial loss, a definition of the same was given in the case of **Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007** where it was stated that;

"The word "substantial" cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words "substantial loss" must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the

applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. 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 his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement. ”

13. This was further discussed by Platt, Ag. JA (as he then was) in the Court of Appeal *Kenya Shell Limited v Benjamin Karuga Kiburu & another* [1986] eKLR at page 416 expressed himself as follows:

“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 corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.

Gachuhi, Ag.JA in the same case (as he then was) at 417 held:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

14. Substantial loss entails the applicant establishing 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. See *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR. The applicant claims that he stands to suffer substantial loss should execution of the decree take place.

15. On the issue of deposit of security, it is for the Applicant to demonstrate that he will deposit the decretal sum in order to safeguard the interest of the decree holder who is being denied the chance to enjoy the fruits of judgement. The applicant has deponed that he is ready to abide by any conditions to be imposed by the court.

16. In the case of *In Machira T/A Machira & Co Advocates vs. East African Standard (No 2)* [2002] KLR 63 it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

17. Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya provides that he who alleges must prove. The Applicant claims that its intended appeal would be rendered nugatory if a stay is not granted. The legal burden is on him to prove that allegation. In his affidavit in support of the motion he simply averred in paragraphs 7 and 8. The Applicant merely alleges that he will suffer substantial loss but has not gone ahead to indicate how he will suffer. He again alleges that he is under the threat of execution but has not put in evidence to support the same. I would ask the same questions; what loss would be suffered? To what extent? What are the chances of the appeal succeeding? However, this Court is tasked with the duty of striking a balance between the rights of the parties to ensure the ends of justice are met.

18. On this I am persuaded by the case of *John Gachanja Mundia vs. Francis Muriira Alias Francis Muthika & Another* [2016] eKLR where it was stated that:

“There is doubt the Applicant has shown that substantial loss would occur unless stay is granted. However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in the Constitution as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief.”

19. Judgement was entered for the appellant in the sum of Kshs 2,100,000/ plus costs and interest. I note that the cause of action arose in 2003, about 18years ago and the Appellant has been moving in different courts in his quest for justice. Indeed, this is a long period of time for one to still be in the corridors of justice. However, it cannot also be denied that the 1st Respondent has a constitutional right to appeal. While it is not this court’s duty to determine whether the appeal is merited or not, I find that the draft memorandum of Appeal raises prima face grounds of appeal and that the appeal might be arguable. I find that an order for deposit of the decretal sums into a joint interest earning account in the names of both advocates would be appropriate as the same takes care of the parties’ concerns.

20. In the result, the 1st Respondent’s application dated 18.2.2020 is allowed in the following terms:

a. An order of stay of execution of the judgement dated 5.2.2020 is hereby issued upon the 1st Respondent depositing the entire decretal sums into a joint interest earning account in the names of both advocates for the parties within thirty (30) days from the date of this ruling failing which the stay shall lapse.

b. The costs of the application shall abide in the appeal.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 12TH DAY OF MARCH, 2021

D. K. KEMEI

JUDGE