



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO. 13 OF 2020

(CORAM: F.M. GIKONYO J.)

(An appeal from the Ruling of Hon W. Juma (C.M))

delivered on 3rd June 2020 in Narok CMCC No. 17 of 2017)

RAJ DEVANI.....APPELLANT

-versus-

NORTHWOOD AGENCIES LTD.....RESPONDENT

RULING

Brief facts

[1] The Appellant /Applicant herein was the Defendant in the trial court; the Respondent was the Plaintiff. The Respondent instituted proceedings in the trial court vide **Narok CMCC No. 17 of 2017**. An *ex parte* judgment was entered against the Applicant on 20th November 2017 in default of defence and appearance in the suit. A decree was issued on 19/12/2017.

[2] The application to set aside the *ex parte* interlocutory judgment was dismissed vide a ruling delivered on 3rd June 2020. However, stay of execution of the *ex parte* interlocutory judgment was granted 30 days.

The application

[3] Now vide an application dated 10/07/2020 he seeks for stay of execution of the decree arising from the *ex parte* judgement entered against the applicant in **Narok CMCC No. 17 of 2017 pending the hearing and determination of the appeal**.

[4] The applicant contends that judgment was entered without proper service on him since he was in GK prison at the alleged time of service and no copy of pleadings were left to him.

Respondent opposed application

[5] The Respondent did not file submissions as ordered by the court. Nonetheless, they filed grounds of opposition dated 6th November 2020 citing the following grounds: -

- a) That the appellant has not demonstrated that he will suffer any substantial loss if an order of stay is not granted;
- b) That the appellant has not offered any security for due performance as is required under the relevant law governing stay of execution. Therefore, prays dismissal of the application with costs.

The Applicant's Submissions

[6] The applicant's counsel submitted that the right to fair hearing was violated since the applicant was not granted the opportunity to be heard.

[7] The applicant seeks the discretion of this court to granted him an unconditional stay so as to preserve the subject matter of the appeal. He has relied in the case of Absalom Dova Vs Tarbo Transporters [2013] eKLR

[8] The applicant submitted that stay pending hearing and determination of application which was granted has expired. Now he seeks for stay pending the hearing and determination of the appeal. He claims that if stay is not granted, he will suffer substantial loss due to serious risk of execution. The execution will make the appeal nugatory. He has pointed out that the respondent will not be prejudiced in the process.

[9] The applicant filed the application expeditiously without delay.

[10] The applicant states that the court has discretion to allow for stay pending appeal and has relied in the Civil Appeal No. 5 Of 2016- Patrick Mwenda Vs Evans Omari Mwita [2016] eKLR. That further on the issue of security the applicant's car is already attached by the respondent and the same has been sold. Therefore, the said vehicle should be considered as having been sufficient security.

[11] Having been aggrieved by the trial Magistrate's ruling, the applicant filed the appeal herein for orders that the appeal be allowed, ruling of the subordinate court be set aside, interlocutory Judgment be set aside.

ANALYSIS AND DETERMINATION

[12] At the time of writing this ruling the Respondent had not filed its submissions despite being given timelines within which to file. Nonetheless, I will consider the application on its merit. I have carefully perused the application, affidavits, grounds of opposition and submissions. I should determine;

a. Whether stay of execution pending appeal is merited.

Stay of execution pending appeal

[13] Stay of execution pending appeal is a discretionary remedy. However, the exercise of the discretion under Order 46 Rule 6(2) of the Civil Procedure Rules, 2018 should consider;

(a) Whether substantial loss may result to the applicant unless the order was made;

(b) Whether that the application was made without unreasonable delay; and

(c) Provision of such security as the court orders for the due importance of such decree or order as may ultimately be pending on him has been given by the appellant.

[14] I find the Court of Appeal's decision in Butt Versus Rent Restriction Tribunal (1982) KLR 417, to be quite instructive when it stated;

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

(b) 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.

(c) 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.

(d) 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 that there was a large amount of rent in dispute and the applicant had an undoubted right of appeal.

(e) The court-exercising its powers under Order xvi 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 courts as ordered will cause this order for stay of execution to lapse."

[15] I shall be so guided.

Delay or otherwise in filing application

[16] This point is normally straight-forward as the court simply looks at the time taken to file the application and decides whether the delay is beyond acceptable limits or is one which prevents consideration of the application due to possibility of prejudice to the respondent. The record shows that the ruling subject of appeal was delivered on 3rd June, 2020 which is about a month prior to filing of the application. In the circumstances of this case, I find that there has not been any unreasonable delay in the filing of this application.

Substantial loss occurring

[17] The cornerstone of the jurisdiction in order 42 rule 6 of the CPC is to prevent "substantial loss" from occurring. Substantial loss has been said to refer to loss that is of real value as opposed to loss without or of nominal value. See the case of Sewankambo Dickson Vs. Ziwa Abby HCT-00-CC MA 0178 of 2005 where the High Court of Uganda at Kampala stated that: -

“...substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal”.

[18] Therefore, the Applicant must establish that execution of the decree will irreparably affect or negate the very essential core of being the successful party in the appeal. Some have referred to such “successful party as “a holder of a barren result”; whilst others, “a mere pious explorer in the judicial voyage”. However, the assessment of substantial loss to the applicant, should not be oblivious of the reality that; both parties have rights. Whereas the appellant has right of appeal which includes prospects that the appeal will not be rendered nugatory; the respondent has the right to immediate realization of the fruits of his judgment. It therefore becomes an act of balancing these competing rights without treating any as the lesser or greater.

[19] In the instant case, the Applicant claims that he will suffer substantial loss, as the attached motor vehicle herein was sold, but, yet, looms the threat of further execution. I will couple this with the fact that his appeal is on the setting aside of an ex parte interlocutory judgment-where he was not heard. In the circumstances, it is only fair to give him an opportunity to be heard on his appeal. This appeal is on right to be heard which will be badly hurt by further execution of the decree. Accordingly, I find that substantial loss would occur unless stay of execution is granted.

Of security

[20] Should the applicant be ordered to provide security for the due performance of such decree or order? It is decreed that, making it the policy of the court that the decretal sum should always be deposited in court as security for stay of execution, will stifle appeals. The effect of insistence on such policy was explained in the Ugandan case of *Sewankambo Dickson (supra)* as follows: -

“...insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals – especially in a Commercial Court, such as ours, where the underlying transactions typically tend to lead to colossal decretal amounts”.

[21] I am aware this is a money decree. The respondent may also be in a position to refund the decretal sum if paid over to them. Whereas the ability of the respondent to refund the decretal sum is a relevant consideration in stay of execution in money decrees, I doubt it constitutes a hard and fast rule of law that stay should be refused in all instances if the respondent is able to refund the decretal sum. Such rule would be an outright sacrifice of justice at the altar of financial endowment. I take the considered view that cases should be decided on their peculiar circumstances and facts. On this proposition, I am content to cite the Court of Appeal in the case of *Kenya Hotel Properties Ltd Versus Willesden Properties Ltd, Civil Application No Nai 322 Of 2006(VR)* that:

“The decree is a money decree and normally courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain order to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that on considering such matters as hardship, a third principle of law was not being established at all.”

[22] I am also aware that the respondents are entitled to the fruits of their judgment. However, the now most dependable system of justice demands that the court should consider the two accounts in the case in order to arrive at a just and fair determination. I have noted that this appeal is an attempt to set aside an *ex parte* judgment and a quest for an opportunity to be heard. The applicant claims that he was condemned unheard. In addition, the applicant’s motor vehicle, make, Range Rover, was attached and sold in execution of the decree herein. This fact was not disputed. The court has not, however, been shown the accountable documents or return of warrants on execution. That notwithstanding, I agree with the applicant that in the circumstances of this case, asking for a further security for purposes of order 42 of the CPR will be injurious. I also do note that the decretal sum is over Kshs. 17 million; and insisting on deposit of the decretal sum as security will not only stifle right of appeal, but would also be most unfair. These facts salute to the command of the Constitution to the courts; to serve substantive justice; and to take a wide view of justice in applying prescriptions provided in law as a guide in the exercise of discretion. The facts of this case support the grant of stay of execution pending appeal.

[23] In view of the foregoing, the court finds that the applicant/Appellants application dated 10th July, 2020 has merit and allows it in the following specific terms;

(a) A stay of execution of the decree in Narok CMCC NO 17 OF 2017 is hereby granted pending the hearing and determination of the appeal;

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

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 15TH DAY OF MARCH 2021

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F. GIKONYO

JUDGE

In the Presence of:

1. Kegen for the applicant
2. Kiplagat for the Respondent
3. Mr. Kasaso – Court Assistant

F. GIKONYO

JUDGE