



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 213 OF 2020

RICKY MBURU GITICHE.....APPELLANT/APPLICANT

= VERSUS =

ELIZABETH SYOMBUA MWENDWA.....1ST RESPONDENT

BENJO (K) LIMITED.....2ND RESPONDENT

RULING

The Appellant/applicant filed a Notice of Motion dated 6th November, 2020 under the provisions of Sections 1A, 1B, & 3A of the Civil Procedure Act, Cap 21, Order 42 Rule 6 and Order 50 Rule 1 of the Civil Procedure Rules, 2010. The prayers before this court for determination are;

1. Spent

2. Spent

3. **THAT** this Honourable Court be pleased to stay execution of the judgement/decree dated 30th April, 2020 and all consequential orders herein pending hearing and determination of the appeal.

4. **THAT** the costs of this application be provided for.

The application is premised on the grounds on the face of the application, the supporting affidavit and further affidavit of Anthony Thuo Kanai, an advocate acting for the Appellant/Applicant, sworn on 6th November, 2020 and 10th December, 2020 respectively. The 1st Respondent opposed the application through her Replying Affidavit sworn on 27th November, 2020. The 2nd Respondent did not file any response and therefore did not oppose the said application. The parties agreed to have the application canvassed by way of written submissions. The Appellant/Applicant and the 1st Respondent have filed their submissions dated 5th January, 2020 and 20th January, 2020 respectively. The Appellant/Applicant filed a further affidavit dated 1st February, 2020 and supplementary submissions dated 1st February, 2021.

The present application is based on the grounds that the Appellant/Applicant being aggrieved with the judgement delivered by the trial court on 30th April, 2020 has preferred an appeal by filing a Memorandum of Appeal dated 2nd June, 2020. It is the Appellant/plaintiff's contention that the appeal, if successful, will be rendered nugatory and he will suffer irreparable damage if execution is not stayed pending the appeal. The Applicant avers that it is willing to deposit security for due performance of the decree and that the 1st Respondent shall not suffer any prejudice if the application is allowed. Further, that it is in the interest of justice that the application be allowed as he had earlier filed an application for stay of execution dated 3rd July, 2020 which was dismissed by the trial court on the ground that it lacked jurisdiction. The Appellant/Applicant further deposes that Article 165 (3) of the Constitution gives the High Court unlimited original jurisdiction and that via Gazette Notice No. 1756 of 2009, gave the Nairobi High Court Supervisory Jurisdiction over Thika Magistrate's Court and therefore the appeal is properly before the court.

The Appellant/Applicant submits that the issues deponed to are uncontested issues of fact and law that are well within the knowledge of the Advocate and therefore not in contravention of Rule 9 of the Advocates (Practice) Rules. In the case of *Salama Beach Hotel vs Mario Rossi [2015] eKLR*, it was held that *Rule 9 of the Advocates (Practice) Rules* permits an advocate to swear an affidavit on formal or non-contentious matters in as far as is relevant to the application. While in *Regina Waihera Mwangi Gitau vs Boniface Nthenge [2015] eKLR* the Court exercising its discretion under Article 159 (2) (d) of the Constitution allowed an appeal and set aside an order striking out an affidavit sworn by an advocate who was handling the matter stating that there was no mistake.

The Appellant/Applicant submits that the Memorandum of Appeal was filed within the statutory time and complied with the provisions of Order 50 Rule 3 of the Civil Procedure Rules, which provides that:

“Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.”

In his supplementary submission, the Appellant/Applicant submit that with the advent of Covid 19 and the introduction of e-filing deadline for filing documents was extended. Gazette Notice No. 2357 dated 4th March, 2020 at Practice Note No. 14 (2), (3) provides that;

(2) For purposes of computation of time, the deadline for e-filing of a document in any particular day shall be 11:59:59 p.m. in the standard Kenyan time.

(3) Where any document is required by law to be lodged in the registry within office hours, it shall be deemed to have been properly lodged if it meets the deadline specified under sub paragraph (2).

On jurisdiction, the Appellant/applicant submits that the High Court has unlimited original jurisdiction and supervisory jurisdiction over subordinate courts in the country and may make an order or give directions it considers appropriate to ensure fair administration of justice. The Kenya Gazette Notice No. 1756 of 27th February, 2009, placed Thika Magistrate’s Court under supervision of the Nairobi High Court. The Appellant/Applicant has cited the case of **Crossley Holdings Ltd V Nagendra Saxena & 3 others [2008] eKLR**, where the applicant had sought the transfer of the suit to Kisumu High Court from the Nairobi High Court, Kimaru J. stated that the geographical restriction placed on suits filed in the subordinate courts does not apply to the High Court, was cited.

The Appellant/applicant has further submitted that he will be gravely prejudiced and will suffer irreparable damage if the decree is executed and the Judgment in Thika CMCC No. 695 of 2015 which was used as a test suit for other cases before that court is relied on to determine liability, which has been challenged herein, and secondly if he is deprived of his property while he is pursuing this appeal. The Appellant/Applicant has urged the court to exercise its discretion in its favour as per the decision of the Court of Appeal in **Butt v Rent Restriction Tribunal [1982] eKLR, 417** where the Court held that discretion ought to be exercised in a manner that would not render an appeal nugatory, if successful.

Relying on the case of **Stanley Karanja Wanaina & Another v Ridon Anyangu Mutubwa [2016] eKLR**, where the court in holding that the Respondent had not discharge its burden stated **“In my view the Respondent has evidential burden to show that he has the resources since this is a matter that is purely within his knowledge...”**, The Appellant/Applicant submitted that the 1st Respondent, who is aged 18 years and unemployed, has not demonstrated that she would be in a position to refund the decretal sum of Kshs. 140,000 if the appeal succeeds on both liability and quantum. It is the Appellant/Applicant further submission that substantial loss does not have to be alot of money as held in the case of **G.N. Muema P/A (Sic) Mt. View Maternity & Nursing Home v Mirriam Maalim Bishar & Another [2018] eKLR**.

Lastly, the Appellant/applicant submit that the present application brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 was brought without unreasonable delay and referred to the case of **Ezekiel Mule Musembi V H.Young & Company (E.A) Limited [2019] eKLR** where Odunga J. *while agreeing that the delay was inordinate, stayed the proceedings in the lower court in the interest of justice and the need to avoid wastage of judicial resources*

Respondent’s Case:

The 1st Respondent in opposition to the application, averred that the appeal is incompetent for the reason that it was filed out of the stipulated time and is yet to be admitted pursuant to the provision of Section 79G of the Civil Procedure Act. The 1st Respondent contends that the filing fees for the Memorandum of Appeal was made at 6:11 pm which he argues is outside the official working hours and as such this court cannot issue stay of execution orders where an appeal does not exist. Secondly, the 1st Respondent depones that the application has been filed in the wrong court which does not have administrative jurisdiction and that it should be directed to the appropriate forum. The 1st Respondent further deposes that the supporting affidavit is defective and should be struck off as it has been deposed in contravention of Rule 9 of the Advocates Practice Rules and established law; that the Appellant/Applicant has not offered an explanation about the delay in seeking the stay orders and further the judgment was on notice and no evidence has been availed on the follow up actions he took; that the Appellant/Applicant has not demonstrated evidence of the substantial loss he would suffer if the stay is not granted and further that the uncertainty of the 1st Respondent financial capabilities is not *ipso facto* proof of substantial loss; and that the Court should decline to grant stay of execution as the Appellant/Applicant has not met the threshold for grant of stay. It is the 1st Respondent’s position that if the court is inclined to grant a stay then it should direct that half the decretal amount be paid to him and the other half be deposited in an interest earning account in the joint names of the advocates for the parties.

The 1st Respondent maintains that there is no proper appeal on record as the Memorandum of Appeal was paid on 02.06.2020 at 6:11 pm and relied on the case of **Dinit Virchand Malde V Spire Bank Limited [2018] eKLR**, where the court held that to ascertain the correct date, the most reliable document would be the filing receipt. It was further submitted that the filing was done outside the judiciary working hours of between 8:30 to 5:00 as affirmed in the case of **Maranga (Minor Suing Through his Next Friend and Father Charles Maranga Bagwasi) v Samuel Kamonjo Muchiri & Another [2000] eKLR**.

The Respondent submits that the correct forum for filing the present appeal would be the High Court at Kiambu which has an appellate jurisdiction on decisions delivered at Thika Chief Magistrate’s Court, however, the Gazette Notice alluded to by the respondent has not been supplied to this court. It is the 1st Respondent contention that although the High Court in Nairobi has supervisory jurisdiction under Article 165(6), that jurisdiction is limited to instances of ultra vires and/or infringement of fundamental human rights as was held in the case of **Fredrick Karanja Mbui v Simon Ndichu Nyiha & 2 Others [2013] eKLR**, where the court addressed itself on the supervisory powers of the High Court and held that the power is exercisable with caution and only where the inferior court has exceeded its jurisdiction or where a party’s constitutional rights are being or about to be abrogated through the process in that inferior court, however, this case does not apply to the circumstances of the present case.

The 1st Respondent has submitted that the supporting affidavit of Anthony Thuo Kanai should be struck out as it contains contentious matters and that no explanation has been given as to why the Appellant/Applicant did not personally swear the affidavit as held in the case of **East African Foundary Works (K) Ltd V Kenya Commercial Bank Ltd [2002] 1KLR 443**, by **Ringera, J** (as he then was) who stated that an advocate should not swear to contentious averments of facts in a case where he is appearing as such so as to avoid the unseemly prospect of counsel being called upon to be examined in matters in which they appear as counsel.

It is the 1st Respondent further submission that the Appellant/Applicant has not laid out sufficient facts to warrant the shift of burden upon the 1st Respondent on whether she can refund the decretal sum if the appeal succeeds. Reference has been made to the case of **Socfinac Company Limited v Nelphat Kimotho Muturi [2013]eKLR**, where Odunga J. held that the Respondent should demonstrate factors that lead to the presumption that the Respondent is unable to repay the decretal sum and in the case of **Antoine Ndiaye v African Virtual University[2015] eKLR**, where Gikonyo J. held that the applicant must show that he will be totally ruined in relation to the appeal if he pays over the decretal to the 1st Respondent so as to be reduced to a mere explorer in the judicial process.

The 1st Respondent contends the present application should be dismissed as it has been brought SixtyThree (63) days after the trial court judgment was delivered and that the delay has not been sufficiently explained. He has relied on the case of **Nairobi City County v Salima Enterprises Limited [2020] eKLR** and **Joseph Ngigi Ibare v Myovi James & Another [2016] eKLR** where the significance of sufficiently explaining delay in filing an appeal was emphasized.

The 1st Respondent acknowledges the Appellant/Applicant willingness to deposit security for due performance of the decree and has offered to deposit part of the decretal sum in an interest earning joint account in both parties' advocates names. However, she contends that the Appellant/Applicant must prove all the three conditions, not just one or some of them as was held in the case of **Equity Bank v Taiga Adams Company Limited [2006] eKLR**. The 1st Respondent has further submitted that in balancing the parallel positions of the parties, the court should order payment of half of the decretal amount due and depositing of the other half in an interest earning account held in joint names of both advocates on record and relied on the cases of **Kenya Shell Ltd v Kibiri & Another{Supra}**, **Tarbo Transporters Ltd v Absalom Dova Lumbasi [2012]eKLR**, and the case of **J.P Macharia T/A Macharia & Co. Advocates V East African Standard (NO.2) [2002] KLR 63** where the Court of Appeal emphasized the importance of balancing the parallel positions of parties.

Analysis:

The issues for determination in the present application are identified as follows:

- i) Whether this Court has jurisdiction to entertain this application*
- ii) Whether the Memorandum of Appeal was filed within stipulated time*
- iii) Whether the Appellant/Applicant is entitled to stay of execution pending hearing of the appeal.*

Jurisdiction:

Article 165 (3) (a) and (e) of the Constitution of Kenya provides that;

“Subject to clause (5), the High Court shall have—

- (a) unlimited original jurisdiction in criminal and civil matters;...**
- (b) ...**
- (c) ...**
- (d) ...**
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.”**

While Article 165 has conferred the High Court with supervisory jurisdiction over subordinate courts. Article 165 (6) states that:

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

Further, Gazette Notice No. 1756 of 2009 of 27th February, 2009 places Thika Magistrate's Court as one of the Nairobi High Court's area of supervision. I am in agreement that the nearest High Court that this application would have been filed is at the Kiambu High Court which has supervisory jurisdiction over the Thika Chief Magistrate's Courts. However, the Constitution gives weight to the provision of substantive justice without delay or undue regard to procedural technicalities. Further, this court takes judicial notice that in the advent of the COVID-19 pandemic and the restrictions put in place movement was restricted. This court holds that it has jurisdiction to hear and determine this application.

This court has been vested with the inherent authority to transfer a suit filed in the High Court to another court of equal status for hearing and determination even in the absence of a specific statutory provision, as a consequence, the parties herein can move the court appropriately.

Competency of the Appeal;

The parties agree that the Memorandum of Appeal was filed on 2nd June, 2020 and the filing fees made at 6pm. I agree with the Appellant/Applicant that the Gazette Notice No. 2357 dated 4th March, 2020 at Practice Note No. 14 (2) , (3) on e-filing extended the working hours to midnight thus the Memorandum of Appeal was filed on time and hence the Appeal is properly on record.

Stay of execution;

The present application invokes the discretionary powers of the court which must be exercised judiciously. It is brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 that empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided for under Rule 6(2) of Order 42 and states as follows:

“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 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.”

As rightly submitted by the parties, the Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

“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, a 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.”

The application was filed six (6) months after the delivery of judgement by the trial court. The Appellant/Applicant filed a Memorandum of Appeal dated 2nd June, 2020 and an application for stay before the trial court dated 3rd July, 2020 which was dismissed on 26th October, 2020. The current application was filed ten (10) days after the ruling that is on 6th November, 2020 thus signaling the Applicant’s interest in pursuing the appeal. There is thus no inordinate delay on the part of the Applicant.

In the Court of Appeal case of **Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited v Aquinas Francis Wasike & another (UR)** as cited by the High Court in **Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa [2016] eKLR** it was held;

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a Respondent or lack of them. Once an applicant expresses a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”

In the case at hand, the 1st Respondent has not disclosed any source of income that she would use to refund the Appellant/Applicant the decretal amount should the appeal succeed. Indeed, the 1st Respondent’s has not refuted the Appellant/ Applicant averments that the 1st Respondent is an unemployed 18-year-old with no source of income. On this ground, i am satisfied that the Appellant/Applicant has established that it will suffer substantial loss if the intended execution is not stayed. It also follows that if the 1st Respondent executes the judgement and the Applicant’s appeal succeeds, then not only will the Applicant suffer substantial loss but the appeal will also be rendered nugatory. Further, since this was a test case, it is prudent to have it pursued on appeal so that the decision of the trial court can either be affirmed, set aside or varried. This will ultimately affect the other pending cases.

The Appellant/Applicant has indicated its readiness to furnish security for the due performance of the decree by depositing the decretal sum

in a joint interest earning account in both parties' advocates names. The 1st Respondent although agreeable to this has proposed that the Appellant/Applicant pay half of the decretal amount due to the 1st Respondent and deposit the other half in an interest joining account. The Appellant/Applicant is appealing both finding on liability and quantum and a perusal of the Memorandum of Appeal, I agree with the Appellant that deposit of the decretal amount in an interest joint account of the parties advocate would be sufficient security while balancing the parallel interests of both parties.

In the circumstances, I direct that the decretal amount shall be deposited in an interest earning account in the joint names of the advocates for the Applicant and the 1st Respondent within 45 days from the date of the ruling. The costs of the application shall abide the outcome of the appeal and shall follow the cause.

DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF MARCH, 2021

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S. CHITEMBWE

JUDGE