



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. CIVL APPLICATION NO.49 OF 2014

(CONSOLIDATED WITH MISC. APPLICATIONS NOS.41 & 47 OF 2014)

M.S SHARIFF & COMPANY ADVOCATE.....ADVOCATE/RESPONDENT

VERSUS

OMARI MBWANA ZONGA.....CLIENT/APPLICANT

RULING

1. Before me for determination is an application dated **22nd October, 2020** filed by the Client/Applicant on **23rd October, 2020**. I have indicated at the heading of this Ruling that the matter is consolidated with **Misc. Applications Nos.41 and 47 both of 2014**. **Firstly**, for the reason that a similar application has been filed in those matters and the arguments put forth therein are the same. **Secondly**, when the advocates on record for the parties appeared before me, they agreed that the orders to be issued in this matter shall apply to both **Misc. Applications Nos. 41 & 47 of 2014**.
2. The application is brought under **Order 42 Rule 6** and **Order 51 Rule 1** both of the **Civil Procedure Rules, 2010** and all other enabling provisions of the law and seeks for the following orders;
 - (a) *Spent;*
 - (b) *That the Honourable Court be pleased to order that stay of execution pending appeal be extended pending the service and hearing of this motion inter-parties on a date to be ordered by this court.*
 - (c) *That upon inter-parties hearing, stay of execution of the orders made herein be granted pending the hearing and determination of the Appeal.*
 - (d) *That the costs of this application be provided for.*
3. The grounds upon which those prayers are sought are that the Client/Applicant is aggrieved by the **Ruling** of this Court delivered on **25th September, 2020** and he is desirous of appealing against the same having filed a **Notice of Appeal** on **8th October, 2020**. Further, that there is no stay in place and there is likelihood of the Respondent proceeding to execute the Judgment of the court.
4. The affidavit in support of the application sworn by the Client/Applicant illuminates the grounds on the face of the application where he further deponed that he never signed any retainer to engage the Advocate/ Respondent and that the **Sale Agreement** for **plot No.734/225** was not drawn by the firm of the Respondent for the client to sign.
5. The Applicant states that he will suffer substantial loss for the reason that the Respondent had previously applied for him (the Applicant) to be committed to civil jail and if stay orders are not granted, then he will be deprived off his freedom and liberty. The Applicant has also averred that he is asthmatic and if committed to civil jail, his health will deteriorate and his political career jeopardized. According to the Applicant, failure by this Court to grant orders for stay of execution, the intended Appeal which is said to be arguable will be rendered nugatory.
6. The Respondent opposed the application on the basis of her **Replying Affidavit** sworn on **28th October, 2020**. She submitted that she is familiar with the signatures of the Applicant and on that basis, she is convinced that the signature on the **Supporting Affidavit** is not the Applicant's. The affidavit having been signed by a stranger is therefore *null and void ab initio*. She faulted the **Notice of Appeal** filed by the Applicant for being defective and averred that the application cannot be a basis of settling the Applicant's obligation of his debts. It is averred that the application is mounted to cause more delay in this matter and frustrate the execution process in as much as the Applicant has started disposing of his properties. Lastly, it is submitted that the intended Appeal cannot be said to be arguable without an annexure of the **draft Memorandum of Appeal**.

7. At the hearing of the application, parties consented to having the application disposed by way written submissions. The Applicant filed his submissions on **11th November, 2020** while the Respondent filed hers on **1st December, 2020**. On **20th January, 2021**, only **Mr. Asige**, Counsel for the Applicant attended court for highlighting. It will be noted that on **14th December, 2020**, **M/s Shariff** informed the court that she would adopt her submissions as filed.

THE APPLICANT'S SUBMISSION

8. In his submissions, the Applicant invited the court to consider that the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules**, which provides three conditions which must first be met for stay orders to issue. The grounds are further elucidated in the case of **Butt –vs- Rent Restriction Tribunal [1982] KLR 417**, which the Applicant relied on and submitted that;

a) Firstly that the Applicant has shown sufficient cause by establishing that the Respondent may at any time proceed to execute the ex-parte Judgment issued against him. Learned Counsel, Mr. Asige submitted that it had not been shown that the Respondent had rendered any legal services to the Applicant and to that extend, no retainer had been executed by the Applicant. He reiterated that the Sale Agreement was not drawn by the Respondent firm of advocates and if the Applicant is subsequently committed to civil jail, he will suffer substantial loss by losing his freedom of liberty. It is further submitted that the Applicant was never served with any fee note or the bill of costs and if the orders sought are not granted, then he will be condemned unheard.”

b) Secondly, the Applicants' learned Counsel submitted that his committal to civil jail would eventually result to irreparable damage in the event that the appeal succeeds. He also argued that the right to appeal is a protected right and the court should safeguard that right by granting the orders for stay.

c) Lastly, it was submitted that the Appeal would be rendered nugatory if the Applicant is committed to civil jail; that the application has been made without undue delay and finally that the Applicant will abide with any directions issued by the court with regard to costs.

RESPONDENT'S SUBMISSIONS

9. The Respondent began by submitting that the **Notice of Appeal** has been filed by someone else other than the Applicants and the same is therefore defective and a nullity. She reiterated that service had been effected to the Applicants and/or his agents and therefore the Judgment was entered regularly.

10. She added that the Respondent's Law Firm is reputable and capable of refunding the decretal sum in the event of a successful Appeal. As such, it is argued that the Respondent should not be prevented from enjoying the fruits of her Judgment and that right should be balanced with the Appellant's right of Appeal.

11. With regard to the averments that the Respondent had commenced proceedings to commit the Applicant to civil jail, the Respondent said nothing about it but submitted that the Respondent is entitled to execute the Judgment made in her favour. It is also argued that the Applicants has started to dispose of his real property and is hiding his movables so as to frustrate the execution process.

12. It is further submitted that the Appellant has not offered to furnish any security for orders of stay to issue and the court should take notice that the Respondent has filed a series of similar causes against the Applicants for non-payment of legal fees. Therefore, on a balance of convenience, grant of the stay orders will impact negatively on the Respondent.

Analysis and Determination

13. I have carefully considered the arguments advanced by both parties in this case and the relevant law and authorities as enumerated later in this Ruling in respect of the application dated **22nd October, 2010**. As earlier mentioned, the Applicant substantively seeks for orders of stay of execution pending Appeal. Therefore, **Order 42 Rule 6(1) & (2)** of the **Civil Procedure Rules** is the relevant legal provision in the circumstances and it reads as follow;

1. 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 application and 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 of stay 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 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.

14. From the above provision, it is clear that the power to grant an application for stay of execution pending Appeal is a discretionary one on sufficient cause being shown, being ***where the applicant may suffer substantial loss; the application is made without unreasonable***

delay and on provision of such security as the Court may impose.

15. Lastly, to grant or not to grant an application for stay of execution pending Appeal is discretionary in that when granting stay, the court has to balance the interests of the Applicant with those of the Respondent. I will apply the said conditions of stay of execution in this case.

16. To begin with, the cornerstone of the jurisdiction of the court under **Order 42** of the **Civil Procedure Rules** is that substantial loss would result to the Applicant unless a stay of execution is granted. What constitutes substantial loss was broadly discussed by **Gikonyo, J** in the case of **James Wangalwa & Another –vs- Agnes Naliaka Cheseto**

where it was held *inter alia* that:-

“No doubt, in law, the fact that the process of execution has

been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish 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. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein vs. Chesoni,the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”

17. The Applicant in this case has averred that if stay is not granted, the Respondent may proceed to execute the Judgment and have the Applicant committed to civil jail. It was submitted that if the Applicant is deprived of his liberty, the loss will be beyond compensation and his political career jeopardized. The affidavit in support of the application speaks much of what the Applicant wishes to establish in the Appeal. It was stated that the Applicant did not sign the purported **Sale Agreement** in relation to this case while in the other two cases consolidated herewith, it was averred that the Respondent never offered any legal services. I also note that the **Ruling** delivered by this court on **25th September, 2020** addressed the concerns of the Applicant and I will not delve on the same again at this stage. Whether those issues are arguable, I leave it to the Court of Appeal to decide.

18. I must reiterate the fact that the process of execution is likely to be put in motion does not by itself amount to substantial loss. The averment by the Applicant that he might be committed to civil jail is a mere speculation because no arrest warrant or notice to show cause has been issued against him. I am therefore not convinced that the Applicant has demonstrated that he would suffer substantial loss.

19. On whether or not the application was brought without undue delay, I am satisfied that there was no delay. This application was filed on **23rd October, 2020** while the **Ruling** was delivered on **25th September, 2020**. There was therefore no unreasonable delay in filing the application.

20. Apart from proof of substantial loss, the Applicant is enjoined to provide security. The Applicant has not offered to provide any security in the affidavit he swore in support of the application. However, the offer for security must come from the Applicant as a price for stay. (See the case of **Carter & Sons Ltd. –vs-. Deposit Protection Fund Board & 2 Others**). The Client/Applicant is not interested in the fact that the Advocate/Respondent is a successful party who has a decree in its favour, a right that has accrued and which should also be safeguarded.

21. The ordinary principle is however that a successful party is entitled to the fruits of his/her Judgement or of any decision of the court giving him/her success at any stage.

22. Having carefully considered the application before me and in further consideration of the law, I am persuaded that proof of substantial loss and the willingness on part of the Applicant to provide security in performance of the decree have not been established. The principles set out under **Order 42 Rule 6** of the **Civil Procedure Rules** go hand in hand and failure to prove one dislodges the other.

23. In the upshot, and having considered the material evidence placed before the court, while applying the principles for grant of stay orders, I am not persuaded that the Client/Applicant has met the threshold to warrant this Court exercise its discretion in his favour. For those reasons, the application dated **22nd October, 2020** is disallowed and subsequently dismissed with costs to the Respondent.

24. These orders shall apply *mutatis mutandis* to **Misc. Applications Nos. 41 and 47, both of 2014** as agreed by Counsel for both parties and indicated at the beginning of this Ruling.

It is hereby so ordered.

DELIVERED, DATED and SIGNED VIRTUALLY at MOMBASA this 4th day of May 2021.

D. CHEPKWONY

JUDGE.