



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

CIVIL APPEAL NO. 71 OF 2019

PETER MWANIKI NJERU.....APPELLANT/APPLICANT

VERSUS

SAMUEL KAGOYA WAMBUGU.....1ST RESPONDENT

TERESIA WANJIRU KARIUKI.....2ND RESPONDENT

JOSEPH NGUNJIRI KAGOYA as administrators of the Estate of

JOSEPH NGUNJIRI KAGOYA (Deceased).....3RD RESPONDENT

ANTONY NJOROGE MWAURA.....4TH RESPONDENT

RULING

Brief facts

1. This application dated 9th February 2021 seeks for orders for stay of execution of the decree in CMCC No. 249 of 2018 dated 19th November, 2019. It also seeks for orders for lifting the warrants of arrest in force against the applicant.
2. In opposition to the application, the 1st, 2nd & 3rd respondents filed a replying affidavit dated 10th March 2021 and filed in court on 15th March 2021.
3. On 22nd March 2021, the parties herein agreed, by consent, to rely on their affidavits to dispose of the application herein.

The Applicant's case

4. Relying on Order 42 Rule 6 of the Civil Procedure Rules, the applicant states that he had sought stay of execution in the trial court, which was granted on condition that he deposits Kshs. 3,000,000/- in an interest earning account in the names of the advocates for the parties.
5. The applicant contends that he is not in a financial position to pay the said sum and as such, he is in distress because there is an imminent danger of executing warrants of arrest and being committed to civil jail. He further adds that if he is arrested during the covid 19 pandemic duration, he would be exposed to serious risk on his safety, health and life.
6. The applicant further states that his main point of appeal is that the suit motor vehicle had insurance, but the trial magistrate absolved the third party the 4th respondent of the responsibility herein despite the fact that there was nothing contradicting his testimony on record.
7. The applicant contends that substantial loss may result and further that his arrest will render the appeal nugatory. In the circumstances, it is only fair and just that the warrants and/or execution be stayed.

The Respondent's Case

8. The respondent contends that the applicant has brought this application with the intention of denying them the fruits of their judgment.

9. Further, the respondent states that the fact that the applicant may have no means to pay the decretal sum is not a ground for stay of execution pending appeal. In any event, the applicant had made a similar application to the lower court, whereby the trial court granted stay of execution on condition the applicant do deposit half the decretal amount in an interest earning account of both advocates herein which the applicant has not done.

10. Moreover, the applicant has not demonstrated what substantial loss he will suffer if stay of execution is not granted.

11. The respondents further states that no evidence has been brought by the applicant that executing a warrant of arrest during the covid 19 pandemic would expose the applicant to serious health risks. In any event everyone is exposed to the virus and further there have been no reports that the virus is present in any prisons in Kenya particularly GK Prison in Nyeri.

12. The ruling on the application for stay of execution pending appeal in the lower court was delivered on 30th April 2020 and the applicant has not demonstrated why he has taken over 11 months before filing the present application in the High Court.

13. The respondent states that the subject motor vehicle may have had insurance but the applicant was not the insured party. Further, how the 4th respondent comes into the suit does not concern them.

15. The respondent concludes by stating that the applicant is abusing the court process as he has failed to deposit half of the decretal amount, or any amount, in an interest earning account and he did not attend the Notice to Show Cause why execution should not issue which eventually led to the issuance of the warrants of arrest.

Issues for determination

15. After careful analysis, I identify that the main issue for determination is:

- a. Whether the applicant has met the requisite for grant of stay of execution pending appeal.
- b. Whether the application is an abuse of the due process of the court.

The Law

Whether the Appellant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal;

16. The principles upon which the court may stay the execution of orders appealed from are well settled. **Order 42 Rule 6 of the Civil Procedure Rules** stipulates:-

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 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 orders set aside.

2. 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 1st 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.**

17. Thus under **Order 42 Rule 6(2) of the Civil Procedure Rules**, an applicant should satisfy the court that:

1. Substantial loss may result to him unless the order is made;
2. That the application has been made without unreasonable delay; and
3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

18. These principles were enunciated in **Butt vs Rent Restriction Tribunal [1979]** the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-

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

2. Secondly, 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 the appeal court reverse the judge's discretion.

3. Thirdly, 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. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order for stay of execution to lapse.

Substantial loss

19. Under this head, an Applicant must clearly state what loss, if any, they stand to suffer. This principle was enunciated in the case of **Shell Ltd vs Kibiru and Another [1986] KLR 410 Platt JA** set out two different circumstances when substantial loss could arise as follows:-

“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages....It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts....”

The learned judge continued to observe that:-

“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 cornerstone of both jurisdictions for granting 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.

Earlier on, Hancox JA in his ruling observed that:-

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would...render the appeal nugatory.

This is shown by the following passage of Cotton LJ in Wilson vs Church (No.2) (1879) 12 ChD 454 at page 458 where he said:-

“I wish to state my opinion that when a party is appealing, exercising his undoubtedly right of appeal, this court ought to see the appeal, if successful, is not rendered nugatory. “

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favor without just cause.”

20. On keenly perusing the applicant's application, it is clear he simply states in his affidavit that substantial loss will occur but has not demonstrated what substantial loss he will suffer should the orders sought be refused. I find that this condition has not been satisfied.

The application has been made without unreasonable delay.

21. The applicant contends that he had filed a similar application in the lower court which allowed stay on the condition that he deposit the decretal sum of Kshs. 3,000,000/- in a joint interest earning account. This order was made by the lower court on 30th April 2020. The applicant has brought the present application on 10th February 2021, which was over 10 months after the application of the lower court was determined. Furthermore, the applicant has not given any reasons for his delay in bringing this application.²¹

22. It is trite law that delay may be explained for the court to consider whether the reasons given are satisfactory. The applicant did not make any attempt to explain the ten(10) months delay. My view is that this delay is unreasonable and inordinate and has not been mitigated. This condition of filing without unreasonable delay has not been established.

Security of costs.

23. The applicant ought to satisfy the condition of requirement to provide security. In the case of **Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd [2019] eKLR** the court observed:-

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this

condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favor. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....

Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

24. Similarly in Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others [2014] eKLR the court stated:-

“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 the 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.”

25. While in Focin Motorcycle C. Ltd vs Ann Wambui Wangui [2018] eKLR it was stated 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 of stay.”

26. From the above persuasive decisions, it is clear that the issue of security is discretionary and it is upon the court to determine the same.

27. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In saying so I rely on the case of Mohammed Salim t/a Choice Butchery vs Nasserpuria Memon Jamat (2013) eKLR where the Court upheld the decision of Portreitz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1991 and stated that:

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

28. In the present application, the applicant has not averred that he is willing to offer any form of security. He depones in his affidavit that he is not in a financial position to deposit Kshs. 3,000,000/- in an interest earning account as directed by the magistrate’s court. The applicant has not demonstrated good faith as is seen from his conduct to fail to attend the notice to show cause to explain why he could not deposit the said monies or even offer a payment plan of the same. The applicant has a duty to give an offer for security so as to secure the judgement in favour of the respondent who has to have his right of enjoying the fruits of judgement suspended. In this regard, I do find that the applicant has not satisfied the conditions set out to warrant him be granted a orders for stay of execution pending appeal.

29. It has been deponed by the respondents that the applicant having been served with notice to show cause under Order 22 Rule 18(1) of the Civil Procedure Act, did not bother to attend court for the hearing which has led to the issuance of the warrants of arrest. From the case cited, it is clear that a judgment debtor is first given an opportunity to appear before court and show cause why he ought not to be arrested and committed to civil jail. In the event the judgment debtor does not appear, the court will issue a warrant for his arrest. The applicant in his affidavit has not cared to mention or give reasons why he did not appear to show cause or why he should not be committed to civil jail. In that regard, I am of the opinion that the warrants of arrest stand and ought not to be stayed.

Conclusion

30. It is my considered view that the applicant has failed to demonstrate any good cause for suspending or lifting the warrants of arrest.

31. It is not in dispute that the applicant had obtained conditional stay from the magistrate’s court about one(1) year ago but failed to comply with the conditions given. The applicant did not appeal against the said order if he was dissatisfied with it. This appeal was lodged on 27/11/2019 while this application was filed on 10/02/2021 under certificate of urgency. The conduct of the appellant does not portray seriousness in either pursuing the appeal or satisfying the decree. This leads me to the conclusion that the applicant could be buying time with the intention of delaying the respondent from enjoying the fruits of the judgement.

32. I have carefully examined the merits of this application under Order 42 Rule 6 and I am convinced that the applicant has failed to satisfy the court on any of the conditions set out therein.

33. I find that this application lacks merit and is hereby dismissed with costs to the respondent.

34. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 6TH DAY OF MAY, 2021.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO LINK THIS 6TH DAY OF MAY 2021