



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 156 OF 2019

BEATRICE WAMBUI KAMAU.....APPELLANT

VERSUS

SARAH WANJIRU GITONGA.....RESPONDENT

RULING

1. This is a Ruling on the Notice of Motion application dated 23rd October, 2019. That application is filed by **Beatrice Wambui Kamau** (the appellant). By that application, the appellant seeks stay pending appeal of execution of the judgment dated 24th September, 2019 of the Senior Principal Magistrate's court Ruiru in **Civil Case No. 1 of 2019**. In that case, **Sarah Wanjiru Gitonga**, (the respondent) obtained judgment against the appellant for Kshs.1,357,200.00. It ought to be noted that the appellant was sued as an administrator and legal representative of the **Estate of Alexander Kamau Githinji, Deceased**. The deceased was husband of the appellant.

2. The appellant grounded her application on grounds that unless stay of execution is granted, the appellant and her family will suffer substantial loss because they will be dispossessed of their household goods and development on the family home; that the estate of the deceased is pending before Kiambu Court in **Succession No. 53 of 2018** (there is no indication whether it is before Kiambu High Court or Chief Magistrate's court); that it is in interest of justice stay of execution of the decree be granted; and that, unless stay of execution of the decree is granted, the respondent will execute the same. Appellant also stated that she has high chances of success with her appeal.

3. The respondent filed a replying affidavit dated 18th November, 2019. The respondent deponed that appellant will not suffer if execution of the decree does proceed; that the appellant 'has been using the said properties for business' (it is not clear what those properties are); that the appellant has not demonstrated she is a person of means who can compensate the respondent in the event execution is allowed; that the respondent's transaction with the deceased was commercial in nature and the stay of execution was causing the respondent commercial loss; and that the estate of the deceased may be distributed soon which would jeopardise execution of the decree.

4. In a further affidavit, the appellant deponed that if stay of execution is not granted, the substratum of her appeal will be lost; that the grant issued for the estate of the deceased has not yet been confirmed.

ANALYSIS

5. The filing of an appeal by itself does not operate as a stay of execution. That is what **Order 42 Rule 6(1)** of the Civil Procedure Rules (hereinafter the Rules) provides. That **Rule 6(1)** and **(2)** of **Order 42** of the Rules provides:-

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 order set aside.

(2) 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.”

6. The conditions of granting a stay of execution are set out in **Rule 6(2)** of the **Order 42** of the Rules. The appellant has argued that she and her family some of whom are minor children stand to suffer substantial loss if the respondent does proceed with execution. The appellant argued that the loss will be because the respondent will attach household properties. The respondent in turn stated that she shall execute the decree by attaching rental income of the estate.

7. Although appellant deposed that an applicant seeking stay of execution need not prove ability to pay decretal amount if required to do so, I will seek to dissuade the appellant by citing the case **BEMUTA AGENCIES LIMITED VS. JATOMY ENTERPRISES LTD & ANOR (2020) eKLR** which referring to a Court of Appeal decision stated thus:-

“In the Court of Appeal decision in the case of Nairobi Civil Application No. 238 of 2005 NATIONAL INDUSTRIAL CREDIT BANK LIMITED V AQUINAS FRANCIS WASIKE & ANOTHER (UR) which was cited with approval by the High Court in STANLEY KARANJA WAINAINA & ANOTHER V RIDON ANYANGU MUTUBWA [2016] eKLR it was held that:-

“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.” (See also ABN AMRO BANK NK V LE MONDE FOODS LIMITED, Civil Application No. 15 Of 2002 [NRB]).”

8. The appellant therefore had an obligation to rebut the assertion that the appellant had failed to demonstrate ability to pay decretal sum when required.

9. In my view, appellant failed to show how she or the estate of the deceased would suffer if execution of the decree was not stayed. It was not enough for the appellant to state, without support, what substantial loss would be incurred. The court in the case of **VICTORY CONSTRUCTION VS. BM (A minor suing through next friend one PMM) (2019) eKLR** interrogated what is meant by substantial loss in **Order 42 Rule 6(2)** of the Rules and stated thus:-

“15. The same position was adopted by Kimaru, J in CENTURY OIL TRADING COMPANY LTD VS. KENYA SHELL LIMITED NAIROBI (MILIMANI) HCMCA No. 1561 of 2007 where he stated that:-

“The word “substantial” cannot mean the ordinary loss to which every judgment 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 judgment.”

10. When a court considers an application of stay of execution pending appeal it is called upon to exercise balance between the two opposing parties. This is what the court held in the case **MACHIRA T/A MACHIRA & CO. ADVOCATES VS. EAST AFRICA STANDARD (NO.2) (2002) KLR 63** as follows:-

“...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 judgment 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.”

DISPOSITION

11. Bearing the above discussion in mind the orders that commend themselves to me are as follows:-

(a) There shall be stay of execution of the judgment in SPM Ruiru Civil Case No. 1 of 2019 on condition that the appellant does provide within 14 days the decretal sum to be deposited into a joint interest bank account of both advocates.

(b) If there is default of (a) above due to the failure of the appellant, execution to proceed. Such execution if it does proceed shall be in accordance with **Section 37 of the Civil Procedure Act Cap 21**.

RULING DATED and DELIVERED at KIAMBU this 10th day of JUNE, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Ndege

For the respondent: Mr. Kasyoka

For the appellant: Present

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE