



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 89 OF 2020

JAMES KIIRU MWANGI.....APPELLANT/APPLICANT

-VERSUS-

GIBSON KIMANI MWANGI.....1ST RESPONDENT

CHRIS GANSURE.....2ND RESPONDENT

RULING

1) The subject matter of this ruling is the motion dated 24th March 2021 whereof the appellant seeks for the following orders *inter alia*:

i. THAT this application be certified urgent and be heard ex-parte in the first instance.

ii. THAT a stay of execution of the judgment and decree in Milimani CMCC No. 5977 of 2015 and all consequential orders thereto be granted pending hearing and final determination of this notice of motion.

iii. THAT a stay of execution of the judgment and decree in Milimani CMCC No. 5977 of 2015 and all consequential orders thereto be granted pending hearing and final determination of this appeal.

iv. Any other or further orders the court may deem fit and just to grant

v. Costs be in the cause.

2) The appellant/applicant filed the affidavit he swore in support of motion. The 1st respondent filed grounds of opposition to resist the motion.

3) Learned counsels appearing in this appeal made oral submissions. I have considered the grounds stated on the face of the motion plus the facts deponed in the supporting affidavit and the grounds of opposition. I have also taken into account the rival oral submissions of learned counsels. The main order sought by the appellant is an order for stay of execution of the trial court's judgment/decree pending appeal.

4) It is the submission of the appellant that unless the order for stay is granted he would be exposed to execution by way of arrest and risk civil jail in violation of his freedom and liberty in the fulfilment of a judgment he has challenged on appeal.

5) It is on the basis of the above averment that the appellant states he will suffer substantial loss should the execution proceed unstopped. The appellant further stated that he brought the application for stay without unreasonable delay.

6) He also averred that he is ready and willing to give security and comply with any orders the court may deem just and

for the due performance of decree.

7) The 1st respondent did not file a replying affidavit to controvert the facts deponed in the supporting affidavit. In the grounds of opposition, the 1st respondent stated that the motion is an attempt to waste time and frustrate the 1st respondent from enjoying the fruits of his judgment.

8) Learned counsels orally stated that they are in agreement that there is need to grant an order for stay save that they are unable to agree on the form of security the appellant should provide for the due performance of the decree.

9) The 1st respondent has argued that the appellant should deposit the decretal sum. The appellant on his part is non-committal on what sort of security he would offer.

10) The principles to be considered in determining an application for stay of execution pending appeal are well settled. **First**, an applicant must show that the application for stay of execution pending appeal has been filed without unreasonable delay.

11) In this case, it is apparent that the decision sought to be stayed was made on 30th January 2020 and the initial application for stay was filed on 2nd March 2020. The aforesaid application was heard and dismissed on 24th September 2020. The dismissal order was reviewed and set aside on 12th March 2021 pursuant to the motion dated 15th October 2020.

12) The application dated 2nd March 2020 was reinstated and the appellant was also granted leave to amend the aforesaid motion giving rise to the filing of the instant motion. I am therefore satisfied that the current application was filed without unreasonable delay.

13) The **second** principle is that an applicant must show that unless the order for stay is given he would suffer substantial loss. The appellant has stated that if the order is not granted he runs the risk of being arrested and being incarcerated thus breaching his constitutional rights to freedom before appeal.

14) With respect, I agree with the appellant that he runs the risk of arrest and being sent to prison thus losing his liberty before the appeal is heard. I am satisfied that the appellant has demonstrated the substantial loss he would suffer if the order for stay of execution is denied.

15) The **third** principle is the provision of security for the due performance of the decree. The court is enjoined to determine the sort of security the applicant should provide for the due performance of the decree. The respondent has urged this court to make an order directing the appellant to deposit the decretal sum in court.

16) In paragraph 7 of the supporting affidavit, the appellant averred that he is ready and willing to give security and comply with any order the court may deem just for the due performance of the decree/order.

17) The decretal sum is stated to be ksh.1,452,878/57. I think the appropriate order is for the appellant to deposit the aforesaid amount of in the alternative to provide a bank guarantee of similar sum.

18) In the end, I find the motion dated 24th March 2021 to be meritorious. Consequently, an order for stay of execution of the trial court's judgment/decreed in Milimani C.M.C.C. no. 5977 of 2015 and all the consequential orders is granted pending appeal.

19) The aforesaid order is granted on condition that the appellant deposits the decretal sum of ksh.1,452,878/57 in an interest earning account in the joint names of learned counsels or firms of advocates appearing in this appeal within 45 days from the date hereof or in the alternative provide a bank guarantee for the amount within a similar period. In default, the motion shall be treated as having been dismissed. Costs of the application to abide by the outcome of this appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 11TH DAY OF JUNE, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant/Applicant

.....for the 1st Respondent

..... for the 2nd Respondent