



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. E037 OF 2021

MARY MUTHONI NYAMU.....APPELLANT

VERSUS

ADEPHINE NYABIKAR.....RESPONDENT

RULING

1. MARY MUTHONI NYAMU (Mary) has filed this appeal against the ruling of the Principal Magistrate Court, Ruiru of 11th March, 2021 (hereinafter the Ruling). By that Ruling of 11th March, 2021, the Ruiru Court declined to stay execution of its judgment delivered on 17th November, 2020. It follows that the Ruiru judgment of 17th November, 2020 is not the subject of this appeal. Yet by a Notice of Motion dated 12th March, 2021, Mary has sought the following prayers:-

“That stay of execution of the judgment entered on 17th November, 2020 be granted pending the hearing and final determination of the intended appeal”

ANALYSIS

2. I have considered the parties’ submissions, both in the affidavits and in oral submissions before court.

3. There are two errors which will lead me to find that the application under consideration is misconceived.

4. As will be noted from the above, judgment was entered against Mary by Ruiru Court on 17th November, 2020. As far as this matter is concerned, no appeal has been filed by Mary against that judgment. It seems that Mary moved in Ruiru Court by application for stay of execution of that judgment. The record is clear in that regard. It is not clear that the stay sought before Ruiru Court was pending what. Ruiru Court did however decline to stay that judgment. Mary moved to this Court and filed a memorandum of appeal on 15th March, 2021, appealing against Ruiru’s refusal or declination to grant stay of execution of the judgment of 17th November, 2020.

5. The first error made by Mary is that she seeks to stay that which is not the subject of this appeal.

6. I severally questioned the learned counsel for Mary on whether there can be a stay of that which is not appealed against but each time I failed to get satisfactory explanation. The very foundation of this appeal is the Ruiru Court’s refusal to grant stay of execution of the judgment of 17th November, 2020. That is Ruiru Court’s Ruling of 11th March, 2021. This is one of the reasons that makes the application before court fatally defective.

7. The second error of Mary in seeking to stay a judgment which is not appealed against is that the Civil Procedure Rules do not require there be an appeal against a refusal from the court appealed from for stay of execution application under **Order 42 Rule 6** of the Civil Procedure Rules (hereinafter the Rules). This is clearly stated under **Order 42 Rule 6** of the Rules which 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.” (underlining mine)

8. That Rule clearly states that if an application for stay of execution is declined by the court appealed from, the same application can be made to the court appealed to and the court appealed shall consider such an application in exercise of its original jurisdiction. In other words, if the application for stay of execution is declined or granted by the court appealed from, an aggrieved party to that refusal or granting does not have to file and appeal against that refusal or granting, such a party can file an application for stay to the Court appealed from.

9. I wholly associate myself with the finding of *Justice G.V. Odunga* in the case of **KENYA WOMEN MICROFINANCE LTD VS. MARTHA WANGARI KAMAU (2020) eKLR** thus:-

“20. Similarly, in PATRICK KALAVA KULAMBA & ANOTHER VS. PHILIP KAMOSU AND RODA NDANU PHILIP (Suing as the Legal Representative of the Estate of JACKLINE NDINDA PHILIP (Deceased) [2016] eKLR it was held by Meoli, J that:-

‘12. For the purposes of this case, the operational words are as underlined above. Thus, whether an application for stay pending appeal has been allowed or rejected in the lower court, the High Court “shall be at liberty... to consider” an application for stay made to it and to make any order it deems fit. The High Court in that capacity exercises what can be termed “original jurisdiction”. And from my reading of the rule, the jurisdiction is not dependent on whether or not a similar application had been made in the lower court, or the fate thereof...

17. So long as an appeal from the substantive decision of the lower court has been lodged, an application under Order 42 Rule 6 (1) of the Civil Procedure Rules can be entertained afresh in the High Court. I believe that was part of the distinction that the Court of Appeal was making in the GITHUNGURI CASE concerning the court’s original jurisdiction, vis-à-vis the appellate jurisdiction and the innovation behind Rule 5 (2) b (as it is now). The foregoing has a bearing on the interpretation of Order 42 Rule 6 (6) of the Civil Procedure Rules and in particular the highlighted phrased therein.

18. Similarly, the jurisdiction of the High Court in this case was invoked when the substantive appeal (itself a fresh pleading separate from the suit in the lower court) was filed. It is true that the application for stay of execution was allowed with conditions in the lower court. The wording in Order 42 Rule 6 (1) however does not preclude the Applicant from approaching this court as it has done.

19. I would venture to add that the wording of Order 42 Rule 6 (1) of the Civil Procedure Rules effectively grants the same jurisdiction to this Court as an appellate court as Rule 5 (2) (b) does to the Court of Appeal: to entertain an application for stay whether or not the same has already been heard by the lower court and dismissed. The only salient difference is that in the case of the High Court the rule makes it clear that it matters not whether the earlier application for stay in the lower court has been allowed or rejected in the lower court. That is my reading of Order 42 Rule 6 (1)...’

24. It is therefore clear that under the said provision, whether the application for stay was granted or refused by the trial court, this Court is at liberty to consider such application and to make such order thereon as it deems just. Where an order of stay is granted but any person feels aggrieved by such an order of stay he may apply to this court to have the same set aside.”

10. From the above, I believe I need not belabour the point any further other than reiterate for stay of execution to be granted, the stay must be sought in respect to the matter appealed from. Secondly, **Order 42 Rule 6** of the Rule does not require an aggrieved party of the order of either refusal or the granting of stay of execution by the court appealed from to appeal that refusal or granting of stay to the court appealed to.

11. It follows therefore that the Notice of Motion dated 12th March, 2021 is incompetent and is dismissed with costs. It follows that the interim stay of execution is hereby vacated.

RULING DATED AND DELIVERED AT KIAMBU THIS 3RD DAY OF JUNE, 2021

MARY KASANGO

JUDGE

Coram:

Court Assistant Ndege

Appellant: Miss Nzioka

Respondent: Mr. Kangethe

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE