



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCA NO. E020 OF 2021**

**DAVID OUMA GOR..... APPELLANT/APPLICANT**

**VERSUS**

**MOLYN CREDIT LIMITED.....1<sup>ST</sup> RESPONDENT**

**STEPHEN UMEME ODERA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is in respect to the application dated 26<sup>th</sup> February 2021 wherein the applicant seeks the following orders: -

**1) Spent**

**2) Spent**

**3) THAT the Honourable court be pleased to issue an order staying the execution of the judgment delivered on 18<sup>th</sup> June, 2019 the resulting decree and all other proceedings emanating there from and/or any other consequential orders arising from the judgment in MILIMANI CMCC 362 OF 2015 MOLYN CREDIT LIMITED -VS- DAVID OUMA GOR & STEPHENE UMEME ODERA pending the hearing and determination of the Appeal against the Ruling on the Appellant's Notice of Motion Application dated 19<sup>th</sup> October 2020 delivered on 27<sup>th</sup> January 2021.**

**4) THAT the Honourable Court be pleased to issue an order setting aside the judgment, decree, proceedings and/or consequential arising from the judgment in MILIMANI CMCC 362 OF 2015 MOLYN CREDIT LIMITED -VS- DAVID OUMA GOR & STEPHENE UMEME ODERA pending the hearing and determination of the Application filed herewith.**

**5) THAT the Honorable court be pleased to grant the Defendant unconditional leave to defend the present case.**

**6) THAT the costs of this application abide the outcome of the suit.**

2. The application was supported by the applicant's affidavit and is premised on the grounds that; -

**1) THAT Plaintiff/Respondent obtained interlocutory/ex parte judgment on 18 of June, 2019, which judgment is irregular and/or irregular for want of service as provided by the law as the 1<sup>st</sup> Defendant/Applicant was never served any Pleadings or Notices in the matter.**

**2) THAT there is a pending Warrant of Arrest in Execution against the 1<sup>st</sup> Defendant/Applicant dated 14<sup>th</sup> February 2020 resultant from the judgment already entered.**

**3) THAT the said Judgment is defective for being entered without any proper hearing or any hearing recognized in law.**

**4) THAT the Defendant/Applicant has been condemned unheard in violation of his constitutional rights under Article 50 (1) and by virtue of miscarriage of justice, he stands to be arrested in execution as the Plaintiff/Respondent has already taken out a Warrant of Arrest in execution dated 14<sup>th</sup> February 2020.**

**5) THAT this Court has, in the interests of justice, powers to save a party from being subjected to miscarriage of justice which the**

*Applicant has suffered in the hands of the Plaintiff/Respondent.*

**6) THAT the 1<sup>st</sup> Defendant/Applicant has since filed an Appeal against the Ruling by the Honourable Magistrate E. Kagoni P.M on the Appellant's Notice of Motion Application dated 19<sup>th</sup> October 2020 which sought to set aside the judgment delivered on 18<sup>th</sup> of June, 2019 and further seeks stay of the said judgment and stay of the order of arrest in execution issued by the lower court on 14<sup>th</sup> February 2020.**

**7) THAT the Appeal by the 1st Defendant/Applicant raises serious legal issues with high chances of success.**

**8) THAT the 1<sup>st</sup> Defendant/Applicant is at danger of serving a Civil jail term and hence render the Appeal nugatory.**

**9) THAT the Constitutional rights of the 1<sup>st</sup> Defendant/Applicant are threatened if the Instant Application and Appeal by the 1st Defendant is not heard and determined.**

**10) THAT having acted in person as from 27<sup>th</sup> June 2017 and having not being served with the requisite notices by the Plaintiff/Respondent thereafter as is required by the rules of procedure the 1<sup>st</sup> Defendant/Applicant was not aware of the proceedings in MILIMANI CMCC 362 OF 2015 MOLYN CREDIT LIMITED -VS- DAVID OUMA GOR & STEPHENE UMEME ODERA and only learnt about the same when he moved the court on 13<sup>th</sup> August 2019.**

3. The respondents opposed the application through grounds of opposition dated 24<sup>th</sup> March 2021 wherein they state that not only has there been an inordinate delay in the filing of the application but that the delay has not been satisfactorily explained. They further state that the applicant has not provided any security for the decretal sum as a condition for the granting of orders for stay of execution.

4. The applicant's case is that he will suffer grave miscarriage of justice and the appeal rendered nugatory unless the orders sought in the application are granted.

5. The respondents' case was that the orders sought in the application are not clear and that the application is solely aimed at delaying their realization of the fruits of their successful litigation. They argued that the application does not meet the conditions set out under Order 42 Rule 6 of the Civil Procedure Rules 2010.

6. I have carefully considered the application, the grounds of opposition and the parties' respective submissions. The main issue for determination is whether the application meets the threshold set for the granting of orders of stay of execution pending appeal and the setting aside of judgment.

#### **Setting Aside**

7. Besides the prayer for stay of execution of the judgment delivered on 18<sup>th</sup> June 2019, the applicant also seeks orders for the setting aside of the said judgment and decree arising from the judgment. I however note that the appeal in question arises from the decision the lower court to dismiss the applicant's Notice of Motion dated 19<sup>th</sup> October 2020 wherein he sought to set aside the judgment delivered on 18<sup>th</sup> of June, 2019. My take is that since the issue of setting aside of the judgment is the subject of the appeal, it is premature and indeed irregular for the applicant to seek the setting aside of the judgment through this application. I will therefore confine the ruling to the subject of stay of execution pending appeal.

#### **Stay of Execution**

8. **Order 42 rule 6(1)** of the **Civil Procedure Rules 2010** stipulates as follows: -

*No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.*

9. **Further Order 42, rule 6(2)** provides that: -

*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 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.*

10. In **Butt v Rent Restriction Tribunal 1979 eKLR (Madan, Miller and Porter JJA)** the court stated as follows when considering an application for stay of execution: -

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

*ii. The general principal 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 that appeal court reverse the judge’s discretion.*

*iii. 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.*

*iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirement*

11. From the above cited provisions and case law, it is clear that an applicant for orders of stay of execution pending appeal is required to firstly; demonstrate that he will suffer substantial loss unless the stay is granted; that the application has been filed without unreasonable delay and that he is willing to offer security for due performance of the decree.

#### **Substantial loss.**

12. In *James Wangalwa & another v Agnes Naliaka Cheseto Misc. Application No 42 of 2011 [2012] eKLR* the court stated as follows regarding what amounts to substantial loss.

*“...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.”*

13. In the present case, the applicant stated that the respondent had already taken out warrants for his arrest and that he faced the risk of being apprehended and sent to civil jail unless the court intervened through the orders sought herein. The respondents did not deny the fact that the applicant’s committal to civil jail was imminent. I find that committal to civil jail is an irreparable/substantial loss that cannot be easily remedied should the applicant’s appeal turn out to be successful.

#### **Delay**

14. It was not disputed that the ruling giving rise to the appeal was delivered on 27<sup>th</sup> January 2021 and the instant application filed on 26<sup>th</sup> February 2021. I find that there has been no delay in filing the instant application

#### **Security**

15. On provision of security for the due performance of the decree, I note that the applicant did not propose any amount for security of costs. In *Gianfranco Manenthi & another vs. Africa Merchant Assurance Company 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 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 fails.*

*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 favour. 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.”*

16. In *Arun C Sharma vs. Ashana Raikundalia t/a Raikundalia & 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 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.”*

17. From the above cited cases it is clear that the court has the discretion to allow or reject an application of stay depending on the merits of a case. This discretion is to be exercised judicially while balancing the interests of the parties. It is however evident that the applicant did not meet all the conditions for the grant of orders for stay. My take is that while the respondent is entitled to the fruits of its judgment, the applicant is similarly entitled to his right of appeal subject to fulfilling the conditions set under Order 42 Rule 6. Under the above

circumstances, the court is required to balance the interests of both parties.

18. For the above reasons, I will nevertheless allow the instant application but on the following conditions: -

*a. That the applicant shall, within 30 days from the date of this ruling deposit security in the sum of Kshs 150,000 in a joint interest earning account to be held in the names of advocates for the parties herein in a banking institution with repute.*

*b. In the event of failure to comply with condition (a) the stay of execution orders to automatically lapse and the respondents will be at liberty to proceed with the execution.*

*c. Costs to be in the intended appeal.*

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF JULY 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID -19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Onyong for the Appellant/Applicant.

Ms Swaka for Plaintiff/Respondent.

Court Assistant: Sylvia.