REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 63 OF 2019

MWAI GITHINJI.....APPELLANT/APPLICANT

VERSUS

BEATRICE WAIRIMU.....1ST RESPONDENT

FR. EVARUSTUS RUBUA MARANGA.....2ND RESPONDENT

RULING

Brief facts

1. The applicant in this application dated 4th February 2021 seeks for orders for stay of execution of the decree passed on 24th October 2019 by the Nyeri Chief Magistrate pending the hearing and determination of the appeal herein.

2. In opposition to the application, the 1st respondent filed a replying affidavit dated 24th February 2021 and filed in court on 2nd March 2021.

The Applicant's case

3. 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 application was dismissed and he was ordered to pay costs within 30 days failure to which warrants of arrest was to issue.

4. The applicant is apprehensive that the respondents will execute the judgment if stay is not granted by this honourable court, which will cause him substantial loss. He adds that he lodged his appeal on 13th November 2019, after judgment was delivered, which appeal has overwhelming chances of success.

5. The applicant contends that he has made the application herein timeously and that he is willing to abide by any conditions imposed by the court in granting stay.

The 1st Respondent's Case

6. The 1st respondent contends that the applicant's case was dismissed by the trial court and thus there is no decree to be stayed. Further, the respondent states that she is recovering her costs which amount to Kshs. 107,460/- which were awarded by the court.

7. Moreover, the applicant has not demonstrated what substantial loss he will suffer if stay of execution is not granted. In any event, recovery of costs is a prescribed course and cannot render the appeal nugatory.

8. The 1st respondent adds that the applicant has not alleged that she will be unable to refund the sum if the appeal succeeds. Furthermore, the 1st respondent contends that the appeal does not have any chances of success and the court ought to allow her to enjoy the fruits of her success from the judgment. As such, the 1st respondents prays that the court dismisses the application herein with costs.

9. Parties canvassed the application by way of written submissions. A summary of their rival submissions is as follows:-

The Applicant's Submissions

10. It is the applicant's case that if stay of execution is not granted by the court he will suffer substantial loss as he is a teacher and will be committed to civil jail and hence lose his job. He states that if he loses his job, such an act cannot be compensated by an award of costs. He

relies on the case of **H.G.E. vs S.M. [2020] eKLR** where Musyoka J referred to the case of **R.W.W vs E.K.W [2019] eKLR.**

11. The applicant further submits that he is willing to abide by the terms of the court in terms of security and deposit the sum of Kshs. 85,310/- in court as security. He relies on the case of **Focin Motorcycle Co. Ltd vs Ann Wambui Wangui & Another [2018] eKLR** to buttress his point.

The 1st Respondent's Submissions

12. It is the 1st respondent's case that the applicant has not satisfied the conditions for granting stay of execution. The 1st respondent relies on the cases of **Victory Construction vs B.M. (A minor suing through the next friend of P.M.M) (2019) eKLR** where the court referred to the case of **Samvir Trustee Limited vs Guardian Bank Ltd Nairobi (Milimani) HCCC No. 795 of 1997 and James Wangalwa & Another vs Agnes Naliaka Cheseto (2012) eKLR** and submits that the applicant has not shown how the appeal will be rendered nugatory or what substantial loss he will suffer. Neither has the applicant made any averments against the 1st respondent on her inability to refund the said sums should the appeal succeed.

13. The 1st respondent further submits that the appeal does not have chances of success because the trial court held that there was no marriage between the applicant and the respondent and hence there was nothing to dissolve. As such, the 1st respondent submits that the application for stay is unmerited.

14. The 2nd respondent did not file any written submissions but elected to be associated with the 1st respondent's submissions.

Issues for determination

15. After careful analysis, we humbly submit that the main issue for determination is whether the applicant has met the perquisite for grant of stay of execution pending appeal.

The Law

Whether the applicant 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, the stands 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:-**
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> **"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 favour without just cause."**

20. On keenly perusing the applicant's application, it is clear that the applicant simply states that substantial loss will occur for he is a teacher and that he may be committed to civil jail and hence lose his job. Evidently, the applicant has not demonstrated what substantial loss will occur to him.

The application has been made without unreasonable delay.

21. The applicant contends that he had filed a similar application in the lower court which was dismissed and he was ordered to pay the costs. This order was made by the lower court on 25th January 2021. The applicant has brought the present application on 5th February 2021. I find that the application herein has been filed timeously.

Security of costs.

22. The applicant ought to satisfy the condition of security. In the persuasive 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.**
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> **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."

23. 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."

24. 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.

25. 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 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 favour. There must be a just cause for depriving the plaintiff of that right."

26. In the present application, the applicant has averred that he is ready to abide by the terms set by the court in granting stay. He is willing to deposit as security in court of the sum of Kshs. 85,310/-. The applicant herein has demonstrated good faith in this regard. However, is there a just cause for depriving the 1st respondent her right of enjoying the rights of enjoying her judgment. The applicant had sought a presumption of marriage and thereafter he sought to have the marriage dissolved in the court below which claim was not successful. The case was dismissed and as such, there is no decree for this court to stay since the judgement was a negative one.

27. It is trite law that courts will not make orders in vain. This means that any order a court makes must be seen to serve the interests of justice. I have perused the judgement of the court below and I am of the considered view that the chances of success in this appeal are somehow grim. Granting any orders for stay may be a waste of precious judicial time and resources which is contrary to the overriding objective.

28. In my considered view, this application has no merit and it is hereby dismissed with costs.

29. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 15th DAY OF JULY, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 15th day of July, 2021.