



**REPUBLIC OF KENYA**

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

**CORAM: HON. D. K. KEMEI - J**

**CIVIL APPEAL NO. 76 OF 2019**

**PRESTON MBONZO NZIOKA.....APPELLANT/APPLICANT**

**-VERSUS-**

**TITUS PATRICK MUTHIANI.....RESPONDENT**

**RULING**

1. The Appellant/Applicant filed a Notice of Motion dated 4<sup>th</sup> of February 2021 seeking the following Orders:

1) ***Spent***

2) ***THAT this Honourable Court be pleased to issue an Order of Stay of Execution in Machakos CMCC No.376 of 2009 pending the hearing and determination of this application.***

3) ***THAT this Honourable Court be pleased to grant a Stay of Execution on Machakos CMCC No. 3766 of 2009 pending hearing and determination of the Appeal against the Judgement made by the Hon. Lorot PM on the 29<sup>th</sup> of April 2019.***

4) ***The costs of this application be provided for.***

2. The Respondent upon filing a replying affidavit filed a notice of preliminary objection dated 9<sup>th</sup> of March 2021 and raised the following grounds:

1) ***That the Appellant's memorandum of appeal was filed after the lapse of the statutory 30 days period.***

2) ***That the said memorandum of appeal and the Appellant's notice of motion are improperly before the Court.***

3) ***That both the memorandum of appeal and the notice of motion ought to be struck out for being incompetent.***

4. The Appellant/applicant's case is that he stands to suffer prejudice if the respondent is allowed to execute the decree as his appeal which has high chances of success will be rendered nugatory. It was further the applicant's case that he is ready and willing to abide by any conditions and terms as to security by the court. Further, it is contended that the respondent's means is unknown and hence it will be difficult to recover any monies from him in the event of success of the appeal.

5. The respondent filed a replying affidavit sworn on 23/2/2021 where he deposed inter alia; that the appellant upon filing a memorandum of appeal went to sleep and did nothing to prosecute it until his properties were proclaimed for attachment; that the application has been filed about one year and eight months and which is an inordinate delay; that the decree of the lower court has partly been executed yet the applicant has not disclosed it to court.

6. The application dated 4/2/2021 and the preliminary objection dated 9/3/2021 were canvassed by way of written submissions.

7. Appellant/Applicant submitted that the notice of motion application dated 4<sup>th</sup> April 2021 is aimed at curing a substantial loss. The Appellant/Applicant expressed his concerns that once he pays the decretal amount to the Respondent and succeeds in the Appeal, he will be unable to recover the amount due hence suffer irreparable loss. He relied on the case of **National Industrial Credit Bank Limited versus Aquinas Francis Wasike and Another (2006) eKLR**.

The Appellant/Applicant herein expressed his fear that the Respondent is a man of straw and that he would be unable to refund the decretal

sum as he is yet to prove that he is in a position to refund the same.

8. The Appellant/Applicant submitted that he was not served with the draft decree as required to necessitate him to take the necessary steps to secure his interests and that the same decree was obtained without following due process. He relied on the case of **Land Mark Holdings Limited versus Robert Macharia Kinyua (2018) eKLR**.

9. The Appellant/Applicant further submitted that the delay in prosecuting the Appeal was occasioned by the fact that typed proceedings have not yet been issued to him by the trial court which derailed him in prosecuting the appeal. He pointed out that the delay was further advanced by the fact that courts scaled down their operations amidst the Covid-19 pandemic thus the Applicant's determination to secure the typed proceedings bore no fruits.

10. The Appellant/Applicant finally submitted that the Respondent herein acted in contempt by directing the auctioneer to attach the applicant's motor vehicle irrespective of the court having issued orders of stay and that the Respondent refused to be served with the court order and hence their actions could only be regarded as malicious.

11. On the part of the Respondent, it was submitted that the Appellant did not even apply and pay for the certified copies of the court proceedings for purposes of preparations of the record of appeal.

12. The Respondent relied on the case of **Jaber Mosen Ali & Another versus Priscillah Boit & Another (2014) eKLR** where the court held that there are stipulated 3 elements that the Applicant needs to demonstrate before the court can grant stay of execution orders. The elements are: there must be demonstration that substantial loss will result if stay is not granted; the application must be made without unreasonable delay; and there needs to be security for the due performance of the decree. The Respondent further relied on Order 42 Rule 6 of the Civil Procedure Rules, 2010.

13. The Respondent submitted that the Appellant/Applicant has not shown any substantial loss that he is likely to suffer if stay is not granted as he has simply made a mere allegation that the appeal will be rendered nugatory and that he will suffer substantial loss which is not sufficient to grant the orders sought.

14. The Respondent submitted that the application has been brought before this court with unreasonable delay, almost 1 year and 8 months after the delivery of the same judgement despite being aware of the existence of the judgement. He urged this court not excuse the delay as it is inordinate.

15. It was further submitted that the Appellant/Applicant in his supporting affidavit stated that he is ready to grant security that the court will order. However, the same is a mere allegation as he has not demonstrated nor shown proof to this court of his ability to deposit the security.

16. The Respondent finally submitted that the notice of motion application by the Appellant/Applicant has failed to meet the conditions outlined in Order 42 of Rule 6 of the Civil Procedure Rules 2010 and the authorities relied upon for grant of order of stay of execution. It was submitted that the grant of stay is discretionary in nature and the Appellant/Applicant is not entitled to them due to his conduct in coming to court too late in the day.

17. In response to the Preliminary Objection, the Appellant/Applicant submitted that none of the parties to the trial suit were present during the delivery of judgement on the 29th of April 2019, meaning that time only started to run once the Appellant/Applicant learnt about the entry of Judgement and that the Respondent has not offered any evidence that the Appellant immediately became aware of the judgement to support his assertions. The Appellant/Applicant relied on the case of **Omega Mwavoo Nyanse vs Jasper Mchonga Magari & Anor. Misc. Civil Appeal No. 18 of 2020**.

18. The Appellant pointed out that the learned magistrate issued a further order that there would be a stay of execution on the judgement for 30 days upon notification and that the Appellant/Applicant lodged his memorandum of Appeal within the prescribed time after getting to know of entry of the judgment. The appellant contended that the Respondent herein has not proved the exact time when the Appellant became aware of the entry of judgement. The appellant urged the court to dismissed the preliminary objection with costs.

19. Having considered all the pleadings and written submissions by the parties, the issues that arise for determination are firstly, whether the appellant's appeal has been filed outside the stipulated period and secondly, whether this court can issue an order of stay of execution of the judgement and decree dated 29<sup>th</sup> April, 2019 pending the hearing of the Appeal.

20. As regards the first issue, the applicant has contended that the judgement of the trial court was delivered in the parties' absence and hence the delay. I note that the memorandum of appeal was filed on 30/5/2019 one day outside the stipulated period of thirty days. The respondent now seeks to have the said memorandum of appeal struck out. Under the provisions of section 79G of the Civil Procedure Act an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time. The applicant has already explained that the judgement was delivered in absence of the parties and only learnt later. The appellant has urged the court to look at the order made by the trial court during the delivery of the ruling. Indeed, the trial magistrate delivered the judgement on the 29/4/2019 in the absence of the parties and that the learned magistrate granted an order of stay of execution of the judgement for 30 days of notification. In the case of **Mwangi V Kenya Airways Ltd [2003] Eklr** the Court of Appeal laid down the grounds for consideration when dealing with an application to lodge an appeal out of time as follows;

**i) The period of delay;**

**ii) The reasons for the delay;**

iii) **The arguability of the appeal;**

iv) **The degree of prejudice which could be suffered by the respondent if the extension is granted;**

v) **The importance of compliance with time limits to the particular litigation or issue; and**

vi) **The effect if any on the administration of justice or public interest if any is involved.**

The appellant's explanation for delay in lodging the appeal on time must be pegged to the above conditions. The appellant has sought to lay blame on the trial court for delivering the judgement in their absence. The lower court record appears to vindicate him in that the learned trial magistrate upon delivering his judgement granted the parties stay of execution on the judgement for 30 days upon notification. It is clear that the trial court sort of left the period of appeal to begin upon the parties being notified of the judgement. That being the position, I find that the appellant should not be faulted for the delay since he has duly filed a memorandum of appeal on 30/5/2019 just late by one day. I find the said delay by one day and the reasons rendered therefor not to be inordinate and excusable in the circumstances. I find no prejudice will be suffered by the respondent if the memorandum of appeal now filed is regularized and the parties be directed to set down the appeal for hearing once the record of appeal is filed. The appellant who has expressly indicated that he wants to pursue an appeal should be given the opportunity to ventilate the same. The appellant's appeal raises triable issues warranting the same to be tried.

21. As regards the second issue, it is noted that Order 42 Rule 6 of the Civil Procedure Rules, 2010 specifies the circumstances under which the court may order stay of execution of a decree or order pending an appeal. It provides that an applicant must demonstrate the following: -

*a) Substantial loss may result to the applicant unless the order was made;*

*b) The application was made without unreasonable delay; and*

*c) Such security as the court orders for the due performance of such decree or order as may ultimately binding on him has been given by the applicant.*

22. From the above provision, it is clear that the power to grant an application for stay of execution pending appeal is a discretionary one on sufficient cause being shown, being that the applicant may suffer substantial loss; the application is made without unreasonable delay and furnishing of such security as the court may impose.

23. I am also of the view that to grant or not to grant an order for stay of execution pending appeal is discretionary in that when granting stay, the court has to balance the interests of the applicant with those of the respondent. I will apply the said conditions of stay of execution in this case.

24. The Appellant/Applicant in this case has averred that if stay is not granted, the respondent may proceed to execute the decree. It was submitted that the respondent is a man of straw and unable to refund the decretal amount in case the appeal succeeds and this position was not rebutted. I must reiterate the fact that an allegation that the process of execution is likely to be put in motion does not by itself amount to substantial loss and for that reason, I do not agree with the applicant's submission in that regard.

25. The other ground taken out by the Appellant/Applicant to demonstrate that he is likely to suffer substantial loss is that the respondent herein is of unknown income who has not demonstrated the ability to repay the decretal sum if stay is not ordered with the end result being that the appeal will be rendered a mere academic exercise. The respondent on the other hand has not submitted on this issue but has asserted that the appeal is a delaying tactic mounted to defeat the right to a successful judgment.

26. I will borrow from the sentiments of the Court of Appeal while considering a scenario similar to the issue at hand in the case of **National Industrial Credit Bank Limited –vs- Aquinas Francis Wasike & Another 2006 Eklr** held thus: -

***“This court has said before and it would bear repeating that while the local 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 resources he has since that is a matter which is peculiarly within his knowledge”.***

27. The Respondent has not disclosed that he has means to refund the appellant/applicant the decretal sum should the appeal succeed. The income of the respondent has not been disclosed nor has he sworn an affidavit to show that the economic activity he engages in can generate income capable of refunding the decretal sum. The law as I understand it and further, guided by the Court of Appeal decision cited above, is that, the appellant/applicant having expressed the fear of the respondent not being able to refund the decretal sum, it was for the respondent to allay such fears by stating his ability to refund the monies in the end if the appeal succeeds. Having not done so, I hold the view that the appellant's fears are not idle and that it needs to be taken into account in considering the prayer for stay.

28. In the decision of **Kenya Shell Ltd – vs- Kibiru [1956-KLR 410]**, the Court of Appeal further pointed out that if an appellant/applicant alleges difficulties in recovery of the decretal sum, it rests on the respondent to show that he would be able to effect a refund. The same court has in the case of **Kenya Hotel Properties Limited –vs- Willesden Properties Limited, Civil Application Nai 322/2006** reiterated in the case of **Housing Finance company of Kenya –vs- Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR**, where it was stated that even in an application involving a money decree a stay of execution pending appeal may be granted so as to alleviate any undue hardship the applicant would suffer if stay is refused.

29. In this particular case, I am satisfied that the appellant/applicant has demonstrated the likelihood to suffer substantial loss if stay is not ordered. The appeal may be rendered a mere academic exercise if the respondent is unable to refund the decretal sum in case of a successful appeal.

30. On whether or not the application was brought without undue delay, this application was filed on 8<sup>th</sup> February, 2021 while the ruling was delivered on 29<sup>th</sup> April, 2019. Clearly, there has been a One (1) year and Eight (8) months delay that has been explained. The appellant/applicant has clearly filed a memorandum of appeal on 30<sup>th</sup> May 2019, within the prescribed period, that is yet to be prosecuted due to lack of typed proceeding and the eventual scaling down of services in our courts due to Covid-19 pandemic. As pointed out in paragraph 20 above, the appeal was filed one day outside the stipulated period and that the reasons for delay have been found to be plausible. The present application was filed after a period of two years. Whereas such a period might be considered as inordinate, it must be noted that the respondent had not embarked on processes towards execution of the decree and that the applicant moved to court upon the execution of the decree took place. There could not have any need to file the application when there were no conditions favouring such a move. Indeed, the applicant moved the court as soon as the auctioneer proclaimed his goods. I find there was no inordinate delay.

31. Apart from proof of substantial loss, the appellant/applicant is enjoined to provide security. This is the final issue for consideration in an application seeking orders for stay pending appeal. However, in this case, the appellant/applicant has expressed willingness to furnish security in due performance of the decree issued by the lower court.

32. My view is that the proposal to provide security should always come from the appellant/applicant but not for the court to propose the same for him. It is a mark of good faith and if the appellant/applicant so proposes, it implies that the application is not just meant to deny the respondent the fruits of his judgment. In this case, the appellant/applicant has shown willingness to abide by this condition. I find an order that the decretal sums be deposited into a joint interest earning account in the names of both advocates pending determination of the appeal will be appropriate in the circumstances as the parties' concerns will have been taken into account.

33. In the result, it is my finding that the applicant's application dated 4/2/2021 is allowed in the following terms;

***a) The Appellant's memorandum of appeal dated 29/5/2019 and filed on 30/5/2019 is deemed as properly filed.***

***b) An order of stay of execution of judgement and decree in Machakos CMCC No. 376 of 2009 is hereby granted pending determination of appeal upon the Appellant depositing the entire decretal sum into a joint interest earning account in the names of the advocates for the parties within Forty Five (45) days of this ruling failing which the stay shall lapse.***

***c) The costs hereof shall abide in the appeal.***

It is so ordered.

**DATED AND DELIVERED AT MACHAKOS THIS 1<sup>ST</sup> DAY OF JULY, 2021.**

**D. K. Kemei**

**Judge**