



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 160 OF 2019

ROBERT MEME.....APPELLANT/RESPONDENT

VERSUS

JOHN MAULUKU M'MUTUNYIRESPONDENT/APPLICANT

RULING

1. Before the court for determination are two applications, each filed by either party. The first is an application under certificate of urgency dated 31/05/2021, by John Mauluku M'Mutunyi (**hereinafter referred to as the respondent**). He seeks release of monies jointly held in A/C No. 978xxxxxxx together with interest to his advocate, M/S Mutembei & Kimathi Advocates.

2. It is premised on the grounds on the face of the application and the supporting affidavit of Hosea Mutembei, the respondent's advocate, sworn on 31/05/2021. He contends that the respondent urgently needs money to undergo a corrective surgery to his deformed hand, as exhibited by the medical report. He urges the court to order for the release of the sum of Kshs 1,512,144 to him.

3. Robert Meme, the appellant (**hereinafter referred to as the appellant**) contemporaneously filed his application dated 7/06/2021, together with a replying affidavit to the respondent's application. In the application, he seeks stay of execution of the judgement and decree in Maua CMCC No. 61 of 2016 pending the hearing and determination of the intended appeal to the court of appeal.

4. The application is premised on the supporting affidavit sworn by **him** on 7/06/2021 and his replying affidavit sworn on even date. I have noted that the replying affidavit is a replica of the supporting affidavit and I do not wish to reproduce the same. In the affidavits, the applicant contends that he will suffer irreparably if the decretal sum is released to the respondent. He further contends that, the said appeal, which has high prospects of success, will be rendered nugatory if execution is allowed to proceed.

5. He fears that, the respondent, who is an impecunious man, will be unable to refund the decretal sum if the appeal succeeds. He deposes that the application is brought timeously, and that the respondent will not suffer any prejudice if the orders he is seeking are granted. He declares his willingness to abide by the reasonable conditions the court may impose as a condition for grant of stay.

6. The application is opposed by the respondent who avers that he should be allowed to enjoy the fruits of his judgement. According to him, the intended appeal will take ages to be heard, which will negatively impact him. He contends that he needs money to undergo further surgery to correct his deformed hand.

7. The parties in their oral submissions made on 24/06/2021 maintained their respective positions. They beseeched the court to balance the two competing rights. The respondent cited **George Oraro v KTN (HCCC 151 of 1992 – Nairobi) and Kenya Shell Ltd v Benjamin Karuga Kibiru & Others (1982 – 88) I KAR 1018** in support of his submissions that a successful litigant ought not be kept away from the fruits of judgment.

Determination

8. The applications are actually the flip side of each other. If I allow the application for stay, that for release of the security stands refused. On the other hand, if disallow the same application for stay, there would be no basis to refuse that for release. With that appreciation in mind I set to determine the application for stay then let the fate of that for release abide the consequences.

9. In order to reach a determination herein, I must place the two competing parties on equal footing and see where the scales of justice lie. I say so because, as much as the applicant has an undoubted right to appeal, the respondent equally has a right to enjoy the fruits of his judgement. This was the position of **Warsame, J** (as he then was) in **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where he expressed himself as hereunder:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss... Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

10. The applicable provision on granting of stay of execution is **Order 42, Rule 6 (2)** of the **Civil Procedure Rules** which the applicant has cited. That provision specifies the principles for consideration in such applications, which I shall address hereunder.

11. On whether the application has been brought without unreasonable delay, I have observed from the record that the judgment to be appealed against was delivered on 19/04/2021 whereas the application was filed on 9/06/2021. That is a delay of some 50 days. No explanation is offered at all. I find that the failure to explain the lapse of that period is not something commendable at all but I do not consider the delay inordinate.

12. The cornerstone consideration in an application for stay has always been whether substantial loss will be suffered. It is not enough to merely state that the applicant will suffer irreparable loss of losing the decretal amount. What sort of loss would this be? I say so because granting stay would mean that, the status quo before judgement should prevail. What assurance can there be of the intended appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.

13. I must point out that, the mere fact that the decree holder is not a man of means does not necessarily justify keeping him away from his money. In ***Machira T/A Machira & Co Advocates v East African Standard (No 2) [2002] KLR 63*** it was held that:

“To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

14. I have considered the explanation given by the applicant that, the respondent has no guaranteed financial means to repay the decretal sum, once the same is paid out to him, if the intended appeal succeeds. I have equally given regard to the position by the same appellant that the respondent is indeed entitled to some damages but not the full sum awarded. Tacitly, I get the appellant to say that it is not insisting that the entire sum be kept away from the respondent but only a portion. I am minded to exercise my discretion in a way that secures the appellants right to appeal and the right of the respondent never to be deprived of what is lawfully his. In coming to this conclusion I have noted that the respondent has not answered the accusation that he would be unable to effect a refund if paid now and the appeal succeeds later on. While I do not take the view that poverty disentitles a man to his judgment, it was the obligation of the respondent to assert ability to effect a refund. Once that allegation was made, it became a task of the respondent to controvert it. He did not and I find that to disallow the application portends a loss to the applicant of the portion of the sum he contends is not due to the respondent. See ***CFC Stanbic Bank Limited v John Kung'u Kiarie & Dyer & Another [2016] eKLR***.

15. My conclusion is that while the respondent has failed to demonstrate ability to refund, the appellant concedes that some money is due. Having made the delicate but deliberate act of balancing the competing interest between the two parties, I do grant stay but on terms that the respondent is paid, out of the sums held in the escrow account, the sum of Kshs 800,000 while the balance is retained in the said account pending the hearing and determination of the appeal to the court of appeal.

16. In order that the appellant does not fall into slumber, I direct that the Record of appeal, if not yet filed, be filed and served within 45 days from today and in default the order of stay shall stand lapsed and discharged.

17. Since both parties have neither failed nor succeeded in whole, I make no order as to costs.

DATED, SIGNED AND DELIVERED AT MERU, BY MS TEAMS, THIS 1ST DAY OF JULY 2021

PATRICK J O OTIENO

JUDGE

In presence of

Ms
Ms Karimi for the respondent

Masamba

for

appellant

PATRICK J O OTIENO

JUDGE