



REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

CIVIL APPEAL NO. 13 OF 2020

ELYVES SITUMA WANJALA1ST APPELLANT/APPLICANT

BERNARD BARMASAI2ND APPELLANT/APPLICANT

VERSUS

SAMUEL OMOLLO OCHUNGRESPONDENT

R U L I N G

The matter for determination is the Notice of Motion Application dated 22nd February 2021, by the 1st Appellant seeking for orders that;

1. Spent.

2. This Honourable court be pleased to order temporary stay of execution of the decree in Eldoret CMCC No. 521 OF 2003 pending the hearing of the application inter-parties.

3. This Honourable court do grant stay of execution of the decree in Eldoret CMCC No. 521 OF 2003 pending the determination of the appeal.

4. This Honourable court be pleased to set aside the orders of Hon. N. Wairimu in declining to grant orders of stay of execution pending the appeal in Eldoret HCCA No. 13 of 2020 Elyves Situma and Another V Samuel O. Ochung.

The application is premised on grounds that;

a. The judgement in this matter was delivered on 28th May, 2019 whereas the 1st Appellant was not heard as he was not served with the notices.

b. The 1st Appellant's application to set aside judgment was dismissed prompting this appeal.

c. There are no stay orders in place and the Respondent is proceeding to execute the decree.

d. That unless stay is granted, the Applicant will suffer loss and the appeal will be rendered nugatory.

e. Subsequent applications for stay of execution of judgement dated 30th January, 2020 and 29th January, 2020 have since been dismissed.

f. The Applicant herein being aggrieved by the said ruling dismissing the application for stay filed an appeal against the whole ruling and all the consequential orders arising there from.

g. The appeal herein raises triable issues and has overwhelming chances of success.

h. The Respondent herein is currently set for the execution of the said judgement and have since issued warrants of attachment of which if effected will occasion substantial loss to the Appellant/Applicant that cannot be compensated by monetary value.

i. The Appellant/Applicant is willing to comply with reasonable conditions the court may grant for stay of execution of the said judgment delivered on 28th May, 2019 and all the consequential orders arising there from pending the hearing and determination of this application and subsequently of the appeal.

j. This application has been brought timeously and in good faith.

k. The Appellant/Applicant stands to suffer irreparable loss and damage if the orders sought are not granted.

l. That it is in the interest of justice and fairness that this application be allowed.

m. That no party shall be made to suffer should the application be allowed.

The Application is supported by affidavit of Elyves Situma sworn on 22/02/2021.

In his supporting affidavit the 1st Applicant averred that judgment in Eldoret CMCC No. 521 of 2003 was delivered on 28th May, 2019 without his participation having not been notified of the said proceedings. Aggrieved by the said decision the 1st Applicant filed an application seeking to set aside the said judgment but the same was dismissed. Further, the 1st Applicant avers that he filed an application for stay pending appeal which was also dismissed. It is his contention that at the time of the accident he was only a driver and that the motor vehicle was insured by Kenya Orient Insurance Company which was duly served with the notices but never assumed liability. He also avers that unless this court issues temporary orders of stay he is likely to suffer as execution of the decree is underway. It is his contention that should execution of the decree proceed, he is likely suffer irreparable loss that cannot be compensated in monetary terms. Aggrieved by the decisions in the lower court the 1st Applicant has since filed an appeal against the whole of the said ruling and all consequential orders arising therefrom. The 1st Applicant avers that the said appeal is meritorious, raises triable issues and has overwhelming chances of success. The Applicant further states that he is willing to comply with any reasonable conditions of stay as is to be ordered by this Honourable Court.

The application is opposed by the Respondent vide his replying affidavit sworn on 14th April, 2021. He avers that the application is made in bad faith, lacks merit, is an abuse of court process and it only aimed at frustrating, delaying and denying him the right to enjoy the fruit of his judgment. It is his contention that the 1st Applicant herein was duly served with pleadings and summons to enter appearance but ignored the same until judgment was entered against him. That the Appellant was duly served with mention and hearing notices but he ignored them and therefore was always aware of the proceedings in Eldoret CMCC No. 521 of 2003. Further, the Respondent avers that the 1st Applicant having been aware of the proceedings in Eldoret CMCC No. 521 of 2003 filed an application in 2006 seeking to set aside the ex-parte judgment and leave to file a defence of which orders were granted, but neither did the Applicant nor his Advocates attend court prompting the attachment of the Applicant's motor vehicle. It is further his case that the 1st Applicant herein was given a chance to defend the claim against him but he chose not to attend court and slept on his right. Further, the Respondent contends that there has been inordinate delay in bringing up this application; the ruling complained of by the 1st Applicant was rendered on 1st January, 2020 at the Chief Magistrate's court and this instant application was filed on 23rd February, 2021 an year after the ruling was delivered and thus an afterthought.

Lastly, it is the Respondent's contention that the 1st Applicant herein has not clearly demonstrated to this court the nature of substantial loss he likely to suffer if the orders sought are not granted and that further the Applicant has not provided security for due performance of the decree. He urges this court to dismiss the application for lack of merit.

Parties agreed to canvass the application by way of written submissions. The 1st Applicant's submissions were filed on 4th June, 2021 while the Respondent filed his on 21st May, 2021.

Analysis and Determination

I have considered the application, the affidavit both in support of the application and in opposition, the submissions filed as well as the authorities relied upon, and the only issue for determination is whether the order of stay of execution should be granted.

The principles that guide Court when deciding on application for stay of execution pending appeal are clearly set out under Order 42 Rule 6 (1) and (2) of the Civil Procedure 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 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.

(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 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.

On the face of it Order 42 Rule 6(1) of the Civil Procedure Rule presumes that the Applicant should pray for orders of stay of execution from the court it is appealing from since the appeal does not act as a stay of execution. The provision further gives the Respondent leeway to have the appellate court set aside the orders of stay of execution

In an application for stay of execution pending appeal, an applicant must satisfy the provisions of order 42 Rule 6 of the CPR. The Applicant must have filed the application without undue delay, must establish that he or she will suffer substantial loss and that he or she is ready and willing to abide by such security for the due performance of the decree as may be set by the court.

The purpose of stay of execution pending Appeal is to preserve the subject matter. In the case of *Consolidated Marine Vs. Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)*, the Court held that;

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.

The Court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the Appeal so that his Appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgment.

The conditions that the Applicant herein should satisfy is as stated under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**. I will hereunder consider each of the condition and determine whether the Applicant deserves the orders sought.

The 1st Applicant has submitted that he will suffer substantial loss if stay of execution his not granted. The 1st Applicant submitted that judgment was entered against him for the sum of Kshs. 1,067,838/= plus costs of Ksh. 260, 800/=. It is his contention that judgment was rendered without him participating in the proceedings at the lower court due to a misunderstanding with his Counsel. Further, he contends that the amount in question is substantial and that he is made to suffer for the lapses on the part of his Counsel on record. To support his arguments, the 1st Applicant cited the case of *Tropical Commodities Supplies Ltd & 2 Others Vs. International Credit Bank (in liquidation) (2004)2 EA 2 331*.

On the first principle, *Platt, Ag. JA* (as he then was) in *Kenya Shell Limited vs. Kibiru [1986] KLR 410*, at page 416 expressed himself as follows:

“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 corner stone of both jurisdictions for granting a 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”.

On his part, *Gachuhi, Ag.JA* (as he then was) at 417 held:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

Similarly, in the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR*, the Court observed that;

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... 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.”

Going by the foregoing, an Applicant must show the substantial loss he is likely to suffer if the Respondent executes the decree against him since granting stay would mean that the status quo should remain as it were before the judgment and that would be denying a successful litigant enjoyment of the fruits of his judgment. The most important limb of the application for stay of execution is proof of substantial loss and it should be noted that mere mention or alleging that an applicant will suffer substantial loss is not enough. The 1st Applicant has not demonstrated to this court to the said standard that he stands to suffer substantial loss, if the lawful Court's order is enforced and stay of execution denied; therefore, it is my finding that the appeal would not be rendered nugatory by declining stay of execution.

On the second condition, I find that it is not in dispute that the impugned judgment was delivered on the 28th May, 2019. The 1st Applicant on 30th September, 2019 applied to set aside the said judgment and for stay of execution in the trial court which applications were denied and ruling delivered on 14th January, 2020 and 3rd September, 2020 respectively. The 1st Applicant filed a memorandum of appeal on 29th January, 2020. This instant application was filed on 23rd February, 2021 which is after a period of about 5 months after the trial court rendered its last ruling. It is thus my finding that there has been inordinate delay on the part of the 1st Applicant in filing this application. Where there is delay in filing an application the applicant is obliged to explain to the court the reason for the inordinate delay. The applicant cannot purport to allege that the application was brought without unreasonable delay having filed the initial application for stay in the trial

court on 30th June, 2020.

On the last condition as to provision of security, I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulate in mandatory terms that the applicant needs to furnish security. In the case of *Aron C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates* the court held that:

“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.”

The 1st Applicant save for stating that he is willing to comply with any reasonable conditions of stay that the court may issue, has not provided or suggested anything as security for due performance of the decree that may be binding on him.

The court in the case of *Congress Rental South Africa v Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & another (Garnishee) [2019] eKLR* at paragraph 41 on the issue of security for the due performance observed as follows;

“The Applicant has been silent on the issue of security in this matter. The offer for a security should come from the applicant, it should not be inferred or implied or left for the Court to make an order for security for due performance as that would amount to stepping into the arena of dispute.”

The upshot is that the Applicant’s application dated 22nd February, 2021 lacks merits and is dismissed with costs to the Respondent.

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S.M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST DAY OF SEPTEMBER, 2021

In the presence of: -

Ms. Chebet for the Appellant

Ms. Achanga for the Respondent

Ms Gladys - Court Assistant