REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. E029 OF 2021

CHARLES KARUGA MWANGI.....APPLICANT

VERSUS

CHARLES WATUTHU NYAGA.....RESPONDENT

RULING

Brief facts

1. The application is dated 17th September 2021 brought under Order 42 Rule 6 of the Civil Procedure Rules seeking for orders for stay of execution of the decree in Nyeri CMCC No. 35 of 2018 and for release of the applicant from civil jail on such terms as security as the court deems fit.

2. In opposition of the said application, the respondent has filed a Replying Affidavit dated 22nd September 2021.

The Applicant's Case

3. It is the applicant's case that this appeal arose from a claim in road traffic accident involving his motor vehicle whereby he was sued for damages. The respondent first obtained interlocutory judgment then a final judgment against him in CMCC No. 35 of 2018. The applicant states that he came to know of the existence of the suit on 19/4/2021 when he was served with a Notice To Show Cause which was coming up for hearing on 22/4/2021.

4. The applicant states that he engaged his counsel who filed an application for setting aside the judgment and leave to defend but the application was dismissed on 24/6/2012. The applicant therefore filed an appeal as well as an application for stay of execution under certificate of urgency.

5. The applicant contends that the magistrate in dismissing the application, set aside the interim orders of stay and issued warrants of arrest against him on 10/8/2021. He was arrested on 15/9/2021 and committed to civil jail for a period of 30 days.

6. The applicant further states that he was condemned unheard which is against fair administrative action and in any event his defence had triable issues which ought to have been heard on merit. He adds that he conducted investigations and there is no record for the accident reported at Nyeri Police Station and that he has never driven the said motor vehicle as alleged.

7. The applicant contends that he is 62 years old, hypertensive and diabetic and has been on medication for over eight years. Further, he has always offered reasonable security to enable him be heard and prosecute his application for stay which the court declined rendering the application nugatory. He further states that he has no desire to run away from any debt and that it is only fair that he is heard on merit before his liberty is curtailed. He believes that the respondent will not suffer any prejudice if stay is granted. As such, he prays that the application be allowed.

The Respondent's Case

8. It is the respondent's case that the instant application is a gross abuse of the court process as there is a similar application in the trial court dated 6th August 2021 that is yet to be determined. As such, no appeal has been preferred against the application before the lower court to warrant the current application seeking similar orders as the matter is yet to be determined.

9. The respondent states that he instituted the trial court suit vide a plaint dated 15th February 2018 and the case proceeded for formal proof

after the applicant refused to enter appearance despite been served. Judgment was entered on 14th June 2019 for a sum of Kenya Shillings Six Hundred and Five Thousand One Hundred and Seventy (Kshs. 605,170/-) with costs and interest. The applicant then brought an application seeking to set aside the said judgment which was dismissed with costs on 24th June 2021. The matter then proceeded for the hearing of the Notice to Show Cause on 10th August 2021 to which the applicant did not attend despite been served. The respondent contends that he applied for warrant to issue and on 15/9/2021, the applicant was committed to civil jail for 30 days.

10. The respondent further contends that he stands to suffer prejudice if the application is allowed as the applicant has come to court 2 years after the case was concluded. In any event, the respondent states that if the court is to allow the application, the applicant should deposit the decretal sum in court or in a joint interest earning account in the names of the advocates on record. Moreover, the respondent adds that the applicant has not brought this application in good faith and is circumventing justice by bringing numerous applications to delay this matter from being finalized. Additionally, the respondent states that he suffered a fracture from the accident which has made it difficult for him to work and that further delaying execution in this matter renders him incapable of getting justice in the matter.

11. The respondent depones that he was issued with a proper police abstract from Nyeri Police Station and since the applicant seeks to lodge an appeal, that is a matter that will be dealt with in the appeal and not in the present application. The respondent therefore prays that the application be dismissed with costs as it lacks merit and is an abuse of the court process.

12. Parties hereby disposed of the application by way of written submissions. A summary of their rival submissions is as follows:-

The Applicant's Submissions

13. The applicant reiterates the contents in his affidavit and adds that the respondent did not serve him with a notice of entry of judgment or a hearing notice for formal proof or the notice for final judgment. The applicant submits that he raised triable issues in his draft defence and thus the court ought to have given him a chance to ventilate his case.

14. The applicant submits that he is willing to post security in order to prosecute his appeal. Though there is a lawful decree, the applicant states that he should be heard on merit under the tenets of fair administrative action.

15. The applicant admits that there is a similar application in the lower court but adds that the said application was withdrawn on 23/9/2021. He further states that under **Order 42 Rule 6 of the Civil Procedure Rules**, an applicant is allowed to seek an order of stay of execution from the trial court and the appellate court and it does not matter if the order has been granted or refused in the trial court in order to clothe the applicant with the right to proceed to the appellate court for similar orders. As such, the issue is moot. Moreover, the fact that the trial court declined to certify the matter urgent or even stay the committal to civil jail pending the hearing and determination of the application, implicitly meant that the court had disallowed the application. On this basis, the applicant entreated this court to hear and grant the application for stay.

16. The applicant concludes by submitting that he shall suffer substantial loss if the application for stay is not granted thus rendering his appeal nugatory. He reiterates that he has offered security and that no prejudice shall be suffered by the respondent. The applicant therefore prays that his application be allowed as prayed.

The Respondent's Submissions

17. The respondent reiterates what he has deponed in his replying affidavit and confirms that the application in the trial court seeking similar orders was withdrawn.

18. The respondent relies on the case of **Masisi Mwita vs Damaris Wanjiku Njeri (2016) Civil Appeal Murang'a No. 107 of 2015** and **Order 42 Rule 6 of the Civil Procedure Rules** and submits that the applicant has not met the threshold to succeed in an application for stay of execution pending appeal. The respondent states that he stands to suffer prejudice as the applicant has brought this application late after the trial suit was determined and therefore his actions amount to delaying the execution of the decree and delaying justice on the part of the respondent.

19. The respondent urges the court in the event it allows the application, to order the applicant to deposit the whole decretal sum in court or in a joint interest earning account in the names of the advocates on record as security. He is guided by the decision of **Victory Construction vs B. M (A minor suing through the next friend one P.M.M) [2019] eKLR.**

Issues for determination

20. After careful analysis, the main issue for determination is whether the applicant has met the prerequisite 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.

21. 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.

22. 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.

23. 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

24. Under this head, an applicant must clearly state what loss, if any, they stand 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:-

"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."

25. On keenly perusing the instant application, the applicant states that he will suffer substantial loss without really explaining how he stands to suffer substantial loss. The applicant is right now in civil jail for non-payment of the decretal amount. His continued stay in civil jail or the payment of the decretal amount that may bot be refunded amounts to substantial loss on part of the applicant.

The application has been made without unreasonable delay.

26. Judgment was delivered on 16th June 2019 and the applicant made an application for stay in the lower court on 6th August 2021. The applicant later withdrew his application and filed the instant application on 20th September 2021 in the instant court. Thus, the application was made over a period of almost two years in the trial court and over a month in the instant court. In that regard, I find that the two year delay is inordinate and has not been explained.

Security of costs.

27. 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.

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."

28. 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."

29. 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. Notably, the applicant has demonstrated good faith by stating that he is ready to abide by the terms set by the court in granting stay and has offered security of costs in order to ventilate his case. The respondent on the other hand states that the applicant ought to deposit the whole decretal sum in court or in a joint interest earning account in the names of both their counsels. I find that since the applicant is willing to offer security, he ought to pay the respondent half the decretal sum and deposit the other half in a joint interest earning account in the names of both the advocates.

30. 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."

31. The court in granting stay has to carry out a balancing act between the rights of the two parties. The issue that arises is whether there is just cause for depriving the respondent his right of enjoying his judgment. The respondent has pointed out that he shall suffer prejudice because it is over two years and he has not enjoyed the fruits of his judgment. He adds that he sustained a fracture and that the injury has not fully healed. The applicant on other hand simply stated that the respondent stands to suffer no prejudice. This respondent case was

determined almost two years ago and since then the respondent has not enjoyed the fruits of his judgement.

32. However, it is noted that from the word go, the applicant denies service of the summons to enter appearances. It is alleged he was served but declined to sign. The accident is also denied by the applicant. In the interests of justice, the applicant ought to be given a chance in his appeal.

33. The respondent on other hand has waited for a long time to enjoy the fruits of the judgement. It is right and fitting to consider that the judgement is still valid unless overturned. The delay by the applicant to bring this application calls for some penalty in way of costs.

34. Having considered all the foregoing issues, I hereby reach a conclusion that the application is merited and is hereby allowed in the following terms:-

a) That stay pending appeal is hereby granted on condition that the applicant deposits the whole decretal amount in an interest earning account in the joint names of the advocates on record for the parties within thirty(30) days and in default, these orders to be automatically vacated.

b) That the applicant do meet the costs of this application which will be costs in the cause in this appeal.

35. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 14TH DAY OF OCTOBER 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 14th day of OCTOBER 2021