



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL DIVISION

CIVIL APPEAL NO. E126 OF 2021

HOSSEIN ZADEH..... APPLICANT

-VERSUS-

MARY EDNA HUWLER.....1ST RESPONDENT

WILLIAM ROMAN MCTOUGH.....2ND RESPONDENT

RULING

1. For determination is the motion dated 11th March, 2021 seeking an order to stay execution of the decree issued in **Milimani CMCC No. 7560 of 2006** on 28th November, 2019, pending the hearing and determination of the appeal herein. The motion is expressed to be brought primarily under the provisions of Order 42 Rule 6 of the Civil Procedure Rules. On among other grounds that, **Hossein Zadeh** (hereinafter the Applicant) being dissatisfied with the ruling delivered on 3rd March, 2021 in **Milimani CMCC No. 7560 of 2006**, has preferred an appeal against the said ruling and is apprehensive that without stay orders, **Mary Edna Huwler and William Roman McTough** (the Respondents) will proceed with execution thereby occasioning him what he terms as “irreparable loss”.

2. The motion is supported by the affidavit of the Applicant who in amplifying the grounds on the face of the motion, asserts that being aggrieved by the ruling in **Milimani CMCC No. 7560 of 2006**, he has preferred an appeal of which has a high chance of success; that on instructions of the Respondents, auctioneers have proclaimed his goods, which would be carted away and sold in execution if this court does not intervene by way of an order of stay; that he would in such event suffer “irreparable loss.”; and that he has filed the instant motion without delay.

3. The motion was opposed by the Respondents through the replying affidavit sworn by the **William Roman Mctough**, (the 2nd Respondent). To the effect that the motion is incompetent for want of leave and therefore this court lacks jurisdiction to entertain the appeal; that the Applicant has not demonstrated the likelihood of substantial loss having not shown that the Respondents are incapable of restituting the decretal sum if the appeal were to succeed; that the decree sought to be stayed is more than thirty (30) months old and the motion was therefore filed after inordinate delay; lastly, that the Applicant has not offered security for the eventual performance of the. The deponent views the motion as an abuse of the court process and urges the court to end this litigation..

4. The motion was canvassed through written submissions. On behalf of the Applicant, it was submitted his satisfies the conditions laid down in Order 42 Rule 6 of the Civil Procedure Rules and ought to be allowed. Substantiating, counsel submitted that *prima facie*, the grounds in the memorandum of appeal, represent sufficient cause as the appeal is arguable. Secondly, he contended that the sale of the Applicant’s goods in execution will occasion him substantial loss as he may be unable to recoup the decretal sum realized in execution. He on the decision in **Bungoma HC Misc. Application No. 42 of 2001 James Wangalwa & Another v Agnes Naliaka Cheseto**. Calling to his aid the decision in **Milton K. Njuki v Edward Ileri Mugo [2005] eKLR**, the Applicant’s counsel contended that the motion was timeously filed. In dismissing the objections raised by the Respondents, he urged the court to determine the appeal on its merits and cited the case of **Peter Samoei v Issac Ruto [2012] eKLR**. The Applicant took the position that the furnishing of security is not a mandatory requirement reiterating nevertheless, the Applicant’s willingness to provide security in the sum of Kshs. 300,000.

5. On the part of the Respondents, counsel argued that the court’s appellate jurisdiction has not been properly invoked as the Applicant did not obtain leave of the lower court before lodging the appeal. Counsel cited the decision in **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR**, and urged that the motion and appeal ought to be struck out. Further, that the motion was an abuse of the court process as the Applicant had failed to comply with earlier conditional orders on stay issued by the lower court. Finally, citing **Century Oil Trading Company Limited v Kenya Shell Limited HCMCA No. 1561 of 2007** counsel submitted that the Applicant has failed to demonstrate substantial loss and the motion should be dismissed.

6. The Court has considered the material canvassed in respect of the motion. As a preliminary issue the Court must determine whether the appeal herein is competent. The appeal filed on 11th March, 2021 relates to the ruling delivered on 3rd March, 2021. The said ruling was in respect of the motion dated 12th November, 2020 which had been brought under Order 45(1) of the Civil Procedure Rules (annexure “HZ 5” to the affidavit in support of the instant motion). Pursuant to the provisions of section 75 (1) (h) of the Civil Procedure Act an appeal lies as of right from any order made under rules from which an appeal is expressly allowed by the Rules, specifically Order 43 of the Civil Procedure Rules.

7. It is trite that the question whether an appeal lies as of right or by leave goes to the jurisdiction of the appellate court to entertain an appeal before it. This court associates itself with the sentiments of **Sewe J**, in **Edith Wairimu Njoroge v Brooks Holdings Co. Ltd [2018] eKLR** that where an appeal does not lie as of right from an order but only with leave, such leave **“was a prerequisite to the assumption of jurisdiction by this court on appeal.”** In the case of **Kakuta Maimai Hamisi (Supra)** the Court of Appeal held that the right of appeal goes to the appellate court’s jurisdiction, is a fundamental matter and that a question regarding the absence of statutory conferment of such right is not a mere technicality.

8. The same court held in **Peter Nyaga Muvake -v- Joseph Mutunga [2015] eKLR, Civil Appeal No. (Nairobi) 86 of 2015** that:

“Without leave of the High Court, the Appellant was not entitled to give Notice of Appeal where, as in this case, leave to appeal is necessary by dint of Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules; the procurement of leave to appeal is sine qua non to the lodging of the Notice of Appeal. Without leave, there can be no valid Notice of Appeal. And without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water.”

9. The Applicant’s motion in the lower court dated 12th November, 2020 whose ruling is the subject of the instant appeal was for review of previous orders of that court. It had been brought under Order 45 Rule 1 of the Civil Procedure Rules and was dismissed. The key prayers sought were:

“2. That this court does review its orders of 23rd October, 2020 and:-

(a) Reduce the amount required to be deposited in court from half the decretal amount (Kshs. 858,808.50) to a lower amount to be paid within 7 days of the order.

(b) In the alternative, extend the time required for the plaintiff to comply with the order” (sic)

10. Order 43 Rule 1(x) of the Civil Procedure Rules provides that an appeal shall lie as a matter of right from Order 45 Rule 3 the latter which is in the following terms:

“(1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.

(2) Where the court is of opinion that the application for review should be granted, it shall grant the same:

Provided”

11. It is clear therefore that in this instance an appeal lay as of right from the ruling delivered on 3rd March, 2021.

12. Now moving on to consider the merits of the motion, it has been repeatedly held that the power of the court to grant stay of execution pending appeal is discretionary. However, the discretion should be exercised judiciously. See **Butt v Rent Restriction Tribunal [1982] KLR 417**. The Applicant’s prayer for stay of execution pending appeal, is brought under Order 42 Rule 6 of the Civil Procedure Rules which provides that:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 subrule (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”.

13. The cornerstone of the Court’s jurisdiction under this rule is substantial loss and the court must determine whether the Applicant has

demonstrated the likelihood of suffering substantial loss if stay is denied. Put differently, the purpose of the jurisdiction to stay execution of a challenged judgment pending appeal is to prevent substantial loss being suffered by the party appealing, while protecting the rights of the decree holder. One of the most enduring legal authorities on the question of substantial loss is the case of **Kenya Shell Kenya Ltd v Kibiru & Another [1986] KLR 410** which the Respondents have cited. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the **Shell** case are especially pertinent. These are that:

“1.

2. In considering 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.

3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.

4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”

14. The decision of **Platt Ag JA**, in the Shell case, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Ag JA (as he then was) stated inter alia that:

“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 the 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 the two courts... (emphasis added)”

15. 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.” (Emphasis added).

16. 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 L J in Wilson -Vs- Church (No 2) (1879) 12ChD 454 at page 458 where he said: -

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that 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.”

17. By his affidavit in support of the motion the Applicant did not demonstrate how he stands to suffer substantial loss, and his appeal thereby rendered nugatory. The matter of substantial loss being one of fact should have been deposed to in the affidavit of the Applicant. The duty to substantiate such loss lies with the Applicant in the first instance. In the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] e KLR** the Court of Appeal stated that:

“This court has said before and it would bear repeating that while the legal 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 Applicant to know in detail the resources owned by a Respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example Section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

See also **Kenya Hotel Properties Limited vs. Willesden Properties Limited**, Civil Application No. 322 of 2006 (UR 178/2006)

18. The Applicant merely deposed in his affidavit that he would suffer “irreparable loss” without any attempt to demonstrate how the loss would arise if execution of the decree is to proceed. The substantiation is apparently contained in the submissions to the effect that the

Applicant may not recover any decretal amounts realized in execution, apparently because, the Respondents bear foreign names and likely, “*are not indigenous Kenyans*”. These matters belong to depositions in an affidavit and not to submissions. Nowhere in his affidavit does the Applicant assert that he will suffer substantial loss either from hardship in making payment or in the Respondents being incapable of refunding any sums if the appeal succeeds.

19. In the circumstances, the Court agrees with the Respondents’ submission that the Applicant has not demonstrated substantial loss. No judgment debtor can properly thwart a lawful execution on the mere basis that he will lose attached property attached or to be attached or otherwise that he will be compelled to satisfy the decree: such is the lawful purpose of execution proceedings. To succeed, he must demonstrate the likelihood that he stands to suffer substantial loss in its various forms. As stated in the **Shell** case, without evidence of substantial loss to an applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Moreover, the Court would in such circumstance find it difficult to justify the denial or delay of the decree holders’ right to the fruits of their judgment. The motion dated 11th March 2021 is without merit and is hereby dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 14TH DAY OF OCTOBER 2021.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr Thuita

For the Respondents: Mr Fundi h/b for Mr Mumma

C/A: Carol