



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. E087 OF 2021

ILIA KUTU.....APPELLANT/APPLICANT

VERSUS

MUTIE NZIOKI.....RESPONDENT

Appeal arising from the Judgement of Honourable G. O. Shikwe (P.M.) at Kithimani Principal Magistrate's Court Civil Case No. 389 of 2018 delivered on 19/05/2021

RULING

1. The **Appellant/Applicant** filed a Notice of motion dated 15/06/2021 seeking the following reliefs:

1. Spent

2. Spent

3. That there be stay of execution of the judgement or decree herein pending the hearing and determination of the appeal herein.

4. That costs of the application be provided for.

2. The application is supported by the grounds set out on the body thereof and by the affidavit of the Appellant/Applicant sworn on even date. The Appellant's case is that he has already lodged an appeal which is arguable and which will be rendered nugatory if stay orders are not granted. The Applicant further averred that he stands to suffer substantial loss if the orders are not granted as the Respondent is not a person of means who will not be in a position to refund the decretal sums in the event of success of the appeal. The Applicant finally stated that he is ready and willing to abide by any condition that may be imposed by the court.

3. The application was strenuously opposed by the Respondent who filed a replying affidavit dated 17/06/2021 in which he averred *inter alia*: that the Applicants appeal has no chances of success as he had been properly held as the beneficial owner of the motor cycle that had injured him; that the application is bad in law as it has been brought under Order 40 Rule 42 instead of Order 42 Rule 6 of the Civil Procedure Rules; that the Applicant has not satisfied the conditions set out under Order 42 Rule 6 of the Civil Procedure Rules; that the Applicant has not shown that he will suffer irreparable and substantial loss if the orders sought are not granted; that he is a person of means as he runs a business of buying and selling charcoal and has five (5) children and a wife who rely on him; that the Applicant's allegations that he is being supported by brothers is false as his father is deceased while his mother is aged and who relies on him for support and hence he is not a man of straw incapable of refunding the decretal sums in the event of success of the appeal; that should the court grant the prayer sought, then the entire decretal sum should be deposited into a joint interest earning account in the names of both Advocates; that this being a money decree the appeal cannot be rendered nugatory; that he stands to suffer prejudice as he will be denied access to the fruits of a lawful judgement entered in his favour; that the application should be dismissed with costs.

4. The application was canvassed by way of written submissions. The Appellant's submissions are dated 30/06/2021 while those of the respondent are dated 29/6/2021.

5. Mr. Mogusu for the Appellant/Applicant in his first part of the submissions dealt with the grounds of appeal by attacking the lower court's judgement which is rather premature as they should be reserved for the determination of the pending appeal. It was submitted that the Respondent will not manage to refund the decretal sums if they are paid as he is a person of no means who has failed to even present

evidence by way of bank accounts or M-pesa statements. It was also submitted that the application has been filed without unreasonable delay. It was also submitted that the Applicant is ready and willing to abide by any conditions to be imposed by the court. Finally, it was submitted that the application has a typing error regarding the provisions under which it had been brought where Order 40 Rule 42 had been indicated instead of Order 42 Rule 6 of the Civil Procedure Rules. Learned counsel urged the court to find that the mistake is excusable as the error does not go to the root of the application and that the same is saved by Order 2 Rule 14 of the Civil Procedure Rules that provides that no technical objection may be raised to any pleading on the ground of any want of form. Counsel urged the court to be guided by article 159(2)(d) of the Constitution that dictates that justice shall be administered without undue regard to procedural technicalities. The court was urged to use its powers under section 3 and 3A of the Civil Procedure Act to hear and determine the application on merit.

6. Mr. Uvyu submitted that the Respondent stands to suffer prejudice as he will be kept away from the fruits of a successful litigation and further that he is not a person of straw as he is a businessman dealing in buying and selling charcoal and is in a position to refund the decretal sums if the appeal succeeds. It was submitted that the Applicant has not shown that he will suffer substantial loss if the stay is refused. Finally, it was submitted that should the court be inclined to grant the stay sought then the entire decretal sums be deposited into a joint interest earning account in names of both advocates within a specific timeline.

7. I have considered the application as well as the submissions and authorities cited. The issue for determination are as follows:-

i. Whether the Appellant's application as drawn is defective for want of form and whether the same should be dismissed.

ii. Whether the Appellant has satisfied the conditions for the grant of an order of stay of execution pending appeal.

8. As regards the first issue, it is noted that the Appellant has predicted his application under Order 40 rule 42 of the Civil Procedure Rules. As rightly pointed out by counsel for the Respondent, the said provisions do not exist and hence *ipso facto* the application as drawn is defective for want of form. Learned counsel for the Appellant has urged the court to exercise discretion and save the application and be guided by section 3 and 3A of the Civil Procedure Act as well as Order 2 Rule 14 of the Civil Procedure Rules and Article 159(2) (d) of the Constitution. Learned counsel for the Appellant in his submissions indicated that he had meant to rely on Order 42 Rule 6 of the Civil Procedure Rules and not Order 40 Rule 42 of the said Rules. If the court were to put premium on technicalities, then this applications warrants an order for dismissal for being defective in nature. However, the Civil Procedure Act and Rules as well as the Constitution of Kenya, 2010 gives the court wide discretion to determine matters presented before it on merit and that the court will consider substance rather than form. Under Article 159 (2) (d) of the Constitution, the court in exercising judicial authority shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities. Again, section 3A of the Civil Procedure Act, 2010 provides for the saving of inherent powers of the court in that the court is vested with powers to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the court. Further, Order 2 Rule 14 of the Civil Procedure Rules provides that no technical objection may be raised to any pleading on the ground of any want or form. It is therefore clear that the above provisions have come to the aid of the Appellant. The issues raised by the Appellant regarding his quest for an order of stay of execution pending appeal are quite clear and unambiguous save only the provisions of the law under which it has been brought. I do not see any prejudice suffered by the Respondent if the application is sustained so that the matter can be determined on merit. Gone are the days when parties could ambush each other over shortcomings in the manner in which pleadings had been drawn and seek to get away on grounds of procedural technicalities as nowadays the practice is that each party should be given their day in court. I am therefore persuaded to overlook the Appellant's failure to cite the correct provisions of the law and proceed to admit the application for hearing on merits.

9. As regards the second issue, the Appellant is expected to satisfy the conditions imposed by Order 42 Rule 6(2) of the Civil Procedure Rules before an order of stay of execution pending appeal is granted and which are as follows:-

a. That the application has been made without unreasonable delay.

b. That security as the court orders for the due performance of the decree has been given by the applicant.

c. That substantial loss may result to the Applicant unless the orders sought are granted.

On the issue of whether the application was made timeously, it is noted that the impugned judgement was delivered on the 19/05/2021 while the present application was filed on 15/06/2021 which was still within the period provided for appeal. I am satisfied that the application has been filed without unreasonable delay.

On the issue of security, Appellant has undertaken to abide by conditions to be imposed by the court. Indeed, security for the due performance of the decree which may be binding upon the Appellant must be furnished. The Respondent on the other hand is of the view that he is being kept away from the fruits of the judgement. Granted that the Respondent's rights to enjoy the fruits of the successful litigation should be considered, the Appellant is also entitled to ventilate his appeal. As the Appellant has undertaken to furnish security for the due performance of the decree, I find that the Respondent's concerns have been taken care of. Upon the furnishing of security, the parties can then deliberate on the appeal and upon determination the Respondent can access the decretal sums if the appeal fails to succeed. An arrangement where the decretal sums are deposited into a joint interest earning account in names of both advocates pending determination of the appeal would best suit the parties appropriately.

Finally, on the issue of substantial loss to be suffered if the order for stay is not granted, the Appellant has averred that he stands to suffer great loss if he is ordered to pay the monies to the Respondent who is a person of straw and who would not have the means with which to refund the same in the event of success of the appeal. The Appellant further maintains that his appeal will be rendered nugatory if the order of stay is not granted. The respondent on the other hand maintains that the appellant has not presented evidence of substantial loss if the order sought is not granted. The Respondent further maintains that he is a person of means and is in a position to refund the decretal sums if the appeal succeeds as he is a businessman dealing in buying and selling charcoal. Looking at the rival claims herein, this court is in agreement that the appellant's right to pursue and ventilate his appeal must be realized and similarly the Respondent's right to enjoy the fruits of the judgement entered in his favour should not be curtailed without sufficient reasons. The Court of Appeal in the case of **Shell**

limited –vs- Kibiru & Another [1986] KLR 419 addressed itself regarding the issue of substantial loss when it held as follows:-

“.....substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without his evidence it is difficult to see why the Respondent should be kept out of their money”.

10. The Appellant has maintained that he stands to suffer substantial loss if he is ordered to pay the decretal sums even before his appeal is determined and which will be rendered nugatory. I am satisfied that the Appellant has furnished sufficient reasons to justify an order for stay of execution pending appeal. It is appropriate to preserve the subject matter of the appeal while at the same time the interests of the Respondent is taken into account by ordering the Appellant to deposit the decretal sums into a joint interest earning account in the names of both advocates. Indeed, learned counsel for the Respondent is not averse to such an arrangement.

11. In light of the foregoing observations, I find merit in the Appellant’s application dated 15/06/2021. The same is allowed in the following terms:-

a. An order of stay of execution of the judgement and decree in Kithimani PMCC No. 389 of 2018 is hereby granted pending determination of the appeal herein on condition that the Appellant deposits the entire decretal sums in a joint interest earning account in the names of both advocates within Fourty five (45) days from the date of this ruling failing which the stay shall lapse.

b. The costs of the application shall abide in the appeal.

It is so ordered.

DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER, 2021

D. K. KEMEI

JUDGE

DELIVERED AT MACHAKOS THIS 14TH DAY OF OCTOBER, 2021

G. V. ODUNGA

JUDGE