



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 19 OF 2020

CHARLES MWANGI GITUNDU.....APPELLANT/APPLICANT

VERSUS

CHARLES WANJOHI WATHUKU.....RESPONDENT

RULING

Brief facts

1. There are three(3) applications for determination herein dated 25th June 2021, 29th June 2021 and 31st August 2021. The applications dated 25th June and 29th June 2021 are both brought by the applicant under **Sections 1A, 3A and 63(e) of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules**. The first application seeks for orders of stay of execution of the decree issued in Nyeri CMCC No. 102 of 2014 pending the hearing and determination of a similar application filed in the Court of Appeal. The second application seeks for review of the orders issued by this court on 28th June 2021.
2. The respondent opposed the application of the applicant through Grounds of Opposition dated 10th July 2021 and a Replying Affidavit dated 15th September 2021.
3. The respondent' application dated 31st August 2021 is brought under **Sections 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule 15 of the Civil Procedure Rules**. It seeks for orders to set aside *ex parte* orders issued by this honourable court on 1st July 2021 for stay of execution of the decree in Nyeri CMCC No. 102 of 2014 pending the hearing and determination of the applications dated 25th and 29th June 2021 and the court of appeal application for stay of execution.
4. The respondent filed Grounds of Opposition and a Replying Affidavit both dated 15th September 2021 in opposition of the applicant's applications.
5. The three applications were consolidated by consent on 29/09/2021 to be heard together and to be disposed of by way of written submissions. For purpose of these applications, the appellant will be referred to as the "applicant" and the respondent as the "respondent"

The Applicant's Applications dated 25th and 29th June 2021

6. The applicant states that he filed an appeal against the decree in Nyeri CMCC No. 102 of 2014 as well as an application for stay pending appeal which the court struck out on 11th March 2021 on the basis that it was *res judicata*. Being aggrieved with this decision, the applicant has lodged this appeal and seeks for orders for stay pending the appeal. He further states that he has filed in that court an application No. E024 of 2021 that was certified urgent on 17th May 2021 but it has not been heard because there is a shortage of judges in the appellate court. This applicant also seeks to review the orders made by this court on 28th June 2021 which according to him contains a glaring and apparent error on the face of the record because the application dated 17th May 2021 was not filed in the instant court but in the Court of Appeal.
7. The applicant further states that the court erred in striking out his application because pursuant to **Order 42 Rule 6(1) of the Civil Procedure Rules** this court has original jurisdiction to hear and determine an application for stay pending appeal even if a similar application has been heard and dismissed by the court appealed from. The applicant relies on the case of **Kenya Women Microfinance Ltd vs Martha Wangari Kamau [2020] eKLR** and **Equity Bank Limited vs West Link Mbo Limited [2013] eKLR** to support his contention. Further, the applicant states that this court has jurisdiction to issue the orders sought even after refusing to grant stay. He refers to the cases of **Erinford Properties Ltd vs Chesire County Council [1974]2 ALL ER 448** and **Riccatti Business College of East Africa Ltd vs Kyanzia Farmers Company Ltd [2010] eKLR.**

8. It is the applicant's contention that he is apprehensive that he will be arrested because the respondent has already obtained warrants of arrest against him in the trial court and unless this court intervenes and issues orders for stay, the appeal will be rendered nugatory.

9. The applicant further states that the respondent has no ability or capacity to refund the decretal sum if the appeal succeed and that he is ready to furnish security by way of a bank guarantee should the court direct him to do so.

The Respondent's Case

10. It is the respondent's contention that the two applications dated 25/06/21 and 29/06/21 are frivolous, bad in law and a gross abuse of the court process as this court has no jurisdiction to grant stay pending an application for stay in the Court of Appeal. The applicant is playing ping-pong with the court as he knows he ought to have returned the motor vehicles but he did not return them to the respondent's father's estate and as such, the respondent states he was entitled to sue for loss of user.

11. The respondent argues that the applicant cannot keep saying that he is ready to deposit the decretal sum or give a bank guarantee without giving any details of such deposit or guarantee to guide the court on the order to make under **Order 42 Rule 6(2)(b) of the Civil Procedure Rules**.

12. The respondent states that the applicant has not met the threshold for review of any order of 28th June 2021 as there is no error worthy of consideration pursuant to **Section 80 of the Civil Procedure Act** and **Order 45 of the Civil Procedure Rules**. Moreover, the order made on 28th June 2021 is not capable of being stayed. As such, the respondent prays that both applications be dismissed with costs.

The Respondent's Application dated 31/08/2021

13. In regard to the application dated 31/08/2021, the respondent states that the appellant/respondent filed an application for stay of execution of decree in Nyeri CMCC No. 102 of 2014 which was dismissed by the trial court on 17th August 2020. The appellant then invoked the jurisdiction of the High Court as the appellate court and filed an application for stay under **Order 42 Rule 6 of the Civil Procedure Rules**. The High Court struck out the application and the appellant filed a Notice of Appeal dated 11th March 2021 to appeal against the negative order which the Court of Appeal is unlikely to grant orders for stay. As such, there is no second appeal to the Court of Appeal from a judgment on the appeal herein from the Chief Magistrate's decision of 18th May 2020.

14. The respondent argues that the substratum of the suit in the trial court and the instant appeal is a consent order dated 26th March 2009 in Nyeri HCSC No. 60 of 1997 where the appellant and the co-respondent as contemnors agreed to return properties to the estate of Wathuku Ngunge as ordered by the court in 2001. Further, the respondent/applicant sued for loss of user of the vehicles.

15. The respondent further states that the applicant has not satisfied the conditions for grant of stay of execution pursuant to Order 42 Rule 6 for he deponed that he was willing to deposit the decretal amount in a joint interest earning account as security yet there is no evidence in his applications dated 25th and 29th June 2021 that the decretal sum has been deposited or is available for deposit if the court so directs.

16. The respondent further states that the court has granted temporary order of stay on 1st July 2021 without jurisdiction either under **Order 42 Rule 6 or Order 45 of the Civil Procedure Rules**. It is only under **Order 42 Rule 6(6)** that a temporary injunction can be granted and not a temporary stay of execution. Further, the High Court can only grant stay in respect of a pending appeal in the High Court and not in respect of a pending application for stay in the Court of Appeal or pending the hearing and determination of the two applications. Moreover, the appellant has not annexed the application filed in the Court of Appeal to warrant the grant of stay of execution pending an application pending in the Court of Appeal. Further, no special circumstances have been demonstrated different from the circumstances that were before the trial court or the high court when the two courts declined to order stay of execution.

17. The respondent further states that the orders granted on 1st July 2021 were granted ex-parte without any reasonable justification for hearing the matter without involvement and participation of the applicant who has been unfairly kept away from the fruits of his judgment. Additionally, the appellant shall not suffer any substantial loss if the ex-parte orders are set aside. As such, the respondent prays that the court allows his application and dismisses those of the applicant dated 25th and 29th June 2021.

Applicant/appellant Response to the application dated 31/08/2021

18. The applicant reiterates what he deponed in his previous affidavits and states that while his application in the Court of Appeal was pending, the applicant obtained warrants of arrest and imprisonment and the appellant invoked this court's inherent powers and the jurisdiction conferred under **Section 3A of the Civil Procedure Act** and **Order 42 Rule 6 of the Civil Procedure Rules** and filed an application for stay. He further states that the said application was not certified urgent because of an apparent error on the face of the record which forced the applicant to file application dated 29th June 2021 for review of the order declining to certify the application dated 25th June 2021 as urgent and for grant of interim conservatory orders. On 1st July 2021, the court granted interim stay of execution pending hearing and determination of the two applications and the application before this court.

19. The applicant contends that if the respondent is aggrieved by the orders of 1st July 2021, he ought to file an appeal or seek review of the said orders.

20. The applicant further states that this court has the jurisdiction to grant the orders made on 1st July 2021. Further, that the instant court has jurisdiction to grant an injunction or stay of execution pending appeal even after dismissing an application for stay. The appellant contends that his appeal has high chances of success as the respondent's claim should have been dismissed because he did not prove the claim to the

required standard and that the claim was barred by the doctrines of *res judicata* and estoppel. Moreover, the applicant states that the respondent cannot refund the decretal sum which is colossal in the event the appeal succeeds. As such, the appellant prays that the application be dismissed.

The Applicant's Submissions

21. The applicant reiterates what he deposed in his affidavits and refers to the cases of **Kenya Women Microfinance Ltd vs Martha Wangari Kamau [2020]eKLR** and **Equity Bank Limited vs West Link Mbo Limited [2013]eKLR** to submit that the instant court has original jurisdiction to entertain an application for stay pending appeal even if the trial court dismissed a similar application. The applicant relies on **Article 165(3)(a) and (e) of the Constitution** and the cases of **Butt vs The Rent Restriction Tribunal [1979] eKLR** and **Kutima Investments Limited vs Muthoni Kihara & Commissioner for Mines & Geology HCC No. 990 of 1999 (unreported)** to support his contention. The applicant further submits that the rationale behind this unfettered discretion was explained in the cases of **Erinford Properties Limited vs Cheshire County Council [1974]2 ALL ER 448** and **Riccati business College of East Africa Ltd vs Kyanzia Farmers Company Ltd [2010]eKLR**.

22. It was further submitted that since he filed for stay pending appeal in the Court of Appeal under Rule 5(2)(b) of the Court of Appeal rules, it did not extinguish his right to seek stay under Order 42 Rule 6 in the instant court. The said application was served upon the respondent and is listed for hearing on 6th October 2021.

23. The applicant submits that his application dated 29th June 2021 is already spent because the court granted interim orders of stay on 1st July 2021. Suffice to say, the said application met the threshold for review under **Section 80 of the Civil Procedure Act** and **Order 45 of the Civil Procedure Rules**. As such, the court ought to deal with the application dated 25th June 2021.

24. The applicant further points out that on the contention by the respondent that no evidence of any application to the Court of Appeal has been exhibited to warrant grant of stay, the applicant states that the court was satisfied as to the existence of the application and if the respondent is aggrieved by the decision of the court he ought to prefer an appeal and not to file an application to set aside the orders.

25. On the issue raised by the respondent that the applicant did not satisfy the conditions for granting stay, the applicant contends that this court cannot sit on an appeal from its own decision and that the matter is before the Court of Appeal. The applicant therefore prays that the court allow his applications dated 25th and 29th June 2021 and dismiss the application dated 31st August 2021.

The Respondent's Submissions

26. The respondent reiterates what he deposed in his affidavits and relies on **Order 42 Rule 6 (1), (2) & (4) of the Civil Procedure Rules** and submits that the appellant did not annex any Notice of Appeal to show that he lodged an appeal or produce the application for stay which the appellants states is pending before the Court of Appeal. Further, the appellant did not furnish any security or show that he would suffer substantial loss if stay was not granted. In fact the appellant rehearsed the similar grounds as those he relied on in the previous applications for stay in the instant court and the trial court. As such, the appellant has not met the conditions for grant of stay under **Order 42 Rule 6**. He relies on the cases of **Kenya Shell Limited vs Benjamin Karuga Kibiru & Another [1986] eKLR**; **Machira t/a Machira & Co. Advocates vs East African Standard [2002] eKLR** and **Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR**.

27. Furthermore, the Civil Procedure Rules do not provide for a grant of temporary orders of stay of execution. If the court granted ex-parte orders of temporary stay of execution in exercise of its inherent powers, the court ought to have stated the exceptional circumstances if any that warranted the grant of such orders. The respondent referred to the case of **Civil Case No. 1001 of 1967 Ng'ang'a vs Kimani [1969] EA 67** to support his contention. Moreover, the respondent points out that the appellant did not seek for a temporary injunction as he demonstrated by the authorities he relied on. The jurisdiction of the instant court only allows it to grant a temporary injunction and not temporary stay of execution.

28. The respondent states that the appellant is not entitled to ex-parte orders made without material disclosure as he had agreed to return the properties of the estate of Wathuku Ngure which included two motor vehicles registration numbers KAE 625Y and KVV 690 pursuant to a consent order dated 26th March 2009. Thus the court ought not to have made the ex-parte orders dated 1st July 2021. The respondent relies on the case of **Civil Appeal No. 50 of 1989 Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] eKLR** to support his contention.

29. Making reference to the case of **Western College of Arts and Applied Sciences vs Oranga & Others [1976-80] 1 KLR** the respondent submits that the ruling of the court on 11th March 2021 is a negative order which is incapable of any orders for stay of execution. Thus the respondent prays that the court set aside the temporary orders of stay of execution granted on 1st July 2021.

30. It was further submitted that the application dated 25th June 2021 is a back door attempt to urge the instant court on an application it already dismissed on 11th March 2021. Thus any order of stay that this court grants will be inconsistent with the court's ruling of 11th March 2021. The respondent relies on the case of **Civil Application No. Nai 6 of 1979 Butt vs Rent Restriction Tribunal [1979] eKLR** to buttress his point. Further, it is not for this court to determine whether it was erroneous in striking out the application for stay, these arguments are for the Court of Appeal. The respondent refers to the case of **Machira t/a Machira & Co. Advocates vs East African Standard [2002] eKLR** to buttress his point.

31. The respondent argued further that a review under **Order 45 of the Civil Procedure Rules** and **Section 80 of the Civil Procedure Act** is possible where an appeal is allowed but no appeal is preferred or where no appeal is allowed. In the instant case, the applicant states that he filed an appeal against the decision by this court of 11th March 2021. Thus the orders for review are not available to the applicant. In that regard, the ex-parte orders granted on 1st July 2021 in respect of the applications dated 25th and 29th June 2021 ought to be set aside and

vacated. The respondents pray that the application dated 29th June 2021 be dismissed with costs.

Issues for determination

32. There are two issues for determination herein:-

- i. Whether the court has jurisdiction to entertain the applications dated 25th & 29th June 2021.
- ii. If the court finds it is possessed of the requisite jurisdiction, then it will proceed to determine the merits of the two applications.

The Law

Whether the court has jurisdiction to entertain the applications

33. The first application seeks for stay pending appeal filed in the Court of appeal. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-

“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.

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.

34. In Patrick Kalaya Kulamba & Another vs Philip Kamosu and Roda Ndanu Philip (Deceased) [2016] eKLR where Meoli J. held:-

“For the purpose of this case, the operational words are as underlined above. Thus, whether an application for stay pending appeal has been allowed or rejected in the lower court, the High Court “shall be at liberty....to consider” an application for stay made to it and to make any order it deems fit. The High Court in that capacity exercises what can be termed “original jurisdiction”. And from my reading of the rule, the jurisdiction is not dependent on whether or not a similar application had been made in the lower court, or the fate thereof....

So long as an appeal from the substantive decision of the lower court has been lodged, an application under Order 42 Rule 6(1) of the Civil Procedure Rules can be entertained afresh in the High Court. I believe that was part of the distinction that the Court of Appeal was making in the Githunguri Case concerning the court’s original jurisdiction vis-à-vis the appellate jurisdiction and the innovation behind Rule 5 (2)(b) (as it is now). The foregoing has a bearing on the interpretation of order 42 Rule 6(6) of the Civil Procedure Rules and in particular the highlighted phrased therein.

Similarly, the jurisdiction of the High Court in this case was invoked when the substantive appeal (itself a fresh pleading separate from the suit in the lower court) was filed. It is true that the application for stay of execution was allowed with conditions in the lower court. The wording in Order 42 Rule 6(1) however does not preclude the applicant from approaching this court as it has done.

I would venture to add that the wording of Order 42 Rule 6(1) of the Civil Procedure Rules effectively grants the same jurisdiction to this court as an appellate court as Rule 5 (2)(b) does to the Court of Appeal: to entertain an application for stay whether or not the same has already been heard by the lower court and dismissed. The only salient difference is that in the case of the High Court the rule makes it clear that it matters not whether the earlier application for stay in the lower court has been allowed or rejected in the lower court. That is my reading of Order 42 Rule 6(1).

It suffices, in my opinion, in this case, in view of the nature of the application before me, that there is an existing substantive appeal against the judgment in the lower court. To insist in this case that the applicant must first file a separate appeal on the ruling of the lower court, apart from the judgment would in my view not only lead to confusing the duplication of proceedings in respect of the same matter but also cause delay. The provisions however must be applied under the guiding principles of Article 159(2)(d) of the Constitution. “

35. The Court of Appeal has expressed itself on the application of Order 42 Rule 6(1) of the Civil Procedure Rules in both its original and appellate jurisdictions in several decisions, while considering its own Rule 5 (2)(b) which is essentially at pari materia with Order 42 Rule 6(1) of the Civil Procedure Rules.

36. Githinji JA held in Equity Bank Limited vs West Link Mbo Limited [2013] eKLR:-

“It is trite law that in dealing with Rule 5 (2)(b) applications the court exercise discretion as a court of first instance and even where a similar application has been made in the High Court or other similar court under Rule 6(1) of Order 42 of the Civil Procedure Rules and refused, the court in dealing with a fresh application still exercises original independent discretion as opposed to appellate jurisdiction. (Githunguri vs Jimba Credit Corporation Ltd No. 2 [1988] KLR 838.”

37. Musinga JA observed on the same question in his judgment and stated:-

“The court is said to be exercising special independent original jurisdiction because on considering whether to grant or refuse an application for stay, it is not hearing an appeal from the High Court decision. It can grant orders of stay, irrespective of whether or not such an application has been made in the High Court.”

38. Kiage JA in his judgment quoted a passage from the judgment of the Court of Appeal in Gurbux Singh Suiiri & Another vs Royal Credit Ltd Civil Application NAI 281 of 1995 expounding the court’s reflection in its dictum in the Githunguri case as follows:-

“In ordinary circumstances the court has only appellate jurisdiction and in the absence of Rule 5 (2)(b) a party who has been refused a stay of execution or an injunction by the High Court would have been obliged to apply to the Court of Appeal to set aside the refusal and then, having done so, to grant the stay or injunction....But because of the existence of Rule 5 (2)(b) one does not have to apply to the court to first set aside the refusal by the High Court and then having set aside the High Court order, to grant one itself. That is clearly the sense in which the expression ‘independent original jurisdiction’ is to be understood and that was made abundantly clear in the Githunguri case, supra, by use of the expressions such as “we have to apply our minds *de novo* or it is not an appeal from the learned Judge’s discretion to ours.”

39. The applicant has two applications for stay, one in the court of Appeal and another in the instant court both which seeks to stay execution of the decree in the lower court and the orders of this court granted on 11/03/21 and striking out the applicant application. Evidently, the applications filed herein are to a certain extent similar to the application which this court dismissed on 11th March 2021. Contrary to the submissions made by the applicant on where a party can file an application of stay whether in the trial court, the High Court or in the Court of Appeal, it is my considered view that this court cannot hear and determine an application similar to a similar one it had dealt with earlier. It is trite law that this court cannot sit on appeal of its own ruling or judgement for it already determined the issue of stay in its ruling delivered on 11th March 2021. The applicant ought to pursue his application for stay in the Court of Appeal.

40. Consequently, I find that this court lacks jurisdiction to entertain the applications dated 25th and 29th June 2021. Regarding the orders for stay granted in favour of the applicant and extended on 05/10/2021, my view is that by their interim nature, they expire upon delivery of this ruling. As we stand there are no orders to be vacated at this stage in regard to the application dated 31/08/2021.

41. The applicant prays for review or setting aside of this court’s orders issued on 28/06/21, In my view, there are no orders on record that would call for review or setting aside, save from directions declining to certify the application dated 25/06/2021 as urgent. Furthermore, the applicant has not placed any material before the court as required by the provisions of Order 45 of the Civil Procedure Rules to support his application. As such I find no substance or merit in the applicant’s application dated 29/06/2021.

42. As for the application dated 25/06/2021 seeking for stay of execution pending determination of the application before the court of appeal, I find that this application is misconceived and incompetent in that this court lacks jurisdiction to make any orders in respect of matters in the Court of Appeal which court ranks higher than the High Court.

43. In conclusion, it is my considered view that the respondents application dated 31/08/2021 and those of the applicants dated 25th and 29th June 2021 are hereby dismissed for lack of merit.

44. The respondent after being served with the applicant’s applications where interim orders had been issued decided to file his own application dated 31/08/2021 seeking to set the said orders aside. The respondent also had an option of filing a response to the two applications. Whichever way the respondent decided to go, costs were to be incurred and were indeed incurred in filing of the application dated 31/08/2021. For this reason, the respondent ought to be considered in awarding costs.

45. Consequently, the respondent will have the costs of these applications.

46. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 11TH DAY OF NOVEMBER 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 11th day of November 2021