REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. E085 OF 2021

(Coram: Odunga, J)

1. EDWARD GACHARI NJUKI

2. MUSTAF SAID-MOHAMMED

3. MOHAMEDSHAKUR.....APPELLANTS/APPLICANTS

=VERSUS=

AK (late a minor by FNO her next friend but having attained majority).....RESPONDENT

RULING

1. By a Motion on Notice dated 24th June, 2021, the Applicant herein substantially seeks an order for stay of execution of the judgement/decree herein (sic) pending the hearing and determination of the Applicants/Appellant's Appeal filed at the High Court of Kenya at Machakos as Civil Appeal No. 85 of 2021. They further seek the unconditional setting aside or lifting of the warrants of attachment and sale issued on 15th June, 2021 and proclamation or any form of advertisement or sale of the Defendant's proclaimed properties.

2. According to the applicants, on 3rd February, 2021 judgement was entered against the Appellant/Applicant in the sum of Kshs 255,000/- being general and special damages and being dissatisfied with the said judgement, they instructed their advocates to appeal against the same . They also applied for stay of execution pending the said appeal before the trial court which application was heard and they were ordered to deposit half of the decretal sum in a joint interest earning account and pay the other half to the Respondent within 21 days.

3. Aggrieved by the said ruling they instructed their advocates to appeal against the said ruling hence the instant appeal which they believe is arguable and has high chances of success. In the meantime, the Respondent has embarked on the process of 3xecution and has issued warrants of attachment and sale of the Applicants' properties.

4. According to the Applicants the judgement is for substantial amount and they are apprehensive that if paid out the same may be dealt with in a manner prejudicial to the Applicant and should the appeal succeed, the Applicants may not be able to recover the same from the Respondent.

5. It was averred that the application was made without undue delay and that no prejudice is likely to be occasioned to the Respondent since the Applicants' insurance company was ready and willing to comply with the conditions that the court may impose including furnishing security in form of a bank guarantee.

6. According to the Applicants the application was made in good faith and it was in the interest of justice that the same be granted.

7. In opposing the said application, the Respondents filed grounds of opposition in which they averred, *inter alia*, that :

1. THAT the Applicants' application is:

a) Frivolous, incompetent and vexatious.

b) Bad in law.

c) Incurably defective.

d) An abuse of the court process.

e) An afterthought and brought in bad faith.

f) Brought after inordinate delay.

g) Res Judicata

2. THAT the Application is solely aimed at frustrating the process of execution from its timing as the application was only fled after proclamation was done.

3. That the Applicants are guilty of laches and there should be an end to litigation.

4. That the Applicants are vexatious litigants as can be seen from the litany of applications seeking the same orders after disobeying the previous ones in Kithimani PMCC No. 241 of 2015.

Determination

8. I have considered the application, the affidavits in support of and in opposition to the application as well as the submissions made.

9. Order 42 rule 6(1) and (2) of the ***Civil Procedure Rules*** provides as follows:

> ***6(1). (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.***
>
> ***6(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.***

10. In this case, the applicants are appealing against the conditional stay of execution pending appeal granted by the trial court. What they seek is the stay of execution of the original judgement pending, not an appeal against the judgement, which they are appealing against in another appeal, but pending another appeal arising from the grant of stay pending the said appeal conditionally.

11. However, a reading of the above cited legal provision clearly shows that a party who is unhappy with the refusal to grant stay by the trial court or by the conditions for the grant thereof is at liberty to apply to the Court to which an appeal lies for stay of execution pending an appeal. In other words, a party aggrieved by the conditions upon which an order for stay is granted need not lodge an appeal against the same but is at liberty to move the appeal court for the same orders and such an application is to be determined by the appellate court in the exercise of its original jurisdiction since the operating statement in the above cited provision is:

> ***"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."***

12. In **Stanley Karanja Wainaina & Another vs. Ridon Anyangu Mutubwa [2016] eKLR,** I was held that:

> **"Counsel for the Respondent submitted on the provision of Order 42 Rule 6 (1) of the Civil Procedure Rules and argued that the Appellants had been granted a stay of execution by the trial court and in bringing the present application it was an abuse of the court process. In my view, Order 42 Rule 6(1) allows a party to file another application for stay of execution in the High Court whether the application for such stay shall have been granted or refused by the court appealed from. I appreciate the argument by the learned counsel and this court shares the same sentiment in that once an application has been dealt with by a court of competent jurisdiction and between the same parties, a similar application cannot be filed before another court as that would be an abuse of the court process or at best, *res judicata.* Unfortunately, that legal provision is part of our laws and until the same has been amended, we have no choice but to live with it as it is."**

13. Similarly, in **Patrick Kalava Kulamba & Another vs. Philip Kamosu and Roda Ndanu Philip (Suing as the Legal Representative of the Estate of Jackline Ndinda Philip (Deceased) [2016] eKLR** it was held by **Meoli, J** that:

"12. For the purposes 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…

[17. 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.

18. 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.

19. 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).

20. 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 of 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 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 15 9 (2) d) of the Constitution.

21. In the circumstances of this case, I consider that driving the Applicant from the seat of justice when there exists a substantive appeal, and in disregard of the full import of Order 42 Rule (6) (1) would amount to raising a technicality, namely, the filing of an appeal on a supplemental matter that actually touches on the appeal where a substantive appeal already exists, above purpose and substance. There may arise in certain cases allegations of abuse of procedure but that must be established."

14. In arriving at its decision the Court relied on **Equity Bank Limited vs. West Link Mbo Limited [2013] eKLR,** where it was held by **Githinji, JA** that:

"[13] 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 –Versus- Jimba Credit Corporation Ltd. (No. 2) [1988] KLR 838."

15. In his judgment **Musinga, JA** observed on the same question that:

"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 had been made in the High Court. (See Stanley Munga Githunguri –Vs- Jimba Credit Corporation Ltd (Supra)."

16. **Kiage, JA** in his judgment quoted a passage from the judgment of the Court of Appeal in **Gurbux Singh Suiri & Anor. –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."

17. In my view where there is an avenue prescribed by law other than an appeal for seeking remedies, to ignore the same and seek a more time consuming process of an appeal may well amount to an abuse of the process of the Court. This is akin to what the Court of Appeal stated in in **Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425,** where it held that;

"there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."

18. On that ground alone, I decline to exercise my discretion in favour of the Applicants herein as a form a dim view of the prospects of success of this appeal.

19. Apart from that there is no basis for forming the view that the Respondent will not be able to refund the decretal sum if the same is paid over to him. The law is that where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the applicant any sums paid in satisfaction of the decree. See **Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.**

20. In my view even if it were shown that the respondent is a man of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person's right to enjoy the fruits of his success. As was held in **Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991,** financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income.

21. I therefore agree with the opinion expressed in **Bungoma High Court Misc Application No 42 of 2011 - James Wangalwa & Another vs. Agnes Naliaka Cheseto** that:

> **"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. This is what substantial loss would entail.''**

22. In the circumstances of this case the conduct of the applicants of seeking to appeal against a decision which they would have simply dealt with by invoking this Court's original jurisdiction, does not lend itself to favourable exercise of discretion in their favour. Further, the applicants have failed to place before me by way of satisfactory evidential means, material on the basis of which I can find that the applicants stand to suffer substantial loss unless this application is granted.

23. Before concluding this matter, it is noted that in this application, the Applicant seeks an order for stay of execution of the judgement/decree herein (sic) pending the hearing and determination of the Applicants/Appellant's Appeal filed at the High Court of Kenya at Machakos as Civil Appeal No. 85 of 2021. The matter before me is an appeal and there is no judgement which can be the subject of an application for stay pending an appeal. Counsel ought to take care to ensure that the application as drawn is capable of being granted. Even if I were to grant the application in the manner the prayers are sought, it would not assist the applicants. The applicants ought to have set out the particulars of the case whose judgement is sought to be stayed on the face of the application otherwise the application may well be rendered incompetent on that score alone.

24. In the premises this application has failed to meet the threshold for grant of stay of execution pending appeal. The same is hereby dismissed with costs.

25. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 8TH DAY OF NOVEMBER, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Mukami for Miss Achoki for the Appellant

Miss Kyalo for Miss Mutunga for the Respondent

CA Susan