



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CIVIL APPEAL NO. 104 OF 2019

EVANS JULIUS OYINDI .....1<sup>ST</sup> APPELLANT

JOHN MUJUMBE AKETCHI.....2<sup>ND</sup> APPELLANT

VERSUS

FREDRICK SIMIYU.....RESPONDENT

RULING

By an application dated 17<sup>th</sup> May, 2021 the appellants/applicants seek;

- a. **Temporary stay of execution of the court's decree and judgement in Bungoma CMCC No. 199 of 2010 pending the hearing and determination of the application inter parties.**
- b. **Temporary stay of execution of the court's decree and judgement in Bungoma CMCC No. 199 of 2010 pending the hearing and determination of the appeal.**
- c. **Costs of the application.**

The application is supported by the affidavit of the appellant who depones that judgement was delivered on 4/10/2019 and the respondent awarded general damages, among other awards. Dissatisfied by the award, he filed this appeal and requested for typed proceedings which he says have not been supplied.

He depones that on 22/2/2021, a warrant of arrest was issued against him and fears that if arrested, he will suffer irreparable loss as he is sickly and his appeal will be rendered nugatory. He depones that he is ready to deposit in court security.

The application is opposed. The respondents filed a replying affidavit sworn on 24<sup>th</sup> May, 2021 by the respondent. He depones that a similar application had been filed in the subordinate court and the same was dismissed with costs and the warrants of arrest are still pending in the subordinate court. He depones that he is a person of means having retired from Telcom Kenya and can therefore pay the decretal sum if the appeal finally succeeds.

He depones that the applicants have not explained the delay of over 1 year before the instant application was filed. That the appellants have a pending criminal case in the subordinate court where the 1<sup>st</sup> appellant is currently in detention after his bond was cancelled while the 2<sup>nd</sup> appellant is on the run therefore not deserving of the orders sought.

He depones that the 2<sup>nd</sup> appellant's conduct in the lower court matter demonstrates that he does not respect any court order and therefore non-deserving of the orders of this court.

The application was canvassed by way of written submissions. Mr Makokha for the appellants submitting on Order 42 Rule 6 and the case of *Vishram Ravji Halai Vs Thornton & Turpin (1990)KLR* and *Victroy Construction Vs BM (Minor suing through next friend PMM) Civ. Appeal 19/2019* asserts that the 3 conditions to be met by the applicant are; establishment of a sufficient cause, satisfaction of substantial loss, furnishing of security and that the application must be made without unreasonable delay.

On substantial loss, counsel submits that the 2<sup>nd</sup> appellant is sickly and the conditions in jail in the current state of Covid 19 pandemic is deplorable. He relies on the authorities in *John Gachanja Mundiā Vs Francis Muriira Alias Francis Muthika & Another (2016)eKLR*, *Century Oil Trading Company Limited Vs Kenya Shell Limited Civil Appeal 1561/2007*, *Samvir Trustee Limited Vs Guardian Bank*

On the requirement for security, counsel submits that the 2<sup>nd</sup> appellant has offered his title deed as security for the due performance of the decree. In support, he cites the cases of *Absalom Dova Vs Tarbo Transporters (2013)eKLR*, *Mwaura Karuga T/A Limit Enterprises Vs Kenya Bus Services Ltd (2015)eKLR*, *Gianfranco Manenthi & Another Vs Africa Merchant Assurance Company Ltd (2019) eKLR*, *Arun C. Sharma Vs Ashana Raikundalia T/A Raikundalia & Co. Advocates & 2 Others (2014) eKLR* and *Focin Motorcycle Co. Ltd Vs Ann Wambui Wangui & Another (2018)eKLR*.

On his part, the respondent submits that the applicants have not met the requirements of Order 42 Rule 6 of the Civil Procedure Rules and the application must therefore fail. Counsel points out that a period of more than I and half years has lapsed between the delivery of judgment and the lodging of the application which period is excessive and contrary to the provisions of Order 42. That the explanation that Covid 19 prevented them is a hollow explanation as practice directions were issued by the chief Justice vide Gazette Notice No. 3137. Reliance has been put on *Antoine Ndiaye Vs African Virtual University (2015)eKLR*.

Counsel also points out to the applicants' conduct in Bungoma Criminal Case No. 57/2008 where the respondent is the complainant and submits that they have no respect for court processes and therefore non-deserving of the orders sought. Counsel relies in the case of *Mohamed Shally Sese (Shah Sese) Vs Fulson Company Ltd & Anor (2006)eKLR*.

This court is of the considered view that the issue arising is whether to grant stay of execution pending the hearing and determination of this appeal. It is trite law that in applications of such kind; the provisions of **Order 42 Rule 6 of the Civil Procedure Rules 2010** apply. It provides;

**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.**

**2. No order for stay of execution shall be made under subrule (1) unless**

**i. 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;**

**ii. 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.”**

Ordinarily in such application, the Applicant must:- **(a)**, demonstrate that if the order for stay is not granted, he might suffer substantial loss, **(b)**, show that the application has been filed without unreasonable delay and; **(c)**, the Applicant has offered security for the due performance of any decree or order that may be binding on him.

It is also trite law that in such applications, the court is normally called upon to exercise its discretion which must be exercised judicially at the instance of the deserving party as was enunciated in *Butt Vs Rent Restriction Tribunal (1979) eKLR* wherein Madan JA held;

**It is the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory .**

The applicant is duty bound to adduce sufficient reasons to convince the court that there exists grounds to grant stay since a mere filing of an appeal does not guarantee one stay of execution. The court must also balance the interests of all the parties. Balancing the applicant's right to exhaust all the legal avenues available and considering the respondents entitlement to the fruits of judgement. The applicant ought not to be chased from the seat of justice.

In the instant case, the applicant states that a warrant of arrest has been issued against the 2<sup>nd</sup> appellant for the payment of Kshs 1, 850, 078/= and is apprehensive that he might be thrown into jail anytime if the court does not issue stay orders. The respondent depones that the applicants' conduct in the subordinate disentitles them from the orders. This court must balance these rights in such a way that the appellants' appeal may be rendered nugatory.

Taking into account material placed before this by the parties and in the interests of justice, I make the following orders.

1. The applicant is hereby granted an order of stay of execution on condition that half the decretal sum; that is, Kshs 925, 039/= is deposited in court within **30 days** from the date hereof failure of which this order lapses.
2. The appellants to prepare and serve the Record of Appeal within **30 days** from the date hereof.
3. The costs of this application shall abide the outcome of the intended appeal.

Orders accordingly.

**DATED AT BUNGOMA THIS 5<sup>TH</sup> DAY OF NOVEMBER, 2021**

**S. N. RIECHI**

**JUDGE**