



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 38 OF 2018

JAMES MUTHOMI NJERU (Suing as Legal Representative

of the estate of the late **AGNES TIRINDI NJERU**).....**APPLICANT**

VERSUS

JOSEPH ERASMUS MUGO Alias **JOSEPH MUGOH**.....**RESPONDENT**

RULING

1. The matter for determination before this court is a notice of motion dated 12.08.2021 in which the applicant seeks the following orders;

i.spent.....

ii.spent.....

iii. *That pending the filing, hearing and determination of the applicant's intended application for stay in the Court of Appeal, a stay of execution of the judgment/decree of the Honourable Lady Justice C.W. Githua and all incidental and consequential orders and proceedings hereto be and is hereby issued or granted.*

iv. *That pending the filing, hearing and determination of the applicant's intended application for stay in the Court of Appeal, this Honourable Court be pleased to set aside the warrants of attachment and the Notice of Proclamation dated 09.08.2021 issued in Siakago PMCC No.30 of 2017.*

v. *That this Honourable Court be pleased to lift/set aside the warrants of attachment issued on 23.07.2021 and Proclamation Notice dated 09.08.2021.*

vi. *That this Honourable Court be pleased to restrain the appellant and/or his agents from attaching, repossessing, selling by public auction or otherwise or in any other manner interfering with the operations of the applicant in respect to this suit pending taxation of Auctioneers' Bill of costs.*

vii. *That the application be heard inter partes on such date and time as this Honourable Court may direct.*

2. The application is supported by the affidavit of Joseph Erasmus Mugo, the applicant herein and sworn on 12.08.2021 in which he reiterates the grounds as set out on the face of the notice of motion and further avers that should execution issue and the appeal succeeds, it will be rendered nugatory and a mere academic exercise and the applicant stands to suffer great prejudice.

3. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory if the appellant succeeds.

4. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

5. The court in exercising the discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case are that the respondent has a right to enjoy the fruits of his judgment and the appellant has an undoubted right of appeal.

6. The said application is opposed by the respondent via his replying affidavit sworn on 10.09.2021 to the effect that it is incompetent in law, mischievous, misleading; that the notice of appeal at the High court registry was lodged on 15.04.2021 and that the application is an abuse of the court process.

7. The parties took directions to have the application disposed off by way of written submissions which I shall summarize as follows;

8. The applicant submitted that the respondent having been awarded general damages, costs and interests by this court and having failed to furnish this court with any documentary evidence to prove his financial standing; he is apprehensive that if the respondent is paid the decretal sum, he might not be able to refund the money to the applicant should the appeal succeed.

9. That there was no unreasonable delay in filing this application and the applicant is ready, willing and able to furnish the court with a bank guarantee of a reasonable amount to secure the decretal sum. The applicant urged this court to allow the application.

10. Reliance was placed on the case of **Focin Motor Cycle Co. Limited Vs Ann Wambugu Wangui & Another [2018] eKLR** and further **Butt Vs Rent Restriction Tribunal [1979]**.

11. The respondent inter alia submitted that judgment was delivered on 18.03.2021 in which the High Court overturned the lower court decision. That the applicant lodged his notice of appeal on 15.04.2021 at the high Court in contravention of the mandatory provisions of the Court of Appeal Rules, 2010.

12. Further that the notice of appeal was not served upon the respondent until 12.05.2021 and that till the time the submissions were done, the respondent had not received the record of appeal from the applicant despite the 60 days period within which to file and serve the record of appeal having lapsed since the lodging of the notice of appeal. That the respondent having not received any record of appeal from the applicant commenced execution process.

13. He urged this court to dismiss the application and allow him to execute the judgment since the application lacks merit and deserves to be dismissed with costs. Reliance was placed on the case of **Solome Naliaka Wabwile Vs Alfred Okumu Musinaka [2021]**.

Analysis and Determination

14. I have considered the applicant's application, the submissions and authorities, as well as the reasons given for and against the said application. The law governing stay of execution pending appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

6.(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 —

(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.

15. The respondent has urged this court to disallow the application he be allowed to execute the judgment since the application lacks merit and deserves to be dismissed with costs. In this case, all that the applicant needs to show are the three grounds set out under Order 42 rule 6 of the Civil Procedure Rules since the merits of the appeal shall be dealt with by the Court of Appeal.

16. There are three conditions for granting of stay order pending appeal under Order 42 Rule (6)(2) of the Civil Procedure Rules to which;

i. The court is satisfied that substantial loss may result to the applicant unless stay of execution is ordered;

ii. The application is brought without undue delay; and

iii. 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 applicants.

17. The requirements for grant of stay pending appeal were set out in **Butt v Rent Restriction Tribunal [1982] eKLR 417** wherein the Court of Appeal held that:

The power of the court to grant or refuse an application for a stay in such a way as not to prevent an appeal.

18. On the first condition of proving that substantial loss may result unless stay order is made, the Court of Appeal in the case of **Mukuma v Abuoga(1998) KLR 645** held that substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory. It was therefore incumbent upon the applicant to demonstrate the kind of substantial loss he would suffer if the stay order is not made in his favour and not merely stating that he would suffer loss if the order of stay is not issued.

19. I have considered the submissions of both the parties herein and find that there is no contestation that judgment was entered for the appellant/respondent on 09.03.for Kshs. 3,911,780/= plus costs and interests.

20. In an application of this nature, the applicant should show the damages he would suffer if the stay order is not granted since by granting stay, it would mean that the status quo should remain as it were before the judgment. The applicant has argued that he is apprehensive that if the appellant is paid, he may not be able to refund the money if the appeal succeeds. It is equally important that the respondent herein should rebut the allegation that if paid the money, he might not be in a position to refund the same.

21. In the case of **National Industrial Credit Bank Limited v Aquinas Francis Wasike Misc Application 238 of 2005**, the Court of Appeal was of the view that the evidential burden lies with the decree holder to prove that he has resources to pay back the decretal sum should appeal succeeds.

22. It should be noted that the right to be heard is provided for in our constitution. The applicant having expressed his intention to be heard, it is paramount that he be granted the opportunity. This is buttressed by Article 50 of the constitution which provides:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

23. On the second condition, there is no contestation that the judgment of this court was delivered on 18.03.2021. The application herein was filed on 12.08.2021 which is more than five months from the date of the said judgment. In my view, the applicant should not be shut out since the orders sought depend on the discretion of this court. In the case of **Jaber Mohsen Ali & Another v Priscillah Boit & Another E & L No. 200 of 2012 [2014] eKLR**, the court stated that what is unreasonable delay is dependent on the circumstances of each case. Even one day could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the circumstances of the instant case, it is my view that the delay herein is not inordinate or excessive.

24. From the record, the decree whose stay of execution is sought is a monetary decree. The applicant deposed that the intended appeal will be rendered nugatory if the stay is not granted; he proceeded to submit that he is apprehensive that if the orders of stay are not granted, he will suffer irreparable damage. Further, that the respondent has threatened to execute the impugned judgment and has taken out warrants of attachment and has already instructed Bealine Auctioneers to execute the same and that the auctioneers have already served a proclamation notice which was set to lapse on 15.08.2021. He further submitted that he may not be able to recover his money in the event he is successful in the intended appeal as the respondent has not demonstrated that he is a person of means.

25. The court has a duty not to deny the judgment debtor the fruits of his judgment and equally the applicant his right of appeal as enunciated in Article 50(2)(q) of the Constitution which states that;

2).....to appeal to, or apply for a review by, a higher court as prescribed by law.

26. In the same breadth, the court in **Century Oil Trading Company Limited Vs Kenya Shell Limited Nairobi [2008] eKLR** held the view that: -

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful to the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

27. From the depositions on record, the issue at hand calls for status quo pending the filing, hearing and determination of the applicant's intended application for stay in the Court of Appeal. Indeed if the respondent is left to execute the decree, it is my view that this will complicate the situation further if the appeal succeeds. The rationale of my view is supported by the fact that the applicant has offered to furnish security by way of Bank guarantee.

28. That being the case, and in balancing the rights of the parties herein, the balance favours the applicant. The respondent will not suffer prejudice which cannot be compensated by way of costs as in most cases, costs are awarded to the winning party.

29. As such, the applicant having offered to provide security, it has satisfied the third condition for grant of stay of execution of the decree of the trial court.

30. In view of the foregoing, I allow the application in the following terms;

i. That pending the filing, hearing and determination of the applicant's intended application for stay in the Court of Appeal, a stay of execution of the judgment/decreed of the Honourable Lady Justice C.W. Githua and all incidental and consequential orders and proceedings hereto be and is hereby issued or granted.

ii. That the applicant to execute bank guarantee securing the whole decretal sum. The same to be executed within 30 days from today.

iii. That failure to comply with order (ii) above, the respondent shall be at liberty to execute the said judgment delivered on 18.03.2021.

iv. That the cost of the application shall abide the outcome of the application for stay to be filed before the Court of Appeal.

31. It is so ordered.

Delivered, dated and signed at Embu this 17th day of November, 2021.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent