



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. E010 OF 2021

MARGARET WANGARI WANDIRIANI.....1ST APPELLANT/APPLICANT

PETER SWAKALA WANDIRIANI.....2ND APPELLANT/APPLICANT

VERSUS

PETER WANGUNGU MUCHIRI (Legal representative of the Estate of JEHOSEPHAT WANJOHI WANGUNGU

alias JOSEPHAT WANJOHI

WANGUNG (Deceased).....RESPONDENT

RULING

Brief facts

1. The application for determination dated 13th April 2021 is brought under **Sections 28, 95, 1A, 1B and 3A of the Civil Procedure Act** seeking for orders for stay of execution of the decree in Nyeri Chief Magistrate Court CMCC No. 365 of 2018 pending the hearing and determination of the appeal.
2. In opposition of the said application, the respondent has filed a Replying Affidavit dated 12th May 2021.

The Applicants' Case

3. It is the applicants' case that judgement was delivered on 17/03/2021 and being aggrieved by the decision of the magistrate, the applicants through their insurance APA Insurance Company Ltd gave instructions for lodging this appeal. Moreover, the trial court granted stay of execution which has expired and the applicant is apprehensive that unless stay is granted by this court, the respondent will execute the decree at any time.
4. The applicants contend that the appeal raises arguable issues with high chances of success and if stay of execution is denied it shall render the intended appeal nugatory and the applicants will suffer irreparable harm as they will have to pay the sum of Kshs. 1,078,620/- plus costs. Further, the applicants state that the respondent is not in a financial position to refund the sum if the appeal succeeds.
5. The applicants state that they shall suffer substantial loss as their goods are likely to be attached and sold by public auction if the decree is executed. Furthermore, the insurance company, is ready and willing to offer security for the decretal sum and is ready to abide by any condition that may be set by the court. Moreover, the respondent will not be prejudiced as he will have security of the decretal sum in the event the appeal is not successful and he will enjoy the fruits of his judgment as the money shall accrue interest.

The Respondent's Case

6. It is the respondent's case that the application is frivolous, vexatious, an abuse of the court process and has no substance as the threshold for granting the orders has not been satisfied.
7. The respondent contends that he is not a man of straw as he is an employee of Kagumo High School and as such can refund the decretal sum if paid to him. He believes that no loss will be suffered by the applicants if the entire decretal sum is paid to him.
8. The respondent argues that the applicants' intention is to deny him the fruits of his litigation. As such, he prays that the application is dismissed with costs.

9. Parties hereby disposed of the application by way of written submissions.

The Applicants' Submissions

10. The applicants reiterate what they have stated in their application and submit that the decretal sum is colossal and the respondent has not filed an affidavit of means to verify that he is in a financial position to pay back the decretal sum if paid to him. The respondent has stated that he is an employee of Kagumo High School but he has not stated in what capacity he is employed in the institution to prove that he has the capacity to refund the decretal amount if the appeal succeeds. The applicants state further that he has not attached any proof that he is an employee of the said institution. The applicants thus urge the court to grant their prayer to have the decretal amount deposited in a fixed joint interest earning account in the names of the advocates on record for the parties.

11. The applicants rely on the cases of **Mombasa HCCA No. 82 of 2012 Abraham Mwangi vs Ahmed Ibrahim** and **Mombasa HCCA Misc. Application No. 40 of 2013 Gyka Fuel Mart Ltd vs Bwana Mshiri Sungura** and submit that they are willing to offer security for due performance of the decree and abide by any conditions set by the court.

12. The applicants further submit that they have filed their application timeously and if there is any delay in filing this application the same was not inordinate. They rely on the cases of **Mohammed Abbas M. Somji vs James Japheth Otieno [2009] eKLR** and **Devki Steel Mills vs Robert Aputo Amariati [2014] eKLR** to support their contention.

13. The applicants state that no prejudice shall be suffered by the respondent that cannot be compensated by way of costs.

The Respondents' Submissions

14. The respondent submits that the applicants have not met the threshold for grant of orders for stay of execution pending appeal as provided for in **Order 42 Rule 6 of the Civil Procedure Rules** and the case of **Antione Ndiaye vs African Virtual University [2015] eKLR**. The applicants have merely stated that they shall suffer substantial loss but they have not demonstrated the magnitude of loss they are likely to suffer. The respondent relies on the cases of **Kerugoya HCC Misc. Application No. 11 of 2017 Kinyunjuri Muguta vs Wotuku Muguta; Kitui HC Misc. No 55 of 2018 Collins Musyoka Mutuku vs Miriam Nzula and Machakos HCCA No. 26 of 2017 Shadrack Mutuku Musili vs Jonathan Nzioka Nzuki** to buttress his point.

15. The respondent states that the applicants have not proved that there exists a threat to levy execution as they have not attached a decree to indicate that any threat exists.

16. The respondent further submits that in the event the court allows the application, the court ought to direct that half the decretal amount be paid to him and the other half be deposited in an interest earning account in the joint names of the advocates within thirty days from the date of the order. He makes reference to the case of **Makueni High Court Civil Appeal No. 159 of 2018 Francis Kakeu Muunda vs Josephine Mulinge Kiluu & Another.**

17. The respondent contends that he is not a man of straw as he is an employee of Kagumo High School and he is able to refund the decretal amount if the appeal succeeds. He states that he has a valid judgment and ought not to be denied the fruits of his litigation.

18. The respondent relies on the case of **Mombasa HCCA No. 175 of 2002 Stephen Bernard Oduor vs Afro Freight Forwarders** and **Order 19 Rule 3 of the Civil Procedure Rules** and submits that the supporting affidavit to the application is sworn by Linda Chorio who is a stranger to this suit. She is not the applicant and therefore cannot depone to information privy to the applicants without proof of authority to depone the same. The respondent prays that the instant application be dismissed with costs.

Issues for determination

19. After careful analysis, the main issue for determination is whether the applicants have met the prerequisite for grant of stay of execution pending appeal.

The Law

20. The principles upon which the court may stay the execution of orders appealed from are well settled. **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.

21. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant must satisfy the court that:

1. Substantial loss may result to him unless the order is made;
2. That the application has been made without unreasonable delay; and
3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

22. These principles were enunciated in **Butt vs Rent Restriction Tribunal [1979]** the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-

- a. **The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.**
- b. **Secondly, 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 should the appeal court reverse the judge's discretion.**
- c. **Thirdly, 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.**
- d. **Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.**

Substantial loss

23. It is trite law that an applicant must clearly state what loss, if any, he/she stands to suffer. This principle was enunciated in the case of **Shell Ltd vs Kibiru and Another [1986] KLR 410 Platt JA** set out two different circumstances when substantial loss could arise as follows:-

“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages....It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts....”

The learned judge continued to observe that:-

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.

Earlier on, Hancox JA in his ruling observed that:-

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would...render the appeal nugatory.

This is shown by the following passage of Cotton LJ in Wilson vs Church (No.2) (1879) 12 ChD 454 at page 458 where he said:-

“I wish to state my opinion that when a party is appealing, exercising his undoubtedly right of appeal, this court ought to see the appeal, if successful, is not rendered nugatory. “

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

24. The applicants state that they stand to suffer substantial loss as the decretal sum is colossal and if the respondent is paid the said sum, he is not in a financial position to refund the same if the appeal succeeds. The respondent, on the other hand, denies being a man of straw and states that he is an employee of Kagumo High School and is therefore financially capable of refunding the decretal sum. Courts of law have

determined that a mere claim that the respondent cannot refund the decretal sum is not sufficient. There must be reasonable grounds provided by the applicant to show that the respondent cannot make refund of the decretal sum after which the respondent will be called upon to discharge. Though the respondent in this case stated that he is employed by Kagumo High School, he did not provide evidence to show his financial capabilities by attaching his pay slip or by filing an affidavit of means. Notably, he did not disclose in which capacity he is employed in the said school. Employees of any given institution fall in different job grades or categories and earn different incomes. As such the applicant was obligated to disclose further and better particulars of his income.

25. In my view, the applicant has demonstrated substantial loss while the respondent has to some extent mitigated the said loss by his willingness to refund. The fact that the respondent is employed has not been denied though his income remains unknown.

The application has been made without unreasonable delay.

26. Judgment herein was delivered on 17/3/2021 and the applicant and stay was granted for a period of thirty days. The instant application was filed on 5th May 2021 which is around 18 days out of the statutory time. Notably, the applicants have not stated any reasons for the delay. However, I find that the delay of 18 days is not inordinate and therefore I opine that the application has been filed timeously.

Security of costs.

27. The applicant ought to satisfy the condition of security. In the persuasive decision of **Gianfranco Manenti & Another vs Africa merchant Assurance Co. Ltd [2019] eKLR** the court observed:-

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....

Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

28. Similarly in **Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others [2014] eKLR** the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

29. It is important to note that the issue of security is discretionary and it is upon the court to determine the same. Notably, the applicants have offered to deposit the decretal sum in a joint interest earning account in the names of the advocates on record for the parties whereas the respondent urges the court to direct that half the decretal amount be paid to him and the other half to be deposited in a joint interest earning account in the names of their advocates.

30. It is worth noting that the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of **Mohammed Salim t/a Choice Butchery vs Nasserpuria Memon Jamat (2013) eKLR** where the court upheld the decision of **Portreitz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1991** and stated that:-

“That right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”

31. In my considered view, it would serve the interests of both parties fairly for the applicants to pay the respondent half the decretal sum.

32. In that regard, I find the application dated 13th April merited and it is hereby allowed on the following terms:-

- a) That stay of execution pending hearing and determination of the appeal is hereby granted on condition that the applicant deposits half of the decretal amount within 30 days in an interest earning account in the joint name of the advocates on record for the parties.
- b) That in default of compliance with the order for deposit, the orders for stay herein will be automatically vacated.

c) That the costs of this application be costs in the cause.

33. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 4TH DAY OF NOVEMBER 2021.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO LINK THIS 4TH DAY OF NOVEMBER 2021