



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 22 OF 2013

PETER MAINA WAIHENYA.....1ST PLAINTIFF/APPLICANT

KARATINA MARKET MALL LTD.....2ND PLAINTIFF/APPLICANT

VERSUS

THE INDUSTRIAL AND COMMERCIAL DEVELOPMENT

CORPORATION (ICDC) LTD.....1ST DEFENDANT/RESPONDENT

JOSEPH MUNGAI GIKONYO T/A GARAM INVESTMENTS.....2ND DEFENDANT/RESPONDENT

RULING

Brief Facts

1. This application dated 6th April 2021 brought under **Order 9 Rule 9, Order 42 Rule 6, Order 50 Rule 5 and Order 51 Rule 1 of the Civil Procedure Rules** seeks for orders for leave for the firm of AGN Kamau Advocates to come on record for the applicants. It also seeks for orders for stay of execution of judgment of this court delivered on 18th March 2021 pending the hearing and determination of the intended appeal.
2. In opposition to the application, the respondents filed Grounds of Opposition dated 22nd April 2021.

Applicants' Case

3. It is the applicants' case that judgment was delivered on 18th March 2021 and being aggrieved by the decision of the court, the applicants state that they intend to appeal against the entire judgment and decree and have filed a Notice of Appeal. Further, the applicants state that the application has been made after judgment which requires the firm of AGN Kamau & Advocates to be granted leave pursuant to **Order 9 Rule 9 of the Civil Procedure Rules** to enable the said firm represent the applicants herein.
4. The applicants are apprehensive that if stay of execution pending appeal is not granted the building on Land Parcel Number Karatina/Town/Block 1/182 will be sold by public auction.
5. The applicants state that the outstanding loan sum is Kshs. 1,000,000/- to which the 1st applicant guaranteed using the suit property as security. However, from the court proceedings, it emerged that the outstanding loan is Kshs. 82, 177,271.27 due to interest and penalties. The applicants contend that the court erred by failing to make a finding that the said amount is exceedingly high and is in contravention of the in duplum rule and the Banking Act which requires that any interest and penalties charged by the 1st respondent should not exceed the balance owing of Kshs. 1,000,000/-. In this regard, the 1st respondent is at liberty to sell the property by way of public auction which the applicants state will be greatly prejudicial to them and will render the appeal nugatory.
6. The applicants further depone that they have an arguable appeal with a likelihood of success and are bound to suffer irreparable prejudice and loss unless stay is granted. They add that there has been no delay in bringing this application and urge the court to grant the prayers sought as the respondents are likely to sell the property any time from now unless restrained by this honourable court.

The Respondents' Case

7. It is the respondents' case that the application is bad in law, incompetent and an abuse of the court process as the honourable court has become *functus officio* and cannot sit on appeal on its own judgment.

8. The respondents contend that there were no positive or prohibitory orders awarded by the court vide its judgment on 18th March 2021 and therefore there is nothing to be stayed as the applicants' case was dismissed. The respondents further state that the applicants are seeking for injunctive orders through the back door which would amount to res judicata in light of the ruling made by this Ombwayo, J court on 22/1/2015. As such, the respondents state that no prejudice will be occasioned to the applicants if the orders sought are not granted.

9. This application was disposed of by way of written submissions.

The Applicants' Submissions

10. The applicants reiterate the contents of their supporting affidavit and relies on **Order 9 Rule 9 of the Civil Procedure Rules** to submit that their new advocates be granted leave to come on record and proceed with this matter on behalf of the applicants.

11. The applicants submitted that they have satisfied the conditions set out under **Order 42 Rule 6 of the Civil Procedure Rules** as they will suffer substantial loss if the orders are denied that will render their appeal nugatory. The applicants state that the notice issued by the 1st respondent for sale of the suit property is still valid and they stand to suffer irreparable damage as the suit property will be sold and illegal sum in interest and penalties will be realized by the 1st respondent. The applicants rely on the case of **Mukuma vs Abuoga (1988) KLR** cited in the case of **Tabro Transporters Limited vs Absalom Dova Lumbasi (2012) eKLR** and submits that substantial loss is of paramount importance in determining an application for stay of execution. As such, the sum claimed by the 1st respondent is exorbitant and the applicants may never recover the said amount in the event the appeal succeeds.

12. The applicants rely on the case of **Parimal vs Veena cited in Okiya Omtata Okoiti & Another vs Okiya Omtata Okoiti & 4 Others [2016] eKLR** and submit that they have demonstrated sufficient cause to warrant the exercise of the court's discretion in their favour and consequently grant stay of execution of its judgment and orders.

13. The applicants submitted further that they have raised valid grounds and ought to be given an opportunity to exercise their constitutional rights of appeal by ventilating their grievance on appeal. They make reference to the case of **Tabro Transporters Limited vs Absalom Dova Lumbasi (2012) eKLR** to support their contention. As such, they pray that the court allows their application.

The Respondents' Submissions

14. The respondents state that they have no objection with the firm of AGN Kamau Advocates coming on record but oppose the application for stay of execution. The respondents submit that the applicants have not extracted a decree and therefore the application is premature and also there is no indication by the 1st respondent that shows it has taken any steps to effect the decree. The respondents further submit that since the applicants' suit was dismissed execution cannot ensue because the pursuant order is negative in nature. They rely on the case of **Kanwal Sarjit Singh Dhiman vs Keshavji Jivray Shah, NRB Civil Appl. Nai No. 302 of 2006, (2008) eKLR** and state that the decree arising from the judgment delivered on 18th March 2021 is a negative one incapable of execution save for the payment of costs.

15. The respondents argue that since there is no decree on record which can be executed it therefore follows that there is none available to be stayed. They further state that the decree arising from the judgment does not provide for the sale of the 1st applicant's property and that the applicants are seeking for injunctive orders through the back door despite a ruling delivered by this court on 21/1/2015 whereby the court dismissed the applicants' application for an injunction pending the hearing and determination of the instant suit. Moreover, this court when it delivered its judgment on 18th March 2021 became *functus officio* and thus the instant application is incompetent.

16. The respondents urge the court to dismiss the applicants' application as there is nothing capable of being stayed and it does not meet the threshold of Order 42 Rule 6 of the Civil Procedure Rules.

Issues for determination

17. After careful analysis, the main issues for determination are:

- a) Whether the firm of AGN Kamau Advocates ought to be granted leave to come on record for the applicants.
- b) Whether the applicants have met the prerequisite for grant of stay of execution pending appeal;

The Law

Whether the firm of AGN Kamau Advocates should be granted leave to come on record for the applicants.

18. **Order 9 Rule 9 of the Civil Procedure Rules** provides:-

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court:-

i. Upon an application with notice to all the parties; or

ii. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

19. On perusal of the application and the Affidavit of Service dated 14th April 2021, it is evident that the firm of AGN Kamau Advocates served the firm of Gathara Mahinda & Company Advocates with the said application for leave. The said application was received by the firm of Gathara Mahinda & Company Advocates and stamped by the company’s official stamp. As such, the firm of AGN Kamau Advocates complied with the leave to come on record for the applicants for it has satisfied the requirements of Order 9 Rule 9 of the Civil Procedure Rules.

Whether the applicants have satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

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:

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 orders set aside.

2. 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 should satisfy the court that:

a) Substantial loss may result to him/her unless the order is made;

b) That the application has been made without unreasonable delay; and

c) 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:-

1. 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.

2. 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.

3. 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.

4. 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. Under this head, an applicant must clearly state what loss, if any, they stand 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....”

24. 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.

25. 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.”

26. The 1st applicant states that he will suffer substantial loss as his property will be sold to recover illegal sums in terms of interest and penalties by the 1st respondent and as such he will never be able to recover the loss in the event that the appeal succeeds. The 1st applicant in his supporting affidavit deposes that he stands to suffer substantial loss but he does not demonstrate how such loss would be suffered. It is only in his submissions that he stated that the 1st respondent was not in a financial position to pay back the 1st applicant the said sums of money in the event the appeal succeeds. As such, the applicants did not give the 1st respondent a chance to demonstrate that it had enough financial capability to pay back the disputed amount in the event the appeal succeeded.

27. The 1st applicant being a commercial bank and not under receivership at the moment must be presument capable of refunding the loan payment excess if any unless the contrary is proved.

The application has been made without unreasonable delay.

28. Judgment was delivered on 18th March 2021 and the applicants have brought the present application on 7th April 2021. This application was filed timeously as required by the law.

Security

29. The issue of whether security is required depends on the nature and contents of a judgement. In a money decree, the applicant who is granted orders for stay, may offer or may be directed to deposit some sum of money for the due performance of the decree. I am of the view that this case is different in that it is a judgement without a decree to be guarded in favour of any of the parties. The requirement of security is not applicable herein.

Is the Applicant entitled to the orders ought

30. The issue that arises is whether there is a just cause for depriving the 1st respondent of its statutory right of sale. The 1st applicant in the suit sought a declaration that any sale by the 1st respondent of the security L.R Number Karatina/Town/Block 1/182 by public auction or otherwise be declared unlawful and untenable and that permanent injunction barring the 1st respondent from selling the suit property be issued. This court found no merit in the suit and dismissed it accordingly. In light of that I find that there is no decree in existence for this court to grant stay since the judgement was negative. I make reference to the Court of Appeal decision of **Donald Oyatsi vs Disciplinary & Ethics Committee & 3 Others [2021] eKLR** where the court stated:-

“The prayers for stay are both hinged on the impugned judgment delivered by the High Court. The issue has been rehashed by this Court time and time again, that a dismissal order cannot be stayed as it cannot be executed nor enforced. Further, it was not a positive order that required the applicant to do or refrain from doing anything hence a stay order cannot be granted as it will be of no use and this Court cannot engage in acts in futility.”

31. The court further cited the case of **Devani & 4 Others vs Joseph Ngindari Civil Application No. NAI 136 of 2004 (unreported)** and stated:-

“By dismissing the judicial review application, the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted, it will have the indirect effect of reviving the dismissed application. This Court cannot undo at this stage what the superior court has done. “

32. In my considered view the application dated 6th April 2021 for stay of execution pending appeal lacks merit except only to the extent of

granting leave for the firm of AGN Kamau Advocates to come on record for the applicants. However, the said firm required leave in my view to enable it prosecute this application for stay of execution which the court has found wanting. Granting leave to the said firm in this case that has been determined and given that there is no decree for execution, would be an exercise in futility. It is trite law that courts will not give orders in vain. In my view, order sought for the law firm to come on record for the applicant is declined for the foregoing reasons.

33. It is my finding that this application lacks merit and it is hereby dismissed with costs.

34. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 16TH DAY OF NOVEMBER 2021.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO LINK THIS 16TH DAY OF NOVEMBER 2021