



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. E638 OF 2021

SAM NYAMWEYA.....APPELLANT

-VERSUS-

BRYAN YONGO OTUMBA.....RESPONDENT

RULING

1. Before this court for determination are two (2) applications, the first being the Notice of Motion dated 4th October, 2021 (“the first application”) brought by the appellant herein and supported by the grounds laid out on its face and the facts stated in the affidavit sworn by the appellant, who sought for the substantive order that leave be granted to the firm of Makori & Karimi Advocates to come on record for the appellant in place of the firm of WM Njagi & Associates, and for an order for stay of execution of the ruling delivered by the trial court on 16th September, 2021 in Milimani CMCC NO. E678 OF 2021 and all consequential orders, pending the hearing and determination of the appeal lodged against the aforesaid ruling and order.

2. The second application is the Notice of Motion dated 8th October, 2021 brought by the respondent and supported by the grounds set out on its face and the facts stated in the affidavit of the respondent. The following are the orders sought therein:

i. Spent.

ii. Spent.

iii. THAT the orders issued by this Honourable Court on 5th October, 2021 be set aside.

iv. THAT the appellant’s Notice of Motion dated 4th October, 2021 be struck out and dismissed.

v. THAT the appellant, together with M/S Makori & Kirimi Advocates be reprimanded and censured for gross misconduct and for misleading the Honourable Court.

vi. THAT the respondent be awarded costs of the application.

3. The two (2) applications were canvassed through brief oral arguments by the respective parties’ advocates.

4. I have considered the grounds set out on the face of the respective applications; the facts deponed in the respective affidavits supporting each of them; and the contending oral submissions.

5. A brief background of the matter is that the respondent instituted a suit against the appellant before the trial court and sought for the sum of Kshs.1,700,000/= arising out of the sale of the motor vehicle registration number KBZ 730W at a consideration of Kshs.3,000,000/=.

6. Subsequently, the respondent filed the application dated 19th May, 2021 before the trial court and sought for an order of entry of judgment against the appellant as prayed in the plaint, plus costs of the application.

7. Upon hearing the parties on the aforementioned application, the trial court in its ruling delivered on 16th September, 2021 allowed it as prayed.

8. The aforementioned ruling has triggered the present appeal lodged by the appellant.

9. Returning to the matter at hand, I will first deal with the second application which as earlier noted seeks twin orders.
10. Concerning the order seeking to set aside the orders issued by this court on 5th October, 2021 the respondent states that the said orders were obtained through fraudulent misrepresentations on the part of the appellant.
11. Upon my perusal of the record, I note that upon hearing the first application ex parte on 4th October, 2021, this court by way of the order issued on 5th October, 2021 granted an order for a stay of execution of the impugned ruling pending interparties hearing of the first application on 28th October, 2021.
12. From the foregoing, it is clear that the aforementioned order for a stay of execution was issued in the interim and has since lapsed. Consequently, there is no interim order in place to be vacated/set aside.
13. The second order sought is for the chastisement of the appellant and the law firm of Makori & Kirimi Advocates be reprimanded and censured for gross misconduct and for misleading this court.
14. Here, the respondent states that the appellant forged the figures contained in the acknowledgment note dated 24th September, 2021 availed by the appellant, claiming that he had paid to the respondent a sum of Kshs.1,200,000/= arising out of the impugned ruling; while in truth the respondent only received a sum of Kshs.200,000/= from the appellant on a without prejudice basis.
15. The respondent is therefore of the view that not only should the appellant and his current advocate be held liable for perjury and fraud, but that the first application ought to be dismissed on that basis.
16. Upon my perusal of the record, I note that the appellant had availed copies of acknowledgment notes dated 24th September, 2021 and 19th September, 2021 purportedly signed by the respondent indicating that he had received a total of Kshs.1,200,000/= from the appellant as part payment in respect to the suit.
17. Suffice it to say that the respondent did not tender any credible evidence before this court to support his claims of fraud, forgery and/or misrepresentation against the appellant and his advocate and hence, I am hesitant to grant the orders sought.
18. This brings me to the first application. Upon my perusal of the proceedings, it is apparent that order seeking for leave for the firm of Makori & Karimi Advocates to come on record for the appellant in place of the firm of WM Njagi & Associates was granted by this court on 28th October, 2021. This leaves the order seeking a stay of execution of the impugned ruling pending for determination.
19. The relevant provision is Order 42, Rule 6(2) of the Civil Procedure Rules which sets out the conditions to be met when it comes to an application seeking for an order for stay of execution.
20. The first condition is that the application must have been brought without unreasonable delay. As earlier mentioned, the decision sought to be stayed was delivered on 16th September, 2021 whereas the first application was filed on or about the 4th day of October, 2021. In my view, there has been no unreasonable delay in bringing the first application.
21. This brings me to the second condition on substantial loss. On his part, the appellant states that unless the order for a stay of execution is granted, the respondent will move to execute the decree, thereby rendering the appeal nugatory. These sentiments were echoed in the oral submissions of *Makori*, advocate for the appellant.
22. On the part of the respondent, it is stated and submitted that no substantial loss has been demonstrated by the appellant and that there is no indication that the respondent will be unable to refund the decretal sum once the same is paid to him and the appeal succeeds.
23. The legal position is that execution; being a lawful process; does not form the basis for granting an order for a stay of execution. Nevertheless, it is also the legal position that in determining applications of such nature, the courts ought to balance the competing rights of the parties, as held in the case of **Tabro Transporters Ltd v Absalom Dova Lumbasi [2012] eKLR** cited by the respondent in the second application.
24. Upon considering the unique circumstances of the matter before me; the competing rights of the parties and the substantive interest of justice, I am satisfied that the appellant has reasonably shown that unless an order for a stay is granted, the appeal if successful will be rendered nugatory thereby resulting in substantial loss.
25. Concerning the third condition on the provision of security for the due performance of the decree. The appellant proposed to provide a bank guarantee which proposal was not specifically opposed by the respondent. I therefore find the provision of a bank guarantee to be reasonable in the circumstances.
26. Consequently, the motion dated 4th October 2021 is allowed thus giving rise to issuance of the following orders

i. There shall be an order for stay of execution of the order/ruling delivered on 16.9.2021 on the condition that the appellant provides the entire decretal sum of Kshs.1,700,000/= in the form of a bank guarantee from a reputable bank within 30 days from today's date failure to which the order for stay shall lapse.

ii. Costs of the Notice of Motion dated 4th October, 2021 shall abide the outcome of the appeal.

iii. The Notice of Motion dated 8th October, 2021 is hereby dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF DECEMBER, 2021.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent