



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 103 OF 2019

ANN NAMUKHULA NAMULALA.....APPELLANT

VERSUS

NICHOLAS MUTUKU.....1ST RESPONDENT

AUTOMOTIVE KENYA LIMITED.....2ND RESPONDENT

RULING

1. This Ruling is in relation to the application dated **31.7.2019** and filed in court on an even date. The application is vide notice of motion brought under Section 3A of the Civil Procedure Act and Order 42 Rule 6 and 51 rule 1 of the Civil Procedure Rules. What remains to be determined are two prayers namely; for stay of Proceedings in Mavoko CMCC 193 of 2019 pending hearing and determination of the appeal and secondly stay of execution pending hearing and determination of the appeal.

2. In support of the application was an affidavit deponed by Ann Namukhula Namulala, the appellant who averred that she was not aware that the suit in the trial court had been instituted and that judgement had been entered against her in **Mavoko PMCC 456 of 2017**. It was averred that the appeal is on the issue of the finding of the trial court that she was aware of the suit and that she had filed an application seeking to cross examine the process server and while the application was pending hearing a declaratory suit was filed against her insurer and which is scheduled for hearing. It was her view that it would be in the interest of justice that the application be allowed.

3. In reply to the application Nicholas Mutuku averred vide affidavit deponed on 13.8.2019 that the applicant is non deserving of the orders sought as the applicant ought to have approached the court in the first instance before the declaratory suit commenced. Counsel averred that counsel entered appearance in the declaratory suit 193 of 2019 and that the matter had already progressed. It was his view that the respondent will be prejudiced if the application is allowed.

4. The court directed that the matter be canvassed vide submissions. Counsel for the applicant submitted that the instant application was made without unreasonable delay being 21 days after the delivery of the ruling. It was counsel's argument that any loss that the respondent may suffer could be compensated by way of costs. Reliance was placed on the case of **Focin Motorcycle Co Ltd v Ann Wambui Wangui & Another (2018) eKLR**.

5. On the issue of stay of proceedings counsel made no submissions.

6. In reply to the application, counsel for the respondent submitted in respect of the prayer for stay of proceedings that all the requisite documents for the declaratory suit were served on the applicant who entered appearance and steps have been taken to have the matter heard. In this regard the prayer be disallowed. In respect of the prayer for stay of execution, counsel submitted that the applicant is non deserving of the orders as she has not met the requirements under Order 42 Rule 6 of the Civil Procedure Rules.

7. The issue to be determined is whether the court can grant the orders sought.

8. With regard to the prayer for stay of proceedings, the test for stay of proceedings was stated by Ringera J in the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** thus;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of

judicial time and whether the application has been brought expeditiously”

9. In **Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 Others** (2013) eKLR the court stated the principles to be applied in considering an application for stay of proceedings as thus:-

“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

10. Further in the case of **Kenya Power & Lighting Ltd v Esther Wanjiru Wokabi** (2014) eKLR it was observed that:

“the court’s discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;

a) Whether the applicant has established that he/she has a prima facie arguable case.

b) Whether the application was filed expeditiously and

c) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.”

11. In **R v Horseferry Road Magistrates Ex parte Bennet** [1994] 1 A.C. 42 the House of Lords stated:

“.....the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court’s conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of the jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the Court’s process has been abused.”

12. In this regard the pleadings in the suit that the applicant seeks to stay have been annexed to the application and I am aware and that the applicant has filed an appeal against the ruling in the parent suit that sought to challenge the ex-parte judgement that was entered against the applicant. In this regard from the evidence presented before me, the prejudice the applicant has averred that she will suffer if the declaratory suit is allowed to take its course in the trial court is that the appeal that challenged the parent suit will be relegated to an academic exercise. Whether or not I will allow to grant prayer 4 in the application will depend on my determination in respect of prayer 3.

13. With regard to the prayer 3 for stay of execution, the conditions to be met by an Applicant in order to be entitled to an order for stay are laid out in that Rule in the following terms:

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 sub-rule (1) unless—

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 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.

14. I have perused the filed Memorandum of Appeal in this case as annexed to the application. I have had due regard to Section 2 of the Civil Procedure Act Cap 21 of the laws of Kenya which in the definition of a “decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—

(a) any adjudication from which an appeal lies as an appeal from an order; or

(b) any order of dismissal for default:

Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;

Explanation. — A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

15. In the same section, decree holder, alludes to an order that “is capable of execution.” In that section, a decree holder is defined as “any person in whose favour a decree has been passed or an order capable of execution has been made...” It therefore obtains that there are orders that are capable of execution while others are not.

16. In **Ndungu Kinyanjui v Kibichoi Kugeria Services & Another Civil Application No NAI 79 of 2007** (unreported) it was observed that in the *Re Sonalux* case, the Court of Appeal had this to say:-

“This Court has repeatedly stated in previous decisions... that in an application under Rule 5 (2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to pay any sum there would be nothing arising out of that decision for this court to enforce or to restrain by injunction.”

17. The Court has no jurisdiction to stay any action unless there is a positive order of court for something to be done or enforced. Even if the application in the trial court was refused, the court has no power to stay a negative order of dismissal of the application. In **Exclusive Estate Limited vs. Kenya Posts and Telecommunications Corporation and Another [2005] 1 EA 53 (CA)** it was held by the Court of Appeal that stay of execution envisaged under rule 5 (2) (b) of the Court of Appeal Rules of Kenya is the execution of a decree capable of execution in any of the methods stipulated under section 38 of the Civil Procedure Act. The Court further held that a decree holder as defined under the Civil Procedure Act means a person in whose favour a decree capable of execution has been passed. In that case the order which had been made dismissed the suit and was a negative order in that it was not capable of execution. It was held that a negative order can only be set aside by the appellate court.

18. Section 38 of the Civil Procedure Act provides for the various modes of execution in the following words:

- a. ***“by delivery of any property specifically decreed,***
- b. ***by attachment and sale, or by sale without attachment, of any property,***
- c. ***by attachment of debts,***
- d. ***by arrest and detention in prison of any person,***
- e. ***by appointing a receiver,***
- f. ***in such manner as the nature of the relief granted may require.”***
- g.

19. The section envisages an order which is not yet implemented or executed and which is capable of execution. For the order or decree to be satisfied, the judgment creditor or an officer of the court such as a bailiff must force or compel the judgment debtor or 3rd party such as the Garnishee using any of the modes provided for under section 38 of the Civil Procedure Act to implement the order or decree.

20. In the premises there is no order of court that is capable of execution and the prayer for stay of execution cannot be allowed to stand. In any event the declaratory suit already has already commenced in earnest and in which all the parties are involved and that any pressing issues can be raised therein.

21. In light of the foregoing and in view of the fact that prayer 3 has collapsed, then prayer 4 is declined. Already the parties have commenced the declaratory suit in which all the attendant pleadings have been filed and that any issues of concern can be raised therein. The appellant herein can proceed to set down the appeal herein for hearing on priority basis and it is possible to finalize it within a short time since most appeals are always disposed of by way of written submissions and there could be a possibility that it can be disposed of even before the declaratory suit is determined.

22. In the result I find the instant application dated 31.7.2019 lacks merit and is dismissed with costs.

It is so ordered.

Dated and delivered at Machakos this 5th day of February, 2020.

D. K. Kemei

Judge