



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO.60 OF 2019

MONALISA HOTEL LIMITED.....APPLICANT

VERSUS

ELIZABETH HABIN TELEPHONE & BETTY NAKADOBHOYO

MATSEKI (suing as an administrator of the Estate

and Legal Representative of the Estate of FRANCIS

SPINKS KOMORA-deceased).....RESPONDENTS

Coram: Hon. Justice R. Nyakundi

Mr. Lily K. Musinga for Applicant

Mr. Ameli Inyangu for Respondents

RULING

The Notice of Motion Application dated 6th November, 2019 principally seeks orders that this Court be pleased to grant a stay of execution of the judgement dated 29th July, 2019 pending the hearing and determination of the Appeal.

The application is based on the grounds set out in the Supporting Affidavit sworn by PETER THIGA WACHIRA. The deponent states that the Applicant was aggrieved with the lower court judgement and it has displayed its dissatisfaction by lodging an appeal which was assigned HCCA Number 60 of 2019. It is deponed that it was in response to the threats of execution by the Judgment creditor, the applicant made a formal application for stay of execution pending appeal at the Lower Court and that on the 4th November 2019 the subordinate Court delivered its ruling dismissing the applicants' motion for stay of execution pending appeal despite the applicant's express willingness to comply with the requirements Order 42 rule 6(2) of the Civil Procedure Rules 2010.

Further that, the applicant has also expressed willingness to comply with the requirements Order 42 rule 62 of the Civil Procedure Rules 2010 and that the applicant is interested in prosecuting the appeal but is apprehensive that without order of stay of execution the appeal will be rendered an academic exercise. It is stated that applicant is willing to furnish security for the appeal including depositing the decretal sum interest account in the name of Advocates on record. The applicant is further apprehensive that execution of the decretal sum will occasion it substantial loss, which may prove difficult to recover in the event the appeal is successful. **(Attached herewith and marked as "PTW-04" is a copy of the judgment)**

He states that the Memorandum of appeal lodged on the 15th August 2019 raises serious legitimate triable issues that warrant the interrogation by the appellate Court and that it is in the interest of justice for the stay to be granted and for the appeal to be heard and determined on its merit.

In Response to the Notice of Motion Application herein, the Respondents opposed the same by way of a Replying Affidavit sworn by Elizabeth Habin Telephone, on the 15th of November, 2019 and filed on the 22nd of the same month. She states that the instant Application seeks orders which are incapable of being enforced as we are yet to extract a decree for purposes of execution.

The deponent confirmed that, it is true that the Appellant has lodged an appeal against the judgment of Hon. D.S Sitati delivered on 29th July, 2019 as we were served with a Memorandum of Appeal dated 13th August, 2019. That she is stranger to the allegations at paragraph 4 that the Appellant has requisitioned for typed and certified proceedings and judgment from the Executive Officer of the Court.

In response to paragraph 5, she states that the Appellant Application Filed before the subordinate Court was dismissed with costs on grounds inter alia, that the supporting Affidavit was not only defective but also the Applicant had failed to prove the substantial loss they stand to suffer since we had not commenced the process of execution. She further states that the fact that there is a judgment in place does not mean that there is imminent danger of execution. Furthermore, we are yet to extract the decree for purposes of execution of the said judgment.

In response to paragraph 7 & 8, the deponent states that the Appellant has not demonstrated the substantial loss they stand to suffer in the event we are to proceed with execution of the decree arising out of the judgment delivered on 29th July, 2019. Further that, the intended Appeal will in no way be rendered nugatory since they have not even began the execution process and that the judgment in question is a money decree and therefore the Appellant cannot allege that the intended appeal will be rendered nugatory unless they can prove that she is a person of no means.

The deponent contends that the intended appeal has no chance of success and it would thus be in vain and unjust to grant the orders of stay of execution and in the event this Honourable Court is inclined to grant the orders sought in the instant Application, the same should be conditional on the Defendant furnishing security including depositing the decretal sum in a joint interest earning Account.

In light of the foregoing, the Respondents believes that it only prudent and just that the instant Application be dismissed with costs for failing to satisfy the vital limbs in Order 42 rule 6 of the Civil Procedure Rules.

The Applicant's Written Submissions.

The Applicant brought to the attention of this court the fact that by a judgment dated/issued on the 29 July 2019 in SRMCC NO. 439B OF 2018 AT KILIFI, the Honourable trial court awarded the Respondent a gross sum of Kshs. 3, 323, 495.00 (*see annexure PTW-04 in the Affidavit of Peter Thiga*). Subsequently, the Applicant herein being aggrieved by the judgement elected to exercise its right to appeal the decision by lodging a Memorandum of Appeal before this Honourable Court on the 15th August 2019.

The Applicant argues that Memorandum of Appeal raises serious legitimate triable issues in the effect that the learned Magistrate erred in law and fact in ignoring the Defendant's Written Submissions; that the learned Magistrate erred in law and fact in holding the Defendant 100% liable for the accident without any evidence thereof; that the learned Magistrate erred in law and fact in awarding the plaintiff excessive damages; that the learned Magistrate erred in law and fact in considering the deceased's multiplicand despite the lack of evidence therein and that the learned Magistrate erred in law and fact in considering a higher dependency ratio of 2/3 as against the Defendant.

The Applicant submitted on the principles governing grant of stay of execution pending appeal and whether the applicant/appeal has satisfied the threshold to warrant the orders being sought. The Applicant contends that it is reckoned tritely in judicial parlance that the purpose of stay of execution pending appeal is to preserve the subject matter so that the right of appeal can be exercised without prejudicing the applicant as the appeal would be rendered nugatory if there is no stay.

In light of the foregoing, it is therefore argued that the nature of an application for stay of execution is such that it invokes the discretionary powers of the Court. The Applicant resorted to the Court of Appeal in **Butt vs Rent Restriction Tribunal [1982] KLR 417** where then it was held that:

“The powers of the Court to grant or refuse application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal”

The Applicant therefore argues that the amount in the judgment delivered on the 29th July 2019 is an enormous sum of Kshs. 332349500 hence the Applicant will suffer heavy financial substantial loss in the event the application is disallowed, bearing in mind that it will be left exposed to execution proceedings by the Respondents. In the same vein, the Memorandum of Appeal raises serious legitimate triable issues hence the appeal may be rendered nugatory.

On whether the Applicant has satisfied the threshold to warrant the orders being sought, the applicant both in the trial Court and in this Court has demonstrated willingness to comply with any orders granted by the Court including but not limited to depositing of the decretal amount in a joint interest earning account in the name of both Advocates on record. In that regard, the Applicant humbly pray that this Honourable Court do exercise its discretion in favour of the Applicant and allow the instant application.

The principles upon which the court exercises discretion under Order 42 rule 6 of the Civil Procedure Rules are firmly settled. The discretion under Order 42 rule 6 is on its terms unfettered but the aggrieved party must satisfy the court on a well set of conditions precedent to be made before such exercise of discretion in his or her favour.

The application under this Order 42 rule 6 is to be viewed in reference to the following factors:

- 1) That the application has been filed without undue delay.***
- 2) That the applicant had demonstrated that substantial loss may result unless stay orders are granted.***
- 3) That the applicant is ready to give security for due performance of the decree or order as may ultimately be binding on him at the end of the determination of the appeal.***

I have considered the notice of motion, affidavit in support and grounds of opposition. I therefore find it necessary to apply the facts of the case to each of the conditions stipulated in Order 42 rule 6 to establish whether the applicant has a meritorious application.

First, is the condition without unreasonable delay? The legislative intent under Order 42 is to bind the parties to prosecute their claims without undue delay. A court of equity frowns at stale claimant who step on their rights and only to approach the court after a long period of time. From the record Judgement was delivered on 29th July, 2019 and the appeal was timeously lodged on the 15th August, 2019, which was dismissed by the Honourable trial court. The ruling of the trial court was issued on the 4th of November 2019 and on the 6th of November, the Applicants filed this notice of motion application accompanied by a certificate of urgency having been aggrieved by the decision of the lower court to deny stay of execution.

The rationale behind this condition is to guide the court not to order stay of execution only meant to delay the trial process or enforcement of a decree. The right to be heard on appeal should not be seen to defeat the ends of justice.

This was affirmed in the case of **Global Tours & Travel Limited Nairobi. He Winding up Cause No. 43 of 2000** where the court held:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from it 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 stay the court should essentially weigh the pros and cons of granting of not granting the order.”

The foregoing observation, this court finds that the appeal was timeously filed and there was no undue delay. Neither did the Respondents argue in those lines. Apart from that, the court must consider whether there is likelihood of substantial loss on the part of the applicant.

It is trite that the fact of an appeal pending shall not operate as a stay of execution. Under Order 42 rule 6 of the Civil Procedure Rules the applicant must demonstrate that without stay of execution he will suffer irreparable harm or what is commonly referred to as substantial loss which he cannot be compensated by way of damages.

In the case of **Federal Commission of Taxation v Myer Emporium Ltd 1986 160 CLR 220** the court held:

“It well established by authority that the discretion which it confers to order stay of proceedings is only exercised where special circumstances exist which justify departure from the ordinary rule that a successful litigant is entitled to the fruits of his litigation pending the determination of any appeal.”

Discussing the very point on substantial loss Platt, JA in the case of **Kenya Shell Ltd v Benjamin Keruga Kibiru and others 1982-85 1 KAR 1018** observed:

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented.”

In the case **Pan African Insurance Co. Ltd vs International Air Transport Association High Court No. 86 of 2006** held as follows on substantial loss:

“The deponent should go a step further to lay the basis upon which court can make a finding that the applicant should would suffer a substantial loss as alleged. The applicant should go beyond vague and general assertion of substantial loss in the event a stay order is not granted.”

In the instant application there is no claim for substantial loss. The applicant sought only stay of execution orders as to his legal rights to pursue an appeal. It is my considered view that from the affidavit evidence the applicant has not made out a case on this condition deserving of being granted stay of execution.

Thirdly, 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 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 fails.

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 judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal. In **Arun C Sharma -V- Ashana Raikundalia T/A Rairundalia & Co. Advocates** Justice Gikonyo the Court stated that:

“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 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.”

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. In this regard, I stand to be guided by the case of **Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR**, where it was stated that: _

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

I'm alive to the fact that grant of stay being a discretionary order the court is expected to balance out the interests of the successful litigant and the applicants' unfettered right to file an appeal to fully ventilate her grievances. This means that the court has discretion to consider other factors such as good cause and in the interest of justice why stay should be granted. Whether the appeal has merit or not is not a matter for the jurisdiction of this court.

Having made the above findings, exercise my discretion in favour of the appellant and make the following orders.

- 1. The applicant's notice of motion for stay of execution pending appeal is hereby allowed.***
- 2. In so far as it relates to security for the performance of the decree the applicant is hereby conditioned to deposit the entire principal amount of the judgment being Kshs.3,323,495.00/= within 15 days from today's date in the joint earning interest account of both advocates in a preferred financial institution of their choice.***
- 3. That in default of depositing of security within the time stipulated in this Order of stay of execution automatically lapses.***
- 4. The appellant to compile, file and serve a record of appeal upon the respondent within 15 days from the date hereof.***
- 5. The costs of this application do abide the outcome of the appeal.***

DATED, SIGNED AND DELIVERED AT MALINDI THIS 6TH DAY OF FEBRUARY, 2020.

.....

REUBEN NYAKUNDI

JUDGE

In the presence of: -

Mr. Juaje for Okoko for the Applicant

Mr. Mr. Atiang for Azei for the Respondent