



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

H. C. APPEAL NO. 86 OF 2019

JAMES KARIUKI KIHARA.....PLAINTIFF

V E R S U S

DANIEL WOKABI MATHENGE T/A

WOKABI MATHENGE & CO. ADVOCATES.....RESPONDENT

RULING

1. The applicant James Kihara vide an application dated 9/11/19 seeks orders that the court do issue an order of stay of execution of the orders issued in C.M.C.C No. 105/2019 pending the hearing and determination of the Appeal herein. He also asks for costs.
2. The application is based on the grounds that the applicant was dissatisfied with the ruling delivered on 31/10/2019 in this matter. That the applicants right to fair trial were violated as he was denied a chance to be heard. It is also contended that the appeal raises triable issues and has high chances of success. He contends that he is likely to suffer irreparable loss if stay is not ordered. That it is in the interests of justice that he be given a chance to be heard.
3. The application is supported by the affidavit of the applicant sworn on 7/11/19 wherein he has deponed that he came to learn of the judgment which was entered in default and he filed an application dated 8/8/2019 requesting for time to file and serve his defence but the same was dismissed. He was dissatisfied with the Judgment and filed a Memorandum of Appeal. He contends that he has raised issues pertaining to service of pleadings. He further deposes that he should not be locked out of justice on technical grounds and if that happens he is likely to suffer irreparably as his constitutional rights will have been violated. That if stay is not ordered the intended appeal will be rendered nugatory.
4. The respondent opposed the application and filed a replying affidavit sworn by Daniel Wokabi Mathenge sworn on 3/12/19. He depones that the applicant does not deserve orders of stay of execution of the decree. The applicant has not explained what prejudice he is suffering or is likely to suffer by failure to issue order of stay of execution. He submits that he should not be denied fruits of Judgment. He further submits that the applicant has not satisfied the threshold for issuance of a stay of execution. That the applicant's recourse if any lies with setting down the appeal for hearing as this is a money decree.
5. The application proceeded by way of oral submissions. The applicant submits that the respondent is likely to execute. The amount involved is Kshs 700,000/- and he is likely to suffer. That the appeal will be rendered nugatory. That he will suffer prejudice as he was served with Notice to show cause and he is likely to be committed to civil jail.
6. For the respondent it is submitted that the application is incompetent as the order issued on 31/10/19 was not annexed. That the application was supposed to be filed without unreasonable delay and the applicant is supposed to demonstrate that he is likely to suffer substantial loss. That the applicant is supposed to provide security. That the application was filed three months after Judgment was entered. There was unreasonable delay. That no evidence of substantial loss has been demonstrated. That the application has not met the conditions laid out in **Order 42 rule 6 of the Civil Procedure Rules**. That the respondent who is an Advocate will be in a position for reimburse if the stay is not ordered and the appeal succeeds. It is further submitted that the applicant has filed a similar application in the Lower court, is forum shopping and the practice is frowned upon in law. That if stay is ordered the applicant be ordered to provide security.
7. I have considered the application, the replying affidavit and the submissions. The issue which arises for determination is stay of execution pending the hearing and determination of an appeal.

Order 42 of Rule 6(2) Civil Procedure Rules provides:-

“No order for stay of execution shall be made under subrule (1) unless—

(a) 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

(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.”

The rule provides that no appeal shall operate as a stay of execution but the court appealed from may order stay of execution but if the trial court declines to order a stay, the court which such appeal is preferred shall be at liberty on an application being made to consider such an application and grant such orders thereon as may to it seem just. A party has to move the court to order stay of execution where an appeal is meant to preserve the subject matter or the status quo so that the right of appeal can be exercised without any prejudice being occasioned on the applicant or render the appeal nugatory. It is an exercise of discretion by the court. The Court of Appeal in the case of **Butt-v- Rent Restriction Tribunal (1982) 417** stated that the discretion ought to be exercised in a manner that would not prevent an appeal.

The applicant has to satisfy the court that:-

a) The appeal has been filed without unreasonable delay,

b) Substantial loss may result and the appeal may be rendered nugatory.

c) That security for the performance of the decree has been provided see **G. N. Mwerua P/A (sic) Mt. View maternity & Nursing Home –v- Mariam Maalim Bisher & Another (2018)eKLR**. I will proceed to consider whether the applicant has satisfied these conditions.

A: Was the application filed without unreasonable delay:

The ruling which the applicant is aggrieved with was issued on 31/10/19. This application was filed on 14/11/19. It took the applicant 14 days to file the application and the Memorandum of Appeal. Whether delay is unreasonable depends on the circumstances of the case. The **Civil Procedure Act at Section 79G** gives a party a right of appeal to the High Court within 30 days against the judgment of a subordinate court. The applicant filed the appeal within a period of 14 days. It has been submitted that he had been served with a Notice to Show Cause why execution should not be levied. In the circumstances of this case a delay of 14 days is not in-ordinate. The applicant had moved the court to set aside its judgment in default. Upon dismissal of the application he moved to this court. A colossal sum of money is involved and there is an allegation that the applicant was not given an opportunity to be heard. As held in the Case of **Butt-v- Rent Restriction Tribunal** since the applicant is seeking a discretionary order, the discretion should be exercised in such away as not to prevent an appeal. The applicant came to court within 14 days. I find that the delay is not in-ordinate.

B. The Second Consideration is whether the applicant is likely to suffer substantial loss.

The decretal sum as shown on DWM-1- amounts to Kshs 777,515/-. This is a large amount which is in dispute and the applicant has stated that he was not served and was not given an opportunity to be heard. The Notice to Show Cause required him to show cause why he should not be committed to civil jail. If stay is not ordered, he would be prejudiced and substantial loss would be occasioned in view of the amount claimed. The Court of Appeal in the case of **Kenya Shell Limited –v- Kibiru & Another, Court of Appeal Nairobi Civil Application No. 97/1980**. The Court held that appeals in money decrees are never rendered nugatory and one must show substantial loss. The court of Appeal discussed this issue at length while considering whether a money decree or liquidated claim would render the success of an appeal nugatory in the case of **Kenya Hotel Properties Limited –v- Willesden Properties Ltd. Civil Application No.Nai 322/2006 UR** where the Court stated –

The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long the court ascertains that the respondent is not “man of straw” but is a person who on success of appeal would be able to repay the decretal sum plus any interest to the applicant. However with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is not ordered purely on grounds that the decree is a money decree. The court was however emphatic that in considering such matters as hardship a 3rd principle of law was not being established at all.

8. Further in **Silverstein –v- Cheson (2002) IKLB 861** the court stated:-

“The issue of substantial loss is the cornerstone of both jurisdiction, substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

9. If he is committed to civil jail he will suffer irreparably and the appeal may be rendered nugatory.

10. Though it was submitted that the respondent would be in a position to reimburse, I note that the respondent has demonstrated that he is not a man of straw and has ability to pay back the said sum. I am satisfied that the applicant would suffer loss and hardship as he would be condemned unheard. The Court of Appeal in the case of **Bhutt –v- Rent Restriction Tribunal** stated as follows:-

“The court in exercise of its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount in dispute and the appellant had an undoubted right of appeal.”

11. My view is that I should exercise discretion in a manner that will ensure that the appeal is heard.

C. Security:

Under **Order 42 rule 6(2)** which I have quoted above, it is the court which orders security. All that a party needs to do is state the willingness to provide security as may be ordered by the court. However, even where the party has not stated that it will provide security, the court will on its own motion order security. If the party fails to provide security, then the respondent will be at liberty to execute unless the court has ordered otherwise as security is a condition precedent to an order of stay of execution.

12. In view of the foregoing I find that the applicant has satisfied the conditions for the grant of stay of execution. Though the respondent had submitted that the application is incompetent for failure to annex the ruling, in the same breath he has deponed that (see Para 5 of the replying affidavit) and rightly so, that the court cannot delve into the arguability of the appeal as the same amounts to sitting on a mini appeal of a sound Judgment of the lower court. There is no prejudice that will be suffered by the respondent by failure to annex the ruling. The respondent has annexed the decree. Under **Order 42 rule 6(1) & 2** the only condition precedent to filing the application before this court is prove that an appeal has been filed. The applicant has filed a Memorandum of Appeal. The submission by the respondent is therefore without merits.

13. The respondent submitted that the applicant has filed a similar application before the trial court. The respondent did not annexed any evidence to prove the contention and whether it has been heard and determined or not. Under Order 42 Rule 6(1) this court has jurisdiction to entertain an application for stay whether or not the application has been granted or refused by the court appealed from. This court has jurisdiction to entertain the application for stay of execution where an appeal has been filed and is at liberty to grant orders as it may deem just.

In Conclusion:-

I find that the application has merits. I allow it and order as follows:-

- 1) There be stay of execution of the ruling in C.M.C.C 105/19 dated 31/10/2019 pending the hearing and determination of the appeal filed herein.**
- 2) The applicant shall provide security by depositing Kshs 100,000/- in court as security within 14 days from the date of the ruling.**
- 3) Costs to abide the outcome of the appeal.**
- 4) If security is not offered as ordered under (2) above the order of stay will lapse and the respondent will be at liberty to execute.**

Dated at Kerugoya this 11th day of May 2020.

L. W.GITARI

JUDGE