REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 99 OF 2009

RAMADHAN MUSTAFA.....APPLICANT

VERSUS

ZULFA NGASIA JUMA.....RESPONDENT

RULING

1. The applicant **(RAMADHAN MUSTAFA)** by a notice of motion dated 8th July, 2019 seeks stay of execution of the judgment and decree delivered on 15/3/2019 pending the hearing and determination of the intended appeal. The applicant is aggrieved and dissatisfied with the said judgment and decree has preferred an appeal against the said judgment., saying that the said appeal has very high chances of success and therefore stay of execution orders should be issued to preserve the estate. The applicant states that he stands to suffer irreparable harm and loss if the present application is not allowed, as the appeal will be rendered nugatory.

2. The appeal was canvassed by way of written submissions pointing out that the respondent has commenced sub division of the suit land which will render the intended appeal nugatory and occasion irreparable loss to the appellant.

3. It is pointed out that the current appeal deals with distribution of the estate of the deceased person and the appellant will suffer substantial loss if the estate is subdivided whereas there is a pending appeal. In support of this, the applicant relies on the case of **RELIANCE BANK VERSUS NORLAKE INUST LIMITED 2002,** where the court stated that:

> ***''to refuse to grant an order of stay to the applicant would cause it to such hardships as we would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.''***

4. This court is urged to find that the applicant has clearly demonstrated and proved the grounds to warrant this honorable court to grant stay pending the intended appeal.

5. The respondent **(ZULFA NGASIA JUMA)** in opposing the application argues that judgment was delivered on 15/3/2019 and the present application filed more than 4 moths later without any reasonable explanation pertaining the delay. That in any event, the Applicant has also not indicated the substantial loss that will occur nor has an offer security for costs been made. The responded relies on the case of ***NEW WIDE GARMENTS EPZ (K) LTD VS RUTH KANINI KIOKO, MACHAKOS HCCA NO. 78 OF 2017*** where stay was declined for failure by the applicant to meet the requirements under **Order 42 Rule 6(2).**

The respondent urges the court to dismiss the instant application with costs.

6. Order **42** Rule **6 (1) & (2)** provides:

> ***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 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 of stay shall be made under sub rule (1) unless-***
>
> > ***a. The court is satisfied that substantial loss may result to the applicant unless the order is made and 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

7. The policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. However, it is necessary to pay regard to the considerations for granting applications for stay pending hearing and determination of an appeal.

8. The Court of appeal in the case of *Butt vs Rent Restriction Tribunal* **(Madan, Miller** and **Porter JJA)** while considering an application of this nature had this to say:

> ***i. The power of the court to grant or refuse an 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.***
>
> ***ii. The general principal 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 that appeal court reverse the judge's discretion.***
>
> ***iii. 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.***
>
> ***iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.***

9. Clearly under Order **42** Rule **6 (1)**, for an applicant to succeed in an application of this nature, he must satisfy the following conditions;

> **(a)** ***Substantial loss may result to the applicant unless the order is made;***
>
> ***(b) The application has been made without undue delay;***
>
> ***(c) Such security as to costs has been given by the applicant.***

10. The corner stone of the jurisdiction of the court under Order **42** of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted. What constitutes substantial loss was broadly discussed by **Gikonyo J** in the case of ***James Wangalwa & Another vs Agnes Naliaka Cheseto*** where it was held *inter alia* that:

> ***"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.***
>
> ***The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of* Silverstein vs. Chesoni *...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory"***

11. The importance of complying with the said requirement was well emphasised in ***Machira T/A Machira & Co Advocates vs. East African Standard*** where it was held that:

> ***"… to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court".***

12. The applicant filed the present application 4 months after delivery of the judgment, in my view that is not an inordinately long period s to render the application not worth considering. The applicant has pointed out that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the appeal as the successful party in the appeal, because distribution of the estate involves dividing and sharing out the land. Once that happens, there is the possibility of the same land being alienated to other parties, or having developments done on the same. I find that the applicant has met the provisions stipulated under Order 42 rule (6) (1) and such the application is merited. Consequently, the application be and is hereby allowed with costs to the applicant.

Delivered and dated this 4th day of May 2020 at Eldoret

H.A. OMONDI

JUDGE