



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA.**

**CIVIL CASE NO. 42 OF 2012**

**MOSES WAMALWA MUKHAMARI.....PLAINTIFF**

**VERSUS**

**JOHN. O. MAKALI.....1<sup>ST</sup> DEFENDANT**

**JOHN MUTTALI WEKESA.....2<sup>ND</sup> DEFENDANT**

**THE HON. THE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

This is an application by Moses Wamalwa Mukhamari the Plaintiff/Applicant dated 11<sup>th</sup> July, 2019 seeking: -

- 1. That there be an order of stay of execution pending the outcome of application in Civil Appeal No. 22 of 2019 in Eldoret.***
- 2. That the costs of the application be provided for.***

The application is supported by the affidavit of the applicant sworn on 11<sup>th</sup> July, 2019 where he depones that he has lodged an appeal in Eldoret Court of Appeal No. 22 of 2019 which is yet to be heard. He further depones that unless the decree holders are stopped, they may execute for the costs and that it is in the interest of justice that the order is granted pending the outcome of the appeal.

The long history of this matter is that John Mutali Wekesa sued the applicant Moses Wamalwa Mukhamari in Bungoma CMCC No. 602 of 2002 seeking an order of specific performance and in the alternative a refund of purchase price in respect of sale of land by the applicant to the respondent of parcel No. Ndivisi/Ndivisi/1751. By judgment dated 16<sup>th</sup> December, 2009 R. Nyakundi Chief Magistrate, entered judgment against the applicant Moses Wamalwa Mukhamari for refund of Ksh.70,000/- plus costs and interest. The costs were assessed on 10<sup>th</sup> March, 2009 at Ksh.60,000/- all-inclusive. The applicant was granted stay of execution for 45 days. He did not pay. Notice to Show Cause was issued against applicant. On 11<sup>th</sup> August, 2009, the applicant having failed to show cause why he should not be committed to Civil Jail, was committed to Civil Jail for 30 days unless he cleared the sum of Ksh.207,575/-. On 18<sup>th</sup> August, 2009 the applicant came up with a proposal for payment. He was released on bond of Kshs.50,000/- to enable him sell a parcel of land to liquidate the decretal amount. He defaulted and was committed to Civil Jail for 30 days on 22<sup>nd</sup> April, 2020 and again committed to Civil Jail for 2 months on 7<sup>th</sup> November, 2011.

The appellants then filed this suit High Court Civil Case No. 42 of 2012 against the Defendant/Respondent seeking

- a) General damages for his breach of constitutional rights and liberty as he was detained at G. K. Prison.***
- b) Costs of the suit.***
- c) Interest.***

After full hearing Aroni J, by judgment delivered on 23<sup>rd</sup> March, 2018 found: -

***“The record show and the plaintiff idd attest to his appearing before Court 3. And as he failed to explain himself or tell the court how he would settle the decretal amount, he was committed to Civil Jail once more.***

*With the above chronological of events the plaintiff in my view failed to prove on a balance of probabilities that his constitutional rights were infringed and or violated. It is to be remembered that rights are accompanied with obligations; they are not absolute. The 2<sup>nd</sup> defendant followed laid down legal processes in making a claim against the Plaintiff, obtained a decree in his favour and pursued the decree by way of execution. It is clear that the plaintiff was all along represented the several consents made to allow him to honour the decree in vain. He cannot in my view hide behind the constitution by claiming rights yet failing to meet his legal obligations.*

*It is also my view that the plaintiff failed to sufficiently prove how the officers who arrested him infringed on his right since a warrant of arrest was out. Indeed, they arrested him and duly presented him before a court. Further at the time there was no order stopping or staying the consent order or his arrest.*

*Having failed to prove his case damages are not payable and the suit is dismissed with costs.”*

Being aggrieved by the decision of Aroni J, the Applicant states that he preferred an appeal against the order in the Court of Appeal where he has filed application No. 22 of 2019 seeking leave to file appeal out of time. He now prays for stay of execution.

The appellant argued the application in person on 12<sup>th</sup> February, 2020. He stated that he has filed an application for leave to file appeal out of time in Kisumu Civil Application No. 78 of 2019 but has not been heard because the Judge who was to hear it died. He confirmed that as at the date there was no appeal that had been filed. He urged the court to grant him stay of execution until the appeal is heard and determined.

Mr. Marunga for the respondent opposed the application. He submitted that firstly there is no appeal filed by the applicant. Secondly, counsel submits that the judgment delivered on 29<sup>th</sup> March, 2018 dismissed the applicant’s claim. It is, therefore, a negative order that cannot be stayed. Thirdly, counsel submit that the application has not satisfied the condition of Order 42 Rule 6 (2) for grant of order of stay and in particular how he will suffer substantial loss if order is not granted.

The Applicant by plaint dated 29<sup>th</sup> March, 2012 sued the Respondent’s and prayed for judgment be entered against the Respondent jointly and severally for

- a) General damages for his constitutional rights and liberty by detention at G. K. Prison Bungoma.*
- b) Costs of this suit.*
- c) Interest at Court rates on (a) above.*
- d) Any other relief that this honourable court deems fit to grant.*

What the applicant sued for in the suit is an award of general damages for being committed to Civil Jail in Prison. This claim for general damages is what was dismissed by Judgment dated 26<sup>th</sup> March, 2018. In this application he seeks stay of execution of that judgment. The judgment has not ordered the Respondents to do anything or to restrain from doing anything or pay any sum. It is a negative order not requesting anybody to do anything. An order for stay must have something to stay.

In **Western College of Arts and Applied Sciences v Oranga & Others (1976-80) 1 KLR**, the Court of Appeal for East Africa stated in respect of stay of execution, stated as follows:

*“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in an application to stay, it is so ordered”*

In **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR** the Court of Appeal (Kantai J.A ) held as follows:

*‘An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in *Mugenyi & Co. Advocates v National Insurance Corporation* (Civil Appeal No. 13 of 1984) where it was stated:*

*‘..... an order for stay of execution must be intended to serve a purpose .....’ (emphasis supplied).*

Further, in the more recent case of **Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Ors [2016] eKLR**, the Court of Appeal expounded on stay of execution stating:

*“ In *Kanwal Sarjit Singh Dhiman v. Keshavji Juvraj Shah [2008] eKLR*, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:*

***“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18<sup>th</sup> December, 2006. The order of 18<sup>th</sup> December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C.”***

The order dismissing the suit is a negative order incapable of execution save perhaps for Costs. It is, therefore, incapable of stay. There can be no order of stay of execution as there is nothing to stay. I, therefore, find this application dated 11<sup>th</sup> July, 2019 by the applicant Moses Wamalwa Mukhamari, without merit and is hereby dismissed with costs.

**Dated, signed and delivered at Bungoma this 21<sup>st</sup> day of July, 2020.**

.....

**S N RIECHI**

**JUDGE**