



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 154 OF 2019

**MARY WANJIKU NGANGA (Sued as the legal representative of the estate of GEOFFREY KAMAU NGANGA (DECEASED))
.....APPELLANT/APPLICANT**

VERSUS

JOHN BOSCO KURIA.....RESPONDENT

RULING ON NOTICE OF MOTION DATED 29TH JANUARY, 2020.

1. This appeal arises from the judgment and decree of the trial court in Nakuru CMCC NO. 433 of 2015 delivered on the 27/8/2019.

A Memorandum of Appeal was filed on the 11th September, 2019.

It is from the said judgment that the appellant herein then the Defendant, filed the application before me, dated 29th February 2020.

2. The Applicant/Appellant seeks stay of execution orders of the judgment and decree and all consequential orders pending hearing and determination of the appeal. It is based on **Provisions of Orders 42,43 and 51 of the Civil Procedure Rules (CPR) and Section 1A, 1B, and 63 (e) of the Act.**

Upon grounds that

- **The applicant stands to suffer substantial loss if stay orders are not granted.**
- **That the trial court denied an order of stay to the applicant, and**
- **That the application has been brought without undue delay**

The applicant swore and filed the supporting affidavit on the 29th February 2020.

3. The application is opposed by a Replying Affidavit sworn by the Respondent on the 17th February, 2020 and filed on the 18th February, 2020.

In addition, both parties have filed written submissions.

4. I have considered the application, the affidavits in support and opposition to the application as well as the parties written submissions.

5. The principles guiding the grant of stay of execution orders pending appeal are provided under **Order 42 rule 6 (2) of the Civil Procedure Rules** that:

No order for stay of execution 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 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.

6. It is trite that no appeal shall operate as a stay of execution or proceedings under a decree unless the court appealed has, for sufficient reasons, refused to grant the stay orders upon which the court appealed to, shall be at liberty, upon application being made, consider the application and make such order as it may deem just – **Order 42 rule 6 (1) Civil Procedure Rule – Stanley Karanja Wainaina & another Vs. Ridon Anyangu Mutubwa (2016) e KLR, Patrick Kalava Kulamba & another Vs. Philip Kamosu & Roda Ndanu Philip (2016) e KLR.**

7. Analysis and determination.

In considering whether or not to grant a stay order pending appeal, the court is empowered to balance and weigh the scales of justice by ensuring that the appeal is not rendered nugatory while ensuring that the successful party is not impeded from the enjoyment of the fruits of his judgment, bearing in mind that a successful party is *prima facie* entitled to the fruits of his judgment.

8. In exercising its discretion, the court should always opt for the lower rather than the highest risk of injustice as held in the **Samvir Trustee Ltd –Vs. Guradian Bank Limited, Nairobi (Milimani) HCCC NO. 795 of 1997** (Warsame J, as he then was).

9. Unreasonable delay.

The impugned judgement was delivered on the 27th August, 2019 and the trial court, upon application, declined to grant the stay order on the 28th January, 2020.

This application was filed on the 30th January, 2020. The same was filed without unreasonable delay.

10. Matter of Security.

The applicant has offered to deposit reasonable security for the due performance of the decree. The decree is monetary, in the sum of KShs.655,188/= plus costs and interest.

11. In his replying affidavit, the Respondent avers that he is a man of means and is able to refund the decretal sum in the event that the appeal succeeds, from his rental income stated to be approximately KShs.250,000/= as seen from his agents and deposit slips, as well as running a saw mill at Lanet with modest income.

12. The applicant agrees with the respondent that being of substantial means, he is able to refund the decretal sum if the appeal succeeds, unlike the applicant who is stated to be struggling financially. It is urged that the status quo be maintained, and the applicant be allowed to deposit Shs.50,000/= as security for costs.

13. The Respondent (John Bosco Kuria) holds a judgment in his hands in the sum of KShs.655,188/=. He is no doubt a man of means. The Applicant/appellant is not so endowed; being widowed, a housewife unemployed and with no source of income she deposes that she can only raise the decretal sum through a financial facility, but is able to deposit KShs.50,000/= as security for costs pending hearing and determination of the appeal.

14. The conditions stated under **Order 42 Rule 6(2) Civil Procedure Rules** are cumulative, and ought to be complied with for an order of stay to be granted – **Trust Bank Ltd –Vs. Ajay Shal & 3 Others (2012) e KLR.**

15. On the matter of substantial loss.

The Court of Appeal in **Kenya Shell Ltd Vs. Benjamin Karuga Kibiru & Another (1986) e KLR** rendered that

“It is not sufficient by merely stating that the sum of KShs.20,380/= is a lot of money, and the applicant would suffer loss if not paid-----

The applicant should show the damages it would suffer if the order for stay is not granted”.

16. Further, in **Machira t/a Machira & Co. Advocates Vs. East African Standard (NO.2), Civil Appeal NO. 612 of 1996**, the court held that

“-----if the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant’s business (eg appeal or intended appeal)”.

17. The applicant was sued as the legal representative of the Estate of her deceased’s husband, Geoffrey Kamau Nganga, over a refund of purchase price of an aborted sale of land **Title No. Nakuru Municipality Block 15/682**, which later turned out to have been a fake title.

18. I have perused the assets of the deceased in the certificate of confirmation of grant to the applicant dated 10th May 2013. The said property is not one of the assets stated. It shows that the applicant is the beneficial owner, by transmission, of several plots and Titles within Nakuru County, among other assets stated therein.

It is therefore not true that she is unable to raise the decretal sum to pay to the Respondent pending hearing and determination of her appeal.

Indeed it is her submission and deposition that she can be able, but by obtaining a financial facility. She is therefore not without options.

19. As stated in the decisions I have cited above an applicant to succeed on the issue of substantial loss/damage specifics and details upon which the court would be able to determine the type and kind of loss the applicant may suffer ought to be supplied and to consider what would happen if the order of stay is not granted – **Machira t/a Machira & Co. Advocates (Supra)**. The applicant has not specified any loss or harm.

20. In my ruling in **Peter Ndungu Ngae & 2 others Vs. John Mugane Keromo (Nakuru High Court Civil Case NO.138/2008) (2015) e KLR**, in very similar circumstances, the applicant satisfied only one condition as set out under Order 42 rule 6(2) Civil Procedure Rule. I dismissed the application holding that the principles of justice and fairness must be balanced against both parties interests.

There being no detailed, specific and particulars of the kind of loss if no stay is allowed, I find that the applicant has failed to succeed in this very crucial condition being the cornerstone for grant of a stay order.

21. The upshot is that the applicant/appellant has failed to satisfy the conditions set out under **Order 42 Rule 6 Civil Procedure Rule** for the grant of an order of stay pending appeal. The application dated 29th February, 2020 is dismissed.

22. Due to the nature and circumstances of the suit and judgment appealed from, I direct that each party bears own costs of this application.

Delivered, Signed and Dated electronically at Kerugoya this 1st day of October, 2020.

J.N. MULWA

HIGH COURT JUDGE

ADVOCATES:

1. Ochieng Gai & Co. Advocates.
2. Ms.Mutonyi Nyoike & Co. Advocates.

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