REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL APPEAL NO. 4 OF 2020

STEPHEN NJUGUNA.....APPELLANT/APPLICANT

VERSUS

JOHN WAINAINA WANJIKU.....RESPONDENT

RULING

1. The applicant took out a motion on notice dated 3rd March 2020 seeking stay of execution of the Judgment and decree of the trial court delivered on 22nd January 2020 in PMCC No. 191of 2018, pending the hearing and determination of his appeal.

2. The motion is predicted on Order 42 rule 6 of the Civil Procedure Rules 2010; the grounds on its face and the supporting affidavit by the applicant sworn on 3rd of February 2020. The applicant's case is that he will suffer substantial loss if stay is not granted; that the decretal sum is colossal; that his appeal will be rendered nugatory if stay is not granted and that his right of appeal will come to naught.

3. In the supporting affidavit, the applicant deposed that judgment was entered against him in favour of the respondent for Kshs. 870,208/= together with costs and interest and that he is dissatisfied with that judgment and has exercised his right of appeal.

4. The applicant further deposed that although he applied for copies of proceedings, he is yet to receive them. He expressed his apprehension that if the entire decretal sum was to be paid, the respondent may not be able to refund the amount were his appeal to eventually succeed. He offered to provide a title deed for his property as security.

5. The respondent filed a replying affidavit sworn on 26th May 2020 as well as grounds of opposition on 12th May 2020. He deposed and averred that the application is frivolous, vexatious and an abuse of court process; is an afterthought; is defective and un procedural and that it is incompetent. The respondent also denied that he was in the process of executing the decree.

6. He stated that the applicant has not shown that he is a financial risk and would be unable to refund the decretal amount should the appeal succeed. He argued that if the applicant was genuine he should have paid half the decretal amount into a joint account. He contended that the applicant does not deserve the orders sought.

7. Parties agreed to dispose of the motion by way of written submissions. The applicant submitted through his submissions dated and filed on that for the court to grant stay of execution, an applicant must show that he will suffer substantial loss, that the application has been made without delay and that he is ready to offer security.

8. He submitted that he has met the conditions for grant of stay of execution. He submitted, in particular, that he will suffer substantial loss if he pays the decretal sum. He relied on ***Stanley Karanja Wainaina v Ridon Onyangu Mutubwa*** [2016] eKLR, for the proposition that the onus lies on the respondent to show proof of ability to refund the money if paid.

9. The applicant further submitted that the application was filed within 2 months of the decision and therefore it was filed without delay. He relied on ***Florence Hare Mkaha v Pwani Tawakal Mini Coach & Another*** [2014] eKLR, where an application for stay was allowed though filed one year after the judgment. He also relied on ***Focin Motor Cycle Company Limited v Ann Wambui Wangui & Another*** [2018] eKLR where a delay of 2 months was found not inordinate.

10. On security, the applicant submitted that he is willing to deposit title deed for ***parcel No. Naivahsa/Maraigushu Block 1/3003*** as security. He relied on ***John Mark Obure v Fidelity Security Limited*** [2006] eKLR; ***Michael Waweru & Another v Grace Nyokabi Kinuthia*** [2019] eKLR and ***Alex Khalumba v Harrison Anukutse*** [2019] eKLR where applicants were allowed to deposit title deeds as security.

11. The respondent filled his written submissions on 21st September 2020. He submitted that as the applicant seeks exercise of discretion in

his favour, the court should be alive to Article 27(1) of the Constitution regarding every person's right to equal protection and benefit of the law. He relied on ***Re Estate of Michael Kiarii Njoroge*** (Deceased) [2019] eKLR.

12. The respondent also relied on ***Margaret Njeri Mwicigi v Rose Nyambura Kamande*** (suing as the Administrator of the estate of Michael Kiarii Njoroge-Deceased), citing ***Sir John Ronaldson, M R*** in ***Rosengrens v Safe Deposit Centres Ltd*** [1984] 3 All ER 198 who stated:

> ***"We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the defendant while giving no legitimate advantage to the plaintiff…It is our duty to hold the ring even handedly without prejudicing the issue pending the appeal."***

13. The respondent also relied on ***James Wangalwa & Another v Agnes Naliaka Cheseto*** [2012] eKLR and ***Kenya Shell Ltd v Benjamin Karuga Kibiru & Another*** [1986] eKLR.

14. Regarding security, the respondent submitted that although the applicant has proposed to deposit his title deed for parcel ***No. Naivahsa/Maraigushu Block 1/3003*** as security, he neither attached a recent valuation nor stated its estimated value to guide the court in determining whether to accept it or not. The respondent relied on ***Arun C Sharma v Ashana Raikundalia t/a Raikundalia & Co Advocates*** on the purpose of security. he also relied on ***David Kipsang Nyalimo v Naran Lalji Rabadia t/a Shruti Enterprises*** [2019] eKLR for the submission that having a title deed as security may not serve the purpose of security as much as depositing half of the decretal amount would.

15. The respondent argued that it would be difficult for him to liquidate the title deed which is outside its jurisdiction so as to realize the decretal amount in case the appeal does not succeed. The respondent further relied on ***Bibian Mbatha Ngotho v Odera Obar & co Advocates*** [2020] eKLR for the suggestion that it would not be proper to permit the applicant to deposit title documents as security since there is no way of establishing whether the value of the subject property constitutes adequate security. he urged the court to dismiss the motion.

16. I have considered the application, the response and submissions. I have also considered the authorities relied on. The applicant has sought stay of execution of the decree of the trial court pending the hearing and determination of his appeal against that decree.

17. In the impugned judgment, the trial court decreed Kshs. 870,000/= in favour of the respondent against the applicant. It is that decree that the applicant has appealed against, and now wants its execution stayed pending the hearing and determination of his appeal.

18. Whether or not to grant stay of execution calls for exercise of judicial discretion which should as a matter of law be exercised judicially. While exercising judicial discretion, the court must also balance rights of parties; an applicant's right of appeal and that of a respondent who has a judgment in his favour.

19. That said, grant of stay of execution is guided by Order 42 Rule 6 of the Civil Procedure Rules. First, an applicant must show that he will suffer substantial loss should stay not be granted; that the application was filed timeously and that he is willing to offer security for the due performance of the decree should the court direct him to do so.

20. There is no question that the application was filed without delay. The respondent has not argued that the motion filed two months after the judgment appealed against, was filed after inordinate delay. I therefore agree that the application was filed within time.

21. On substantial loss, the applicant has argued that if the decretal sum of Kshs. 870,000/= is paid the respondent will not be able to refund the amount were his appeal to succeed. He contends that the respondent has not shown that he would be in a position to refund the money should the appeal succeed. In essence, the applicant argues that the respondent's financial means are unknown.

22. In his replying affidavit, the respondent did not state his ability to refund the money should the appeal succeed. He deposed generally that he will suffer substantial loss.

23. As this is an application for stay of execution, we turn to the principles upon which it should be granted or denied.

24. Order 42 rule 6 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"*** *(emphasis).*

25. I have already found that the application for stay was filed without delay as it was not in contention. The more important consideration is the requirement that an applicant has to show to the satisfaction of the court, that he will suffer substantial loss, and that it has offered security for the due performance of the decree as the court may deem fit.

26. While considering the grounds for granting stay of execution pending appeal, the Court of Appeal stated in ***Butt v Rent Restriction Tribunal*** *(*Civil App No. NAI 6 of 1979) **that t***he power of the court to grant or refuse an application for stay of execution is discretionary, but the discretion should be exercised in such a way that it does not prevent an appeal. The court added that in exercising the discretion whether to grant or refuse an application for stay the court will consider the special circumstances of the case and its unique requirements.*

27. What is clear from Order 42 rule 6 as well as the above decision is that in an application for stay the court exercises judicial discretion and like any other discretion, it should act judiciously. Whether to grant stay or not, the Court has also to consider the circumstances of each case.

28. It is also clear from the wording of Order 42 rule 6, that the guiding principle is that an applicant should show that he will suffer substantial loss if stay is not granted. As to what amounts to substantial loss has been the subject of consideration by courts. In ***James Wangalwa & another v Agnes Naliaka Cheseto*** *[*2012]eKLR, the court stated;

> ***"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....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"***
>
> *29.* In ***Equity Bank Ltd v Taiga Adams Company Ltd*** [2006] eKLR, the Court again stated that *the only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent, that is; execution proceeds or is carried out, in the event the appeal succeeds, the respondent would not be in a position to pay or reimburse because he has no means of doing so.*

30. *The court was again made it clear in* ***Machira T/A Machira & Co Advocates v East African Standard (No 2*** [2002] 2 KLR 63, that in attempting to demonstrate to court that substantial loss is likely to be suffered, the applicant is under a duty to do more than merely repeating words of the relevant statutory provision or rule or general words used in some judgment or ruling in a decided case cited as a judicial precedent for guidance. The court emphasized that; ***" it is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do."***

31. In considering whether or not to grant stay, the court's duty is to do justice of the case presented before it. The applicant has a statutory right of appeal that he seeks to exercise. As waits to do so, he faces the real possibility of execution and thereby paying the decretal sum of Kshs. 870,000 before his appeal is heard and determined. On the other hand, the respondent has a judgment in his favour that he wishes to execute but he is also faced with the possibility that the appellant's appeal may succeed and he, if he executes, may be required to refund the sum already paid. This requires balancing of rights but the primary consideration is whether there will be substantial loss.

32. The applicant has not been clear what substantial loss he will suffer. He had a duty to satisfy the court that he will indeed suffer something special that cannot be undone should execution proceed. For instance, he did not state that the respondent is an impecunious person who would not be able to refund the decretal sum if paid.

33. On the other hand, the respondent has not stated that he will be in a position to refund the decretal sum if the appeal was to succeed. The two sides more or less made depositions or averments without substantiating and left it to the court to decide.

34. On timeous filing of an application for stay, the judgment, the subject of this application, was delivered on 22nd January 2020 while the application was filed in less than 2 months. There can be no argument, therefore, that the application was filed timeously.

35. On security, the applicant has offered to deposit his title deed for a parcel of land. The respondent argued that the applicant should have deposited half the decretal sum in a joint account. He also argued that the applicant has not attached valuation of the property to show that it is sufficient to cover the decretal sum.

36. I must point out that the rule does not state that an applicant must provide security but that he should show his willingness to provide security should the court so direct. The applicant has stated that he is willing to provide security if the court so directs. He has offered to deposit his parcel of land for that purpose. He has relied on a number of decisions where courts have allowed deposit of tittle documents as security while considering applications for stay of execution.

37. I have considered parties arguments with regard to this aspect of security. I have also perused the applicant's supporting affidavit and annextures to that affidavit. The applicant annexed copies of title deed and search. The land measures approximately 0.0476 HA. There is however no valuation report for the land, and as the respondent correctly argued, there is no way of telling the value of the land to enable the court determine whether to accept it as security or not. It is not enough to deposit a title deed as security. what is important is for the person proposing to deposit the title deed to show the court that if accepted the title deed is sufficient security for the performance of the decree. Accepting a title deed without ascertaining its value would not on its own suffice. It is the duty to the person offering that title deed to do all that is possible and satisfy the court that he has offered sufficient security for the due performance of the decree if called upon to do so.

38. I have considered the application and respective parties arguments. I have also considered the decisions relied on by both sides. In

matter like this, the court should balance interest of both sides where information is unclear. Both the applicant and respondent are individuals. The applicant has exercised his right of appeal while the respondent has a judgment in his favour. The applicant has offered security which falls short due to the fact that its value is un known. The amount involved is over Kshs. 800,000/=. In the circumstance, I am of the view that a conditional stay will suffice.

39. Consequently, I allow the application dated 3rd March 2020 as follows.

a) Stay of execution of the judgment and decree of the Principal Magistrate's Court, Ngong made on 22nd January 2020 in PMCC No. 191 of 2018 is hereby granted pending the hearing and determination of this appeal.

b) The applicant to deposit Kshs. Three Hundred and Fifty Thousand (Kshs. 350,000) in a joint interest account in the names of the respective parties advocates within Forty Five days from the date hereof.

c) In default of order No. 2 above, the application shall stand dismissed.

d) Costs of the application to abide by the result of the appeal.

Dated, Signed and Delivered at Kajiado this 2nd day of October, 2020.

E. C. MWITA

JUDGE