



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 62 OF 2019

MONYORO MONG'ARE SHEM.....1ST APPELLANT/RESPONDENT

NICHOLAS MONG'ARE.....2ND APPELLANT/RESPONDENT

VERSUS

TIMOTHY NYAGAKA NYAGAKA.....RESPONDENT/APPLICANT

RULING

By the Notice of Motion dated 4th September 2020 expressed to be brought under Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act the applicant seeks the following orders:-

“1. (Spent)

2. (Spent)

3. (Spent)

4. That this honorable court do order a return of Keroka PMCC 103 of 2018 to Keroka Law Courts for purposes of execution.

5. That the appeal proceedings herein be stayed until the Appellants comply with the Chief Magistrate's court stay condition orders made on 21st July 2020.

6. That the costs of this application be provided for.”

The application is premised on grounds that:

“(a) The Appellants herein being dissatisfied with the judgement in the trial court in Keroka PMCC 103 of 2018 lodged the present appeal and filed an application for stay pending appeal dated 16th January, 2020.

(b) The application was heard and determined by the trial court on 21st July, 2020 and stay conditions were set that: - the Appellant do pay the Respondent 1/2 the decretal sum in 30days after delivery of the ruling and that the remainder of 1/2 be deposited in a joint interest earning account plus costs awaiting the outcome of the appeal, within 30 days.

(c) The Appellants have not satisfied the above stated conditions and they have gone ahead and set the appeal for mention for directions on 17th September, 2020.

(d) It is trite law an appeal cannot operate as a stay of execution.

(e) In the premises it only fair and just that there be stay of the appeal proceedings and that the lower court file Keroka PMCC 103 of 2018 be returned to Keroka Law Courts for purposes of execution.

(f) The Respondent/Applicant will suffer prejudice if the appeal herein proceeds without security of the judgment being provided.”

The background of the case is that the trial court delivered judgment in favor of the applicant for a sum of Kshs. 10,000,000/= being damages

for injuries sustained by the applicant in a road accident that occurred on 1st August 2018 involving motor vehicles registration no. KMDK 005C and KAR 388X in which applicant and other passengers sustained severe injuries. Being dissatisfied with the outcome, the 1st and 2nd Respondents preferred an appeal and simultaneously filed an application in the lower court seeking a stay of execution of the decree pending hearing and determination of the appeal. On 21st July 2020 the trial court allowed the application on condition that the Respondents' would pay the applicant a ¼ of the decretal sum within 30 days from the date of the ruling and directed that the remaining ¾ be deposited in a joint interest earning account within 30 days. The respondents did not however comply with that order.

By their replying affidavit filed herein on 1st October 2020 the respondent's responded that the instant application is frivolous, vexatious and an abuse of the court process and that, the same is merely calculated to delay determination of the appeal which is almost nearing conclusion as directions have already been taken to canvas the same by way of written submissions. They aver that the position by the applicant that directions on the appeal were taken by the appellants/respondents alone is misleading as both counsel were present. They contended that execution of the decree shall render the proposed appeal nugatory and that their insurer is at an advanced stage of processing the conditions decreed by the trial court. They further assert that the present application is an afterthought and that it will prejudice the appellant who has a strong appeal.

The application was canvassed by way of written submissions.

The firm of Gekong'a & Company Advocates who are on record for the Respondent/applicants filed their submissions on 13th October, 2020. Mr. Gekong'a submitted that **Order 42 rule 6(1) and (2) of the Civil Procedure Rules**, which provides for security as a condition for stay of execution is mandatory. He submitted that the rationale for that rule is to give assurance to the Respondent that his judgment award is intact and accessible should the appeal be unsuccessful. Counsel submitted that the Respondents have not complied with the condition issued on 21st July, 2020 and relying on the case of **Bank Limited v Taiga Adams Company LTD [2006] eKLR of LUXU Woods (K) Limited v Patrick Amugune Kamadi [2016] eKLR** he urged this court to order compliance of the same. Counsel asserted that the intentional refusal to comply with the order of the court amounts to contempt of court and that the applicant stands to suffer substantial loss as he is being denied the right to enjoy the fruits of her judgment. Counsel further submitted that the trial magistrate took note that the applicant who suffered permanent incapacitation assessed at 70% is totally dependent on his family. Counsel submitted that he who seeks equity must do equity. He invited this honorable court to weigh the right of the applicant against those of the respondents/appellants and allow the application.

Relying on the case of **Butt v Rent Restriction Tribunal (1982) KLR 417** counsel argued that the order for stay lapsed once the appellant/applicant breached the conditions. He contended that this appeal cannot operate as a stay and that the respondent/applicant has a right to execute. He therefore urged this court to dismiss the appeal and to order that the lower court file be returned to the lower court for purposes of execution of the decree.

On their part the respondents, through the firm of Kimondo Gachoka & Company Advocates, filed their submissions on 23rd October, 2020 and submitted that the applicant has not rendered any convincing reasons to warrant granting of the orders sought; that the applicant's averment that the appellants listed the appeal for directions before compliance are misleading and only an attempt to delay conclusion of the appeal. Relying on the case of **Wildlife Service Vs. James Mutembei [2019] eKLR** the respondents submitted that returning the file will clearly delay conclusion of the appeal and the right of the appellants to a fair and expeditious trial. Counsel for the respondents also contended that the delay to comply with stay is not intentional and the applicant is merely abusing court process by trying to delay conclusion of the appeal. Counsel stated that the award of the trial court was extremely high and the appeal put forth by the appellants has high chances of succeeding hence, allowing execution to proceed will deny the appellants the right to a fair trial. Counsel for the appellants/respondents urged this court to dismiss the application and stated it is an afterthought and lacks merit and reiterated that their insurer is at an advanced stage of processing the stay conditions decreed by the trial court.

Issues for determination

Having considered the application, the rival submissions and the cases cited by both parties, what calls for determination is whether there is a valid stay of execution pending appeal and whether the orders sought can be granted.

In the case of **Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others [2018] eKLR**, the court held that: -

“No court should.

When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue *ex cathedra*, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.”

The court went further to state that: -

While the right to fair hearing is sacrosanct and is one of the non-derogable rights in Article 25 of the Constitution, we affirm with this Court in **A. B. & ANOTHER vs. R.B.** 2016 eKLR that there may be instances where due to the risk of the rule of law being deliberately undermined, such right may be denied and the hearing of an application for stay denied until there is full compliance with the orders of the High Court.” (See also **COMMUNICATIONS COMMISSION OF KENYA v TETRA RADIO LTD, [2013] eKLR.**

In the instant case, I note that there are orders issued by the trial court on 21st July 2020 which set out conditions to be met for stay of execution pending appeal. It is also noted that the same have not been complied with three months down the line. There were time lines for compliance which have already lapsed. No reasonable explanation has been rendered for non-compliance and there is no application by the appellants for extension of time to comply and neither is there an application to set aside the said orders. Where the court orders for security deposit and there is default, then the orders for stay are rendered useless for a defaulting party. Therefore, it is my find that the appellants/respondents having deliberately neglected or refused to comply with the conditions upon which the order for stay of execution was premised then the said order lapsed and it no longer exists. The argument advanced by the appellants/respondents that their insurer is at an advanced stage of processing the stay conditions is but an admission of the flagrant breach of the conditions but cannot go to the aid of the respondent. The argument that directions in this file in regard to filing submission were given in the presence of both parties advocates cannot help either. **Order 42 rule 6 (1) of the Civil Procedure Rules** provides for stay in case of appeal and in mandatory terms. It expressly states: -

“6. (1)No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 to 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.”

The appeal herein does not in itself operate as a stay of execution of the decree in the lower court. Accordingly having found that the appellants/respondents deliberately defaulted in complying with the conditions given by the lower court and having found that they are in breach of that order and having found therefore that the order for stay of execution lapsed and is no longer valid I find merit in the application that the file should be returned to the lower court for execution. I accordingly order that the file be returned to the lower court forthwith. It is my finding that as there is a record of appeal with certified copies of the proceedings returning the file shall not occasion any delay in the appeal, and hence violate the appellants’ right to have the appeal heard expeditiously. The applicant/respondent shall bear the costs of the application. It is so ordered.

Judgment signed, dated and delivered electronically via Microsoft Teams on this 5th day of November 2020.

E. N. MAINA

JUDGE