



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL APPEAL NO. 29 OF 2020

DAVID KARANJA NGUGIAPPELLANT

VERSUS

DUNCAN RARWAT KERETO....RESPONDENT

RULING

1. The applicant took out a motion on notice dated 8th October, 2020 brought under sections 79G, 3 and 3A of the Civil Procedure Act and Orders 22 rules 22, 42 rules 4, 6 and 7 of the Civil Procedure Rules, seeking stay of execution of the judgment and decree in Loitokitok SRM CC No. 23 of 2020, pending the hearing and determination of this appeal.
2. The application is based on the grounds on the face of the motion and the supporting affidavit by David Karanja Ngugi, the applicant sworn on 8th October, 2020.
3. From the grounds on face of the motion, the applicant states that the trial court held him 100% liable and awarded general damages of Kshs. 800,000 and special damages of Kshs. 5,000; that he has filed an appeal against both liability and quantum; that the appeal has high chances of success but, in the meantime, the respondent has commenced the process of execution, and that he is apprehensive that if stay is not granted his appeal will be rendered nugatory.
4. He also states that the respondent has not shown his financial means and unless stay is granted, he will suffer irreparable loss. He offers to furnish security as the court may direct. The supporting affidavit contains more or less averments similar to the grounds on the face of the motion.
5. The respondent has filed a replying affidavit by Duncan Ramwati Thereto sworn on 16th October, 2020 and filed on 19th October 2020. He deposes that he sustained injuries which left him with a considerable degree of incapacity and needs further treatment; that the trial court awarded him Kshs, 800,000 which is reasonable and that the appeal is not meritorious. He further deposes that the applicant has not shown that he would pay the decretal sum if the appeal was dismissed. He urges that the applicant be compelled to deposit the decretal sum in a joint interest earning account in the names of the advocates.
6. During the hearing, Miss King'e has moved the motion and urged the court to allow it. She submits that the applicant is willing to furnish a bank guarantee and that the application has been brought without delay. He relies on *Kenya Revenue Authority v Keitanyi Changole & 3 others* [2015] eKLR (page 3 para. 7) and *Edward Kamau & Another v Hannah Mukui Chege & another* [2015] eKLR (page 5 para 4).
7. Mr. Were on his part submits in opposition to the application, that the appellant has not met the conditions for grant of stay of execution pending appeal; that he has not deposited the decretal sum into court or interest earning account; that the applicant has not shown that he has an arguable appeal with high chances of success and that the proposal to furnish a bank guarantee is not suitable. In his view, the decretal sum should be deposited into an interest earning account in the joint names of the advocates. He urges the court to dismiss the application.
8. I have considered the motion, the response and submissions by counsel for the parties. I have also considered the decisions relied on. The applicant has sought stay of execution of the decree of the trial court pending the hearing and determination of this appeal.
9. In that judgment, the trial court awarded the respondent general damages of Kshs. 800,000/= and special damages of Kshs. 5,000/= against the applicant. That is the decree the applicant has appealed against, and wants execution thereof stayed pending the hearing and determination of this appeal.
10. Grant of stay of execution is governed by Order 42 Rule 6 of the Civil Procedure Rules which 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).

11. One of the conditions that an applicant must establish before the court can grant stay of execution is that he will suffer substantial loss should stay not be granted. The other is that the application has been filed timeously and finally that he is willing to offer security for the due performance of the decree should the court direct him to do so.

12. On timeous filing of the application, there is no question that the application has been filed without delay. The respondent has not argued that there was delay in filing the motion either. The application was filed on 12th October 2020, while the impugned judgment was delivered on 26th August 2020. I am therefore satisfied that the application was filed without delay.

13. On whether the applicant will suffer substantial loss, he has argued that the respondent has not shown through evidence that if the decretal sum of Kshs. 800,000/= is paid he will be able to refund the amount were his appeal to succeed. In other words, the applicant contends that the respondent has not shown that he has the means and, therefore, he is in a position to refund the money should the appeal succeed. That is, the respondent’s financial means are unknown.

14. The respondent has not stated in his replying affidavit that he has the ability to refund the money should the appeal succeed. He has also deposed that the applicant has not shown that he has the means to pay the decretal amount if the appeal is dismissed.

15. As I have already stated, one of the important consideration in an application for stay is that an applicant has to show to the satisfaction of the court, that he will suffer substantial loss.

16. While considering an application for stay of execution pending appeal, the Court of Appeal stated in ***Butt v Rent Restriction Tribunal [1979] eKLR, Madan, JA.*** stated that if there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory; that a stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings and that it is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution.

17. It is clear from both Order 42 rule 6 and the above decision, that in an application for stay of execution, the court exercises judicial discretion and, like any other discretion, it should act judiciously. The court has also to consider circumstances of each case.

18. It is also clear from the wording of Order 42 rule 6, that an applicant should show that he will suffer substantial loss if stay is not granted. As to what amounts to substantial loss, this 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”

19. 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.

20. The court 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 as that will not do.

21. In considering whether or not to grant stay, the court’s duty is to do justice of the case presented before it. The court must also balance rights of parties; between the applicant’s right of appeal and that of the respondent who has a judgment in his favour.

22. The applicant has a statutory right of appeal that he seeks to exercise but faces the real possibility of execution and thereby paying the decretal sum of Kshs. 800,000 before his appeal is heard and determined. On the other hand, the respondent has a decree 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 may be required to refund the decretal sum already paid. This requires balancing of the two rights. But the primary consideration is whether there will be substantial loss.

23. 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 be allowed to proceed. He did not state that the respondent is an impecunious person who would not be able to refund the decretal sum if paid, but that the respondent has not shown through evidence that he has the means.

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

25. On whether the application was filed within time, I have already found that the judgment, the subject of the application for stay, was delivered on 26nd August 2020 while the application was filed in less than 2 months. There can be no argument, therefore, that the application was filed timeously.

26. On security, the applicant has offered to provide a bank guarantee, which the respondent has argued is not appropriate security. In the respondent's view, the applicant should deposit the decretal sum into court or into a joint interest earning account in the names of the two advocates for the parties.

27. I have considered parties arguments with regard to this application. In an application for stay of execution, the court should balance interest of both sides. 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 in the form of bank guarantee which the respondent does not favour. The amount involved is over Kshs. 800,000/=. The respondent was injured and he has stated that he needs money for future treatment. In the circumstance, I am of the view that to balance the competing interests, a conditional stay will be appropriate so that the applicant exercises his right of appeal and the respondent is not left miserable.

28. Consequently, I allow the application dated 8th October, 2020 as follows.

a. Stay of execution of the judgment and decree of the Senior Resident Magistrate's Court, Loitokitok, delivered on 26th August 2020 in SRMCC No.23 of 2019 is hereby granted pending the hearing and determination of this appeal

b. The applicant to pay to the respondent Kenya shillings Two Hundred Thousand (Kshs. 200,000) within thirty (30) days from the date hereof.

c. The balance of Kenya shillings six hundred thousand (Kshs. 600,000/= be deposited into a joint interest earning account in the names of the advocates for the parties within forty five (45) days from the date hereof.

d. In default of any of orders in (b) or (c)above, the application shall stand dismissed.

e. Costs of the application to abide by the result of the appeal.

Dated, signed and delivered at Kajiado this 11th day of December, 2020.

E.C. MWITA

JUDGE