



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL APPEAL NO. 19 OF 2018

STEVE OMONDI ODERO.....1ST APPLICANT/APPELLANT

NA SCHOOL.....2ND APPLICANT/APPELLANT

VERSUS

ESS (Suing on behalf of a minor EJZ (E)).....RESPONDENT

RULING

The applicant herein took out the notice of motion dated 18th July 2018 and filed on 19th July 2018 seeking stay of execution of the judgment delivered at the HIV&AIDS tribunal on 22nd June 2018. The application is expressed under Article 159 of the Constitution of Kenya, 2010, Order 51 Rule 1 and Order 42 Rule 6 of the Civil Procedure Rules, Section 1, 1A and 3A of the Civil Procedure Act cap 21 and all other enabling provisions of the law.

The orders sought on the face of motion are as follows;

- 1) That the application be certified as urgent
- 2) That this court be pleased to order a stay of execution on the judgment orally delivered on 22nd June, 2018 in the HIV& AIDS tribunal case No.002 of 2016, pending the hearing and determination of this application.
- 3) That cost of this application be in the cause.

The application is supported by the supporting affidavit of Livingstone Gitau, the director of the 2nd Applicant, sworn on 18th July 2018. Consequently, vide the order issued on 25th July, 2018, the court granted the applicants' a temporary stay of execution against the judgment and orders delivered by the HIV & AIDS tribunal on 22nd June 2018.

Livingstone Gitau, the director of the 2nd applicant sworn a supplementary affidavit on 7th November 2018, he deponed that there exists an imminent threat to execute and attach against the appellant's as clearly stated by the respondent's and thus need to have a stay of execution as against the respondent pending the hearing and determination of the appeal so that the appeal is not rendered nugatory.

The applicant deponed in his affidavit sworn on 18/7/2018 that being aggravated of the judgment by the tribunal he will suffer substantial loss and the appeal will be rendered nugatory. In further supplementary affidavit dated 1/11/2018 filed in court on 8/11/2018 he deponed that there is grave danger of execution proceedings against the judgment if stay of execution is not granted by this court. The following documents were annexed to the affidavits the judgement of the tribunal and copies of correspondence to support the validity of the claim.

The respondent ES in reply denied the allegations made by the applicants in both the affidavit in support and accompanying supplementally affidavit dated 1/11/2018. The respondent took issue with the applicant inordinate delay to file the application and even the memorandum of appeal. It is also in the replying affidavit that the applicant has not shown sufficient cause why the orders for stay of execution should be granted. further the respondent deponed that equally important is the bare allegations that the applicant would suffer substantial loss without probative evidence to that effect.

The respondent averred that the applicant has not demonstrated that upon the hearing of the appeal and at the end of it all he succeeds; the respondent will not be in a position to repay the decretal sum.

Applicants' Skeletal Submissions

During the hearing both counsels opted to file skeleton submissions to raise the respective concerns and perspectives in the matter. Mr. Naikuni for the applicant submitted that if indeed stay of execution is not granted they will suffer substantial loss. Further learned counsel contended that if an order of stay is not considered the appeal will be rendered nugatory.

Mr. Naikuni further on behalf of the applicants submitted their written skeletal submissions dated 7th December 2018 and filed on 10th December 2018. In their written submissions, the applicant's submitted that they will indeed suffer substantial loss of 5(five) million Kenya shillings if an order for stay of execution is not granted. If the orders are not considered and the applicant herein does pay the decretal sum to the respondent, the respondent has not demonstrated that upon the hearing and determination of this appeal in favour of the applicants, that she will be in a position to repay the decretal sum. It is in the public domain that the respondent is not financially stable and relies on donors.

The applicant counsel submitted that they are willing to furnish the security as to costs whereby the security is deposited in this honourable court, the respondent will be able to have access to the same without any hardship, in the circumstances that the appeal is not considered by this honourable court.

The learned counsel submitted that the application was made within the stipulated time as required by law. Judgment was delivered on 22nd June 2018, applicants' secured a 30-day stay of execution at the HIV/AIDS tribunal, applied for stay at this honourable court on 19th July 2018, the stay was set to lapse on 22nd July 2018. Failure to file the record of appeal on time is due to the frustrations by the HIV/AIDS tribunal as evidence in the supplementary affidavit. The proceedings and judgment were received by the applicants on 18th October, 2018.

Respondent's Submissions

Mr. Otwal presented written submissions dated 15th December 2018 and filed on 17th December 2018. The respondent counsel submits that the prerequisite condition set out in Order 42 Rule 6 of the Civil Procedure Rules 2010 cannot be severed. This order connotes that all conditions should be met simultaneously. The learned counsel was of the view that the applicant did not fulfil two conditions to be granted a stay of execution, these are; a) the applicant has not shown substantial loss, b) whether such security has been deposited by the applicant.

In addition, learned counsel took the view that, the applicants have not demonstrated in their pleadings before this court how they would suffer substantial loss if the stay of execution was not granted, this being a money decree involving damages and costs. In buttressing his submissions learned counsel relied on the following cases. **(1) Masisi Mwita vs. Damaris Wanjiku Njeri (2) Equity Bank LTD VS. Taiga Adams Co. LTD. (3) Joseph Gachie T/A Joska Metal Works LTD vs. Simon Ndeti Muema**

Based on this learned counsel submitted that nothing presented to the court to demonstrate that the applicants would undergo an anomalous economic situation that would make it difficult to raise the amount the court required or if ordered to pay security or the deposit decretal sum as security. No evidence of financial statements by the applicants have been attached in the application save only for the bare statements by the director and as such the allegations are simply not proved and are therefore unsuccessful to demonstrate substantial loss as a requirement of the law. Case quoted **Pamela Akinyi Opondo vs. Barclays Bank of Kenya Limited**. Counsel further submitted that the applicants have made mere allegations that they will suffer substantial loss without proving or demonstrating the same before this court, the respondent Relied on the case of **Kenya Shell Limited vs. Benjamin Kibiru and another 1986 eKLR**.

In a nut shell learned counsel argued and submitted that the respondent should be allowed to enjoy the fruits of the judgment and thus this court issue and order for the release of the decretal sum to her for the sake of the minor in issue.

On the issue of whether such security has been given by the applicant, the respondent counsel submitted that the applicant's notice of motion and supporting affidavit did not indicate their intention and readiness or proof that they are ready and willing to offer such security as the court may deem fit. With this the respondent counsel prays that the court makes an order that the applicant's herein to provide security and to grant orders for the depositing of the decretal sum in a joint account owned by the two corresponding law firms. According to learned counsel contention the right of appeal must be balanced against an equally weighty right of the respondent to enjoy the fruits of the judgment.

Legal Analysis

A stay of execution under order 42 of the Civil Procedure Rules is an interim order to suspend the rights of one party who is aggrieved with the judgment of the trial; court or tribunal and wishes to exercise his or her right of appeal. Its main objective is to protect the substratum of the suit by delaying the execution process like attachment until the determination of the appeal. Being a discretionally remedy the applicant must demonstrate that he or she has approached the court of equity with clean hands as succinctly stated in the case of **Jajbhay v Cassim 1939 AD 537-551** the court held on this maxim that:

“All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice.”

The general principle of law is that the successful litigant in possession of a valid court judgement is entitled to the fruits of judgement unless there exist exceptional circumstances to deny him or her that right. For purposes of preserving the decree which has been passed against a party stay gives room for maintenance of status quo pending the outcome of the appeal. This principle was stated in the **Nigeria Case of SPDC v Amadi 2011 INLR** where the court held

“If stay of execution is not granted the beneficiaries of the judgment would go into the shell Residential Area (the Res) driven by all kinds of desires and the end is best imagined. The Res may be destroyed before the appeal is determined. A return to the status quo ante bellum in the event the appellant wins and that will be bad for the stream of justice which must be kept pure at all times. The court would be presented with a fait accompli before its judgement is delivered.”

The governing procedural law to satisfy an application of this nature for stay of execution is provided under order 42 rule 6 of the Civil Procedure Rules, 2010 which states as follows;

(a) That the application for stay has been made without unreasonable delay

(b) That substantial loss may result to the applicant unless an order is made.

(c) That such security as the court may order for the due performance of such decree or orders as may ultimately be binding on him has been given by the applicant

It is also trite the mere lodge of an appeal is no ground for stay of execution. The applicant has to satisfy the court of equity that is deserving the stay orders as expressly stated in the above order. The onus to discharge the burden of proof is vested with the applicant.

Unreasonable Delay in Filing the Application

First, the court should consider whether there was unreasonable delay in filing the application for stay of execution. This principle is undisputed in the present case; judgment at the HIV & AIDS tribunal was delivered on 22nd June 2018 and the applicant filed their notice of motion under certificate of urgency on 19th July 2018, this was less than a month from the date judgment was delivered. Contrary to the submissions by the respondent the application seeking stay of execution was filed in a timely manner.

Substantial Loss

Substantial loss is not defined under statute; various case laws have embarked on defining what substantial loss entails. In the case of Tropical commodity suppliers limited, the court observed that:

“substantial loss does not represent any particular mathematical formula. Rather it is a qualitative concept. It refers to any loss, great or small that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”

In the case of **Bungoma HC Miscellaneous Application No. 42 of 2011 James Wangalwa and another Vs. Agnes Naliaka Cheseto** the court further discussed what substantial loss entails:

“The application 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. This is what substantial loss would entail.”

On substantial loss, the borne of contention is whether the applicant will stand to suffer substantial loss when the application is declined hence the appeal will be rendered nugatory or the applicant will not recover the decretal amount if the appeal succeeds which is substantial. The guiding case law, which has been quoted in various judicial decisions is the case of **Kenya Shell Limited v Benjamin Karuga Kibiru and another 1986 eKLR** where the judge observed inter alia that;

“...The test would be whether the appeal would be rendered nugatory unless payments of the decretal were stayed. It is not normal in many decrees for the appeal to be rendered nugatory, if payment is made. The affidavit in support has not set out any information to show that the appeal will be rendered nugatory... no reasons given why the appeal will be rendered nugatory. The court inquired into the respondent's circumstances but the information that was forthcoming did not confirm the applicant's misgivings.”

[I]f there is no evidence of substantial loss to the applicant it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.

The next step is to balance the rights of the parties; on the appeal and judgment held by the applicant and the respondent respectively. Nobody comes to court with superior rights; the applicants' rights are not greater or lesser than the respondent's rights, so the court should not prefer one over the other. Granting stay of execution connotes that the status quo is preserved and the applicant and respondent will remain in the same position before judgment. The respondent's rights to the fruits of her judgment will be postponed but it will be on just terms and secured by provisions of security which is sufficient to guarantee performance of the decree which will be binding on the applicant.

To expand on the above, I will quote the case of **Absalom Doya vs Tarbo Transporters (2013) eKLR** that;

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that case deserves. This is in recognition that both parties have rights; the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefit under the decree. The court in balancing the 2 competing rights focuses on their reconciliation which is not a question of discrimination.”

The subject matter at hand is a money decree and the issue to be resolved is whether the respondent can pay back the decretal sum should the appeal succeed. There are two burdens to be discharged; these are the legal burden and the evidential burden. The legal burden of proof lies

with the applicant who has to prove that the respondent is unable to pay back the decretal sum in the event his appeal succeeds. The applicant should adduce evidence that the respondent has the inability or lack of finances to refund the decretal sum. Prima-facie evidence should be established by the applicant and then the evidential burden will shift to the respondent.

In this instant, case the applicant averred that in his supporting affidavit that they will suffer substantial loss if the orders sought herein are not granted and the appeal is indeed meritorious. The applicant further advanced on this point in his written submissions that they will suffer substantial loss of five million Kenya shillings if an order of stay is not granted. The applicants contend that if they pay the respondent's the decretal sum, the respondents have not proved that they are in a position to refund the decretal sum. The applicant further submitted that it is in the public domain the respondent is not financially stable and relies on donors and they will go through hardship such as instituting legal proceedings to recover the decretal sum.

From the foregoing, has the applicant discharged his legal burden that the respondent cannot refund the decretal sum if the appeal succeeds? The applicant has stated that the respondent is not capable of refunding the decretal sum and that it is in the public domain that the respondent relies on donors. The applicant asserts that the respondent does not have sufficient assets to refund the decretal sum. These submissions attributable to substantial loss has not been controverted by the respondent. Special attention is given to the nature of the claim before the tribunal. It therefore calls for the power of the court to grant stay of execution between the parties so as not to render the appeal nugatory.

The applicant has discharged his initial legal burden of proof and shifts the evidential burden to the respondent to prove in the event the appeal succeeds they would be able to refund the decretal sum. The applicant has established that the respondent will not be able to refund the decretal sum herein and therefore has shown that substantial loss would occur unless the stay is ordered.

Security of Performance

Thirdly, the court must take into consideration the provisions on security for the due performance of the decree as provided under Order 42 Rule 6(c) of the Civil Procedure Rules, 2010. On this principle, the applicant avers that he is willing to a reasonable deposit to serve as security of cost. The rationale of this ground contemplate a situation where if the appeal succeeds the applicant is eligible to enforce the decree without any further execution process.

Decision

It follows therefore that the applicant is entitled to the orders sought in the notice of motion dated 18/7/2018 by granting stay of execution pending appeal from the judgment of the tribunal delivered on 8/6/2018. In so far as it relates to security for the performance of the decree the applicant is conditioned to deposit the entire principal amount of the judgment being Ksh 5 million within 40 days from today's date in the joint earning interest account of both advocates in a preferred financial institution of their choice.

The costs of this application do abide the outcome of the appeal.

Dated, delivered and signed in open court this 16th January 2019

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R. NYAKUNDI

JUDGE

Representation

Mr. Obel for the Applicants

Mr. Kiarie holding brief for Atwal for the Respondent