



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 8 OF 2019

BENARD KHAUKA WAFULA.....APPELLANT

-VERSUS-

JAMES GACHIE NGUGI (suing as the father and Next Friend

of RUTH WATERE).....RESPONDENTS

RULING

[1] Before the Court for determination is the Notice of Motion dated **10 January 2019**, filed herein by the Appellant/Applicant, **Benard Khauka Wafula**. The application was brought pursuant to **Sections 1, 1A, 3A, 63(e), 75(1)(h) and 79(g)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya, Order 42 Rule 6(1) and (2), Order 50 Rule 6 and Order 51 Rule 1** of the **Civil Procedure Act, 2010**, for orders that:

[a] Spent

[b] Spent

[c] The Court be pleased to grant a temporary order of stay of execution of the Judgment/Decree in **Kapsabet SPMCC No. 121 of 2015: James Gachie Ngugi (suing as the father and next friend to Ruth Watere) vs. Bernard Khauka Wafula** delivered on **23 November 2018** pending the hearing and determination of the appellant's appeal herein;

[d] That the costs of this application be in the cause.

[2] The application is premised on the grounds that the trial court delivered its Judgment in **Kapsabet SPMCC No. 121 of 2015: James Gachie Ngugi (suing as the father and next friend to Ruth Watere) vs. Bernard Khauka Wafula** on **23 November 2018**, thereby holding the Applicant 100% liable and awarding General Damages of **Kshs. 250,000/=** to the Respondent; and that being aggrieved by the said Judgment, he has lodged this appeal. It was further averred that upon the delivery of the lower court's Judgment, the Applicant sought stay of execution and was granted 30 days stay which was due to lapse on **16 January 2019**; and that the Applicant was therefore apprehensive that if temporary stay was not granted, execution of the lower court's Judgment and Decree would commence any time from the date aforementioned. It was further averred that the Applicant is ready and willing to furnish security for the due performance of the Decree and to abide by any terms, conditions and orders of the Court.

[3] Temporary orders were granted *ex parte* on **16 January 2019** pending the hearing and determination of the application *inter partes*. The application was subsequently heard on **12 February 2019**. **Mr. Kurgat** for the Applicant relied on the Supporting Affidavit sworn by the Applicant on **10 January 2019** and submitted that the Applicant had satisfied the conditions for stay as provided for under **Order 42 Rule 6** of the Civil Procedure Rules. It was his further submission that the appeal will be rendered nugatory if stay is not granted; and added that the Applicant is ready to furnish security for the due performance of the Decree; and therefore that no prejudice will be visited on the Respondent if the application is allowed.

[4] The application was opposed by the Respondent on the basis of the Grounds of Opposition dated **21 January 2019**. According to the Respondent, the application offends the mandatory provisions of **Order 42 Rule 6** of the **Civil Procedure Rules** as there is no competent appeal on the basis of which the orders sought can be granted. It was further contended that the application is based on mere apprehensions; and that the Applicant had not demonstrated any substantial loss to be suffered by him, since the decretal sum is to be paid by the Insurance company and not the Applicant. On a without prejudice basis, the Respondent averred that, because the appeal is on quantum only, the Applicant should be ordered to pay half of the decretal sum and full costs as a pre-condition for stay; and that the remaining half of the decretal sum be deposited as security for costs.

[5] The Respondent's stance was amplified by Learned Counsel, **Ms. Ruto**, whose contention it was that the mere fact that execution is imminent is not proof of substantial loss. She urged the Court to note that the impugned Judgment was delivered on **23 November 2018**; and therefore that there was inordinate delay in filing this application which has not been explained. She also submitted that the appeal was itself filed out of time without leave and is therefore a non-starter. For those reasons, she urged the Court to dismiss this application to let the Plaintiff enjoy the fruits of his Judgment.

[6] **Order 42 Rule 6 of the Civil Procedure Rules** pursuant to which the instant application has been brought provides that:

"(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 to make such order thereof 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 for stay of execution shall be made under subrule (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."

[7] Accordingly, in an application of this nature, it is imperative for an applicant to satisfy the Court that:

[a] he stands to suffer substantial loss unless the order is made;

[b] that the application has been made without unreasonable delay, and

[c] that such security as the court orders for the due performance of such decree has been given.

[8] The rationale for the aforesaid conditions has been considered in various cases such as **Machira T/A Machira & Co. Advocates vs East African Standard (No. 2) [2002] KLR 63**, in which it was held that:

"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

[9] Accordingly, having given careful consideration to the application in the light of the aforementioned provisions and principles, I note that indeed an appeal has been filed from the Judgment and Decree of the Resident Magistrate at **Kapsabet Law Courts in Kapsabet SPMCC No. 121 of 2015**. The appeal was filed on **15 January 2019** and whether or not it was filed outside time is a question for another day as it clearly falls outside the ambit of the present application, granted the grounds set out in **Rule 6** aforesaid. It is now settled that the mere fact that execution is imminent is no proof of substantial loss. Hence, it was imperative for the Applicant to demonstrate that the Respondent is a person of straw and that his is in no financial state to refund the decretal sum if paid at this point in time.

[10] In my careful consideration of the averments set out in the Supporting Affidavit, I found no indication as to the Respondents' means. Nowhere in the Supporting Affidavit has the Appellant even alluded to the Respondents' lack of ability to refund the decretal sum, amounting to **Kshs. 250,000**. In **Lalji Bhimji Sanghani Builders and Contractors vs. Nairobi Golf Hotels Kenya Limited HCCC No. 1990 of 1995**, it was stated thus, which expressions I entirely agree with:

"...for an applicant to satisfy this condition, he must persuade the Court that the decree holder is a man of straw from whom it will be well nigh impossible, or at least very difficult to obtain back the decretal amount in the event of the intended appeal succeeding. Such persuasion must spring from affidavit or other evidence on record. A bold statement from the bar or indeed in an affidavit by the judgment debtor that he will suffer substantial loss unless stay of execution is ordered unbacked by evidence of the matters I have alluded to carries no weight of persuasion in the mind of a judge."

[11] Likewise, in **Pamela Akinyi Opundo vs. Barclays Bank of Kenya Ltd [2011] eKLR**, it was held that:

"Unless there is evidence to show that the respondent cannot be trusted with the money in question and that he/she is likely to squander the same before the appeal is heard and determined, thereby rendering the appeal nugatory, there is no reason why a litigant should be denied the fruits of his litigation. An appeal cannot be rendered nugatory in a monetary decree if payment is made, and it is not just to deny a successful party the benefit of judgment merely because he is poor. In an application for stay of execution pending appeal, the burden lies upon the applicant to prove that the respondent will not be able to refund to the defendants any sums paid in satisfaction of the decree. It is only when the applicant tables evidence to show that the respondent will not be able to refund the same can it be said with any comfort that the appeal will be

rendered nugatory."

[12] In the premises, the orders that commend themselves to the Court are as follows:

[a] That execution of the Decree issued in **Kapsabet SPMCC No. 121 of 2015: James Gachie Ngugi (suing as the father and next friend to Ruth Watere) vs. Bernard Khauka Wafula** arising from the Judgment delivered therein on **23 November 2018** be and is hereby stayed pending the hearing and determination of the appellant's appeal herein, on condition that the Applicant pays half of the Decretal Sum to the Respondent within 30 days from the date hereof; and that the balance thereof shall be deposited in an interest earning account in the joint names of the Advocates on record within a period of 30 days from the date of payment as ordered herein above.

[b] That the costs of this application be borne by the Applicant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 12TH DAY OF MARCH, 2019

OLGA SEWE

JUDGE