



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO 500 OF 2018

BENJAMIN WAEMA MUTUNGA.....APPLICANT

VERSUS

EQUITY BANK (K) LIMITED.....RESPONDENT

RULING

INTRODUCTION

1. The Applicant's Notice of Motion application dated 26th September 2018 and filed on 28th September 2018 was brought pursuant to the provisions of Orders 22 Rule 6, 42 Rule 6 and 50 Rule 6 of the Civil Procedure Rules, 2012 and Sections 79G and 95 of the Civil Procedure Act, Cap 21 of the Laws of Kenya. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

1. Spent.

2. Spent.

3. THAT the court be pleased to grant leave to the Applicant to lodge an appeal out of time against the whole Ruling of Hon A.M Obura in the Chief Magistrate's court at Nairobi No 6829 of 2017 delivered on 2nd July, 2018.

4. THAT the leave do operate as a stay of execution of the Ruling of Honourable A.M Obura made on the 2nd of July, 2018 in CMCC No 6829 of 2017 pending the hearing and determination of the Appeal.

5. THAT the costs of this application be provided for.

2. The Applicant's Written Submissions and List of Authorities were dated 2nd November 2018 and filed on 6th November 2018 while those of the Respondents were dated 26th November 2018 and filed on 27th November 2018.

THE APPLICANT'S CASE

3. The present application was supported by the Applicant's Affidavit that was sworn on 26th September 2018.

4. He stated that after a Ruling was delivered against him by the lower court, he applied for a stay of execution to enable him appeal against the said decision. He contended that although he applied for certified copies of the proceedings and Ruling, the same were only ready a day after the period of the stay of execution expired.

5. He pointed out that he filed an application seeking to be granted leave to file his appeal out of time in the lower court, which application was granted. He said that subsequently, his advocates noted that leave to appeal could only have been granted by the High Court and not the lower court.

6. It was his averment that there had been no inordinate delay on his part in him filing the application and that it was in the interests of justice that his appeal be heard and determined on merits.

7. He was apprehensive that if leave to appeal did not operate as a stay, the Respondent would proceed to execute against him thus rendering his appeal nugatory.

8. He thus urged this court to allow his application.

THE RESPONDENT'S CASE

9. In response to the said application, the Respondent's Debt Recovery Officer, Gerald Muendo, swore a Replying Affidavit on 18th October 2018. The same was filed on even date.

10. He said that the Applicant's application had no merit, was frivolous and untenable for want of triable issues the Applicant was truly indebted to the Respondent having been granted an Asset Finance Facility for Kshs 18,990,000/=. He stated that the loan facility was secured in the joint names of the Applicant and the Respondent and chattels mortgage created over Motor Vehicles Registration Nos KBW 122Z and KBW 124Z.

11. He averred that although the Respondent repossessed the Motor Vehicles after the Applicant defaulted in repaying the loan, the same were found in a deplorable state and could not be disposed of as their value was extremely low.

12. It was the Respondent's case that the Applicant had not offered any basis why he should file an appeal out of time as failure to obtain the typed proceedings and Ruling was not an impediment to filing a Memorandum of Appeal.

13. It stated that it was in a position to refund the decretal amount should the Applicant's appeal succeed and was emphatic that it would suffer loss if the orders were granted.

14. It also pointed out the Applicant had not furnished any security for the due performance of his obligation.

15. It therefore urged this court to dismiss the present application.

LEGAL ANALYSIS

16. It was clear from the parties' submissions that the main issues for determination by this court were:-

1. Whether or not the Applicant should be granted a stay of execution pending appeal; and

2. Whether or not the Applicant should be granted leave to file his appeal out of time.

17. The Applicant submitted that all he was required to demonstrate was whether his appeal was arguable. He referred this court to the grounds in his draft Memorandum of Appeal and further relied on the cases of Housing Finance Company of Kenya vs Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR and Samuel Mwaura Muthumbi vs Josephine Wanjiru Ngugi & Another [2018] eKLR in this regard.

18. He also placed reliance on the cases of HaritSheth t/a Harit Sheth Advocates vs Shamas Charania [2014] eKLR and Job Kilach vs Nation Media Group Ltd & 2 Others [2015] eKLR where the common thread was that summary judgment should only be entered in plain and obvious cases and where a defence raises no bonafide triable issue.

19. He also referred to the case of Cassam vs Sachania [1982] eKLR where the Court of Appeal held that a judge's discretion to grant a judgment on admission should only be exercised where the admission of facts were so clear and unequivocal.

20. On its part, the Respondent submitted that the legal threshold of being granted a stay of execution was set out in Order 42 Rule 6 (2) of the Civil Procedure Rules. He referred this court to the cases of Equity Bank Ltd vs Taiga Adams Co [2012] eKLR and James Wangalwa & Another vs Agnes Naliaka Cheseto to buttress its argument.

21. It also relied on the case of Kenya Commercial Bank vs Suntra Investment Bank Ltd [2015] eKLR where Gikonyo J addressed his mind to what constituted a triable issue.

22. It appears to this court that the Applicant's arguments relating to the issues of a stay of execution and leave to file a Memorandum of Appeal were not clearly defined. He seemed to have dwelt more on the merits of his appeal as opposed to justifying why he should be granted a stay of execution and leave to file an appeal out of time.

23. As was correctly pointed out by the Respondent, the Applicant was required to demonstrate that he had satisfied the three (3) conditions set out in Order 42 Rule 6 (2) of the Civil Procedure Rules. The issue of arguability of the appeal was reserved for the Court of Appeal and not for the High Court.

24. Order 42 Rule 6 (2) of the Civil Procedure Rules provides as follows:-

“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.”

25. An applicant seeking a stay of execution must demonstrate:-

a. That he will suffer substantive loss if the order for stay is not granted;

b. That he had filing his application for a stay of execution timeously; and

c. That he was willing to provide security.

26. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously.

27. Notably, the Applicant did not attach a copy of the Ruling he intended to appeal against which was a challenge to this court as it could not determine if the order that was issued was capable of being executed. Indeed, a court cannot issue an order for stay of execution if the order an appellants intends to appeal against is a negative order.

28. Be that as it may, this court noted from of Exh “BWM 2” that was attached to the Applicant’s Supporting Affidavit that the Learned Trial Magistrate summarily entered judgment against him. That was a positive order which could be executed against and in which an application for stay of execution could be sought.

29. While the present application was not filed immediately the Ruling was delivered by virtue of the Applicant first having filed his application in the lower court, this court did not find the delay to have been inordinate. He had therefore demonstrated one (1) condition for being granted a stay of execution.

30. He, however, did not demonstrate the likelihood of him suffering substantial loss both in his Affidavit and Written Submissions, a position that was well pointed out by the Respondent.

31. He did not also indicate his willingness to furnish security for the due performance of such order as would be ultimately be binding on him.

32. His assertion that the leave to file an appeal out of time should operate as a stay pending appeal was misplaced. Leave that operates as a stay is only to be found in Judicial Review proceedings. Without belabouring the point, this court came to the firm conclusion that the Applicant had not demonstrated that he ought to be granted a stay of execution pending appeal. However, he was still at liberty to seek the appropriate remedy from court.

33. Turning to the issue of leave to file an appeal out of time, this court noted that Article 50 of the Constitution of Kenya, 2010 provides that:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

34. Appreciably, **“equity aids the vigilant and not the indolent.”** However, it was the view of this court that a delay of about two (2) months in bringing the application seeking leave to file an appeal out of time was not inordinate. This court did not see the prejudice the Respondent suffered. If it suffered any prejudice, then it did not demonstrate the same.

35. Accordingly, having considered the parties affidavit evidence, their respective Written Submissions and the case law they each relied upon, this court came to the firm conclusion that there would be more injustice in the Applicant being denied an opportunity to ventilate his case on merit.

DISPOSITION

36. For the foregoing reasons, the upshot of this court’s Ruling was that the Applicant’s Notice of Motion application dated 26th September 2018 and filed on 28th September 2018 was merited and the same is hereby granted in terms of Prayer No (3) therein on. The Applicant is hereby directed to file its Memorandum of Appeal within fourteen (14) days from today.

37. Prayer No (4) is hereby allowed in the following terms:-

1. The Applicant is hereby directed to file and serve its Record of Appeal within sixty (60) days from the date of this Ruling i.e by 14th June 2019.

2. The Deputy Registrar High Court of Kenya Milimani Law Courts is hereby directed to facilitate the placing of the typed certified proceedings and lower court file to enable the Appellant comply with Para 36 (1) hereinabove.

3. Either party is at liberty to apply.

38. Costs of the application herein shall be in the cause.

39. It is so ordered.

DATED and DELIVERED at NAIROBI this 9th day of April 2019

J. KAMAU

JUDGE