REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 49 OF 2017

JANET KITETU *alias* NZULA MUTINDA.....APPELLANT/APPLICANT

VERSUS

JACQUELINE MWIKALI.....RESPONDENT

RULING

1. The Applicant approached the court with the instant application vide certificate of urgency where she primarily seeks orders for a stay of execution of the judgment and decree rendered between the parties in the lower court on 28th September, 2017. The appeal is from a judgment delivered in Machakos CMCC 430 of 2015 by Hon Ocharo. The Application is supported by a supporting affidavit by applicant who had been sued in respect of a defamation claim. She averred that the judgment in the lower court matter was delivered on 28th September against her and that the respondent was awarded Kshs 1,000,000/- and who has embarked on claiming the amount awarded plus the costs as evidenced by the copy of warrants of attachment that were annexed and marked NM2. The deponent states that she has appealed against the judgement and if execution is carried out, then the appeal will be rendered nugatory. She has not annexed a copy of the memorandum of appeal though but the same is on record.

2. The Application is opposed. In opposition, the Respondent deponed on 10th January, 2019 a replying affidavit wherein he averred that the application is an abuse of the court process, and res judicata. She averred that there was an application in the lower court dated 1.11.2017 that was allowed on condition that the applicant deposited half the decretal amount in a joint interest earning account. She averred further that a notice to show cause was fixed for hearing in the trial court and the instant application is a means of inconveniencing the lower court in the execution of the decree and judgement in CMCC 430 of 2015 and therefore the instant application should be disallowed.

3. The application was canvassed by way of written submissions. Learned counsel for the applicant filed submissions on 11th March, 2019 whereas the respondent's submissions were filed on 13th May, 2019.

4. Learned counsel for the applicant submitted that the legal basis for grant of the order sought is as provided for under Order 42 Rule 6 of the Civil Procedure Rules and they have met the test because should the execution proceed the appeal shall be rendered nugatory and the respondent has not demonstrated that she shall refund the decretal amount should the appeal succeed. Learned counsel added that the application is permissible under Order 42 Rule 6 and that the respondent has not controverted that she is a woman of straw. In placing reliance on the case of **Patani and Another v Patani (2003) KLR** where it was held inter alia that the applicant had to show that he had an arguable appeal and that the same would be rendered nugatory if stay was not granted. Learned counsel submitted that the applicant is willing to abide by an order for security of costs and that an application in the lower court is not a bar to the instant application in this court.

5. According to the Respondent, there are three issues for determination; whether the application dated 2.10.2018 is res judicata, whether the said application is an abuse of court process and who should bear the costs of the application dated 2.10.2018. On the first issue, the respondent cited the provisions of Section 7 of the Civil Procedure Act and submitted that the issue of stay pending appeal was heard and determined in a ruling given by the Chief Magistrates Court on 6.2.2018. The respondent added that she has a valid judgement and is entitled to the fruits of her judgement. On the 2nd issue, the respondent submitted that the applicant is misusing court process to avoid execution and this court has inherent power to preserve the integrity of the judicial process as was held in the case of **Chairman, Cooperative Tribunal & 8 Others Ex Parte Management Committee Konza Ranch & Farming Cooperative Society Limited (2014) eKLR.** On the 3rd issue, counsel submitted that the appellant should bear the costs of this application.

6. The issue for determination is whether the Appellant is entitled to an order for stay of execution.

7. The first argument taken up by the Respondent is that the application is *res judicata* and an abuse of court process. This application is brought under Order 42 Rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. Upon reading the said provisions, I find that the appellant has not breached any law and procedure in bringing this application. Section 3A preserves the applicants' right to approach this court to realize her cherished right of appeal and Order 42 Rule 6 provides for stay of execution pending appeal and on record there is an appeal that was filed on 23rd October, 2017. On the issue of *Res judicata*, Section 7 of the Civil Procedure Act is the operative

law. In the case of **Kamunye & Others v The Pioneer General Assurance Society Limited (1971) EA 263,** the court observed that

> "***The test whether or not a suit is barred by res judicata seems to me to be is the plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already been put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. "***

8. The respondent contended that the question of stay pending appeal was handled by the trial court and therefore its hearing by this court is barred. I find that this is an issue that the applicant has not controverted or disputed and hence it would seem that the applicant seeks to circumvent the orders of the trial court by virtue of the instant application. I shall address the same later. The test in determining whether a matter is *res judicata* was summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others, (2010) eKLR** as follows: - (**a)** The matter in issue is identical in both suits; **(b)** the parties in the suit are the same; **(c)** sameness of the title/claim; **(d)** concurrence of jurisdiction; and **(e)** finality of the previous decision. However I am not satisfied that the issue is res judicata because the magistrate's court and the high court do not have concurrent jurisdiction and the decision of the trial court is appealable to this court. Looking at all the factors in totality, I am unable to agree with the Respondent that this application is an abuse of the court's process and is *res judicata*.

9. Having been satisfied that the application is not incompetently before the court, I will now consider the application on its substance.

10. The application for stay of execution of judgment is primarily governed by the terms of Order 42 Rule 6 of the Civil Procedure Rules. The conditions to be met by an applicant in order to be entitled to an order for stay are laid out in that Rule in the following terms:

> **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.**
>
> **(2) No order for stay of execution shall be made under sub-rule (1) unless—**
>
> **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**
>
> **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.**

11. Applicant has to satisfy a four-part test as was highlighted in the case of **UAP Provincial Insurance Company Limited v Michael John Becrett, Civil Application Number 204 of 2004**. They must demonstrate that:

> ***a. The appeal they have filed is arguable;***
>
> ***b. They are likely to suffer substantial loss unless the order is made. Differently put, they must demonstrate that the appeal will be rendered nugatory if the stay is not granted;***
>
> ***c. The application was made without unreasonable delay; and***
>
> ***d. They have given or are willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on them.***

12. I have perused the Memorandum of Appeal filed in this case and on record. I am unable to say that the grounds of appeal enumerated are in-arguable hence I find that the applicant has easily met that standard.

13. But what is the substantial loss that the Applicant is likely to suffer if the order is not granted" Here is all the Applicant has said in this regard – and it deserves verbatim recitation:

> "*the respondent has no known asset or income and therefore if I pay I will suffer substantial loss*"

14. I am not convinced that there may be loss occasioned to the applicant if the orders sought are not granted. The applicant has not indicated the willingness to deposit security. The respondent also has not expressed any apprehension at all and in this regard it cannot be found that the applicant has showed this court what substantial loss she would suffer if stay of execution is not granted. She has not managed to satisfy this mandatory requirement for the grant of stay.

15. The Application was brought without inordinate delay, and two of the three requirements have been fulfilled and it is therefore my conclusion that the Applicant has substantially met the conditions placed by Order 42 Rule 6.

16. The issue of circumventing court orders was discussed in **Hunker Trading Company Limited v. Elf Oil Kenya Limited [2010] eKLR**, where the Court of Appeal held that to file an application in the appellate court for stay of execution, after having failed to comply with the terms of an order of stay granted upon a similar application before the trial court, is an abuse of the process of the court. In the words of the Learned Justices :

> *"We think that we have the jurisdiction to stop it in its tracks in order to attain or further the "O2" principle. We would act unjustly if we were to allow it another chance in this Court to defeat the cause of justice by failing to obey an important order of the superior court."*

17. In light of the foregoing, I am inclined to decline the instant application. However under Order 42 Rule 6(1), a court is to "**make such order thereon as may to it seem just".** Having considered the materials placed before me, and being cognizant that there was a similar application before the lower court wherein orders were granted and the same had not been complied with I shall give the appellant fourteen (14) days to comply with the trial court orders of 6th February, 2018 and direct that they pay the auctioneers charges failing which the stay shall lapse and the auctioneer shall be free to go ahead with execution. As the Respondent did not contribute to the Applicant's failure to comply with the orders of the trial court, the Respondent is awarded the costs of this application.

Dated and delivered at Machakos this 22nd day of October, 2019.

D. K. Kemei

Judge