



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 5 OF 2019

BENSON MWANGI MURIITHI.....PLAINTIFF

VERSUS

STEPHEN WACHIRA MBURIA.....DEFENDANT

RULING

1. The applicant Benson Mwangi Muriithi vide an application dated 13/2/2019 seeks orders that the court be pleased to issue an Interim Order of stay of execution of the decree/Judgment in Baricho Principal Magistrate's Civil Case No. 36/2018 pending the hearing and determination of the appeal. The application was filed under a certificate of urgency an exparte order of stay of execution pending the hearing and determination the application was granted. The application is based on the following grounds:-

- a) That Judgment in Baricho Principal Magistrate's Civil Case No. 36 of 2018 was delivered on the 31st day of January, 2019.
- b) That as per the aforesaid Judgment, the appellant was ordered to pay the respondent a sum of Kshs 1,500,000/- with interest.
- c) That the respondent was aggrieved by the said Judgment and he has now preferred the appeal herein against the said Judgment.
- d) That the aforesaid appeal has very high chances of success as can be deciphered from the memorandum of appeal adduced herewith.
- e) That having instituted the said appeal, it is only fair and just that this honourable court do issue orders staying the execution of the decree/Judgment in Baricho Principal Magistrate's Civil Case No. 36 of 2018 pending the hearing and a determination of the said appeal.
- f) That the appellant is now apprehensive that the respondent may institute execution proceedings any time this rendering his appeal a nugatory/an academic exercise.
- g) That if the orders of stay sought are not issue and the instituted appeal succeeds, the applicant will suffer prejudice as he will have already paid the decretal amount to the respondent.
- h) That the respondent stands to suffer no prejudice of the orders sought are issued as he will still get a chance to execute his decree in the event that he succeeds in the appeal.
- i) That it is in the interest of justice that the orders of stay sought be granted in order to preserve the subject matter of the appeal.

2. The respondent Stephen Wachira Mburia filed grounds of opposition and contends that the application is fatally defective and an abuse of court process hence it ought to be dismissed with costs. That the provisions under which it is brought are not applicable to the applicant hence the application has no foundation. The applicant has not offered any security to the respondent.

3. I have considered the application. What the applicant is seeking is stay of execution. This is provided under **Order 42 rule 6 of the Civil Procedure Rules, Civil Procedure Act Cap 21 Laws of Kenya**. It provides:-

“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 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 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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

The applicant must prove that:-

- He is likely to suffer substantial loss.
- The application has been brought without undue delay.
- The applicant has to provide security as maybe ordered by the court for the due performance of the decree or order that may ultimately be binding upon him.

4. The court exercises discretion in granting stay of execution. In the case of **Butt –v- Rent Restriction Tribunal(1982 KLR 417** the court held that discretion ought to be exercised in a manner that would not prevent an appeal. The applicant in the supporting affidavit depones that he was aggrieved by the Judgment and has preferred an appeal. He submits that the appeal has high chances of success as can be deciphered from the Memorandum of Appeal, annexure BMM2. He further depones that since he has filed the appeal, it is only fair and just that the court do order stay of execution of the decree/Judgment. That if stay is not ordered the respondent will execute the judgment and the appeal be rendered nugatory. That respondent stands to suffer no prejudice.

5. The applicant seeks the exercise of discretion of this court. In the case of **Butt-v- Rent Restriction Tribunal**, the Court of Appeal gave guidance on how a court should exercise discretion. It stated:-

“The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judges decision.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceeding.

4. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellants had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order of stay of execution to lapse.”

The authority captures the principle which the court has to consider in deciding whether or not to grant a stay of execution pending appeal.

6. The applicant has deponed that the appeal may be rendered nugatory. The consideration which the court has to make in a money decree is whether the respondent will be able to refund the decretal sum if the appeal succeeds.

7. The respondent filed grounds of apposition and did not swear an affidavit stating that he will be able to repay the decretal sum. The Court

of Appeal in the case of **National Industrial Credit Bank Limited –v- Aquinas Francis Wasike & Another UR.** “stated that this court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that the appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

8. This case involves a money decree. The respondent has not disclosed any source of income that he would use to refund to the applicant if the appeal succeeds. The decretal sum is Kshs 1,500,000/-. This is no doubt a big sum of money. The applicant has proved that he is likely to suffer substantial loss if stay is not ordered. It is also true to find that if stay is not ordered and the appeal succeeds the applicant will not only suffer substantial loss but the appeal will also be rendered nugatory.

9. The second consideration is whether the application was brought without unreasonable delay.

10. The judgment of the lower court was delivered on 31/1/2019. The Memorandum of Appeal was filed on 13/2/2019. This application was filed on 13/2/2019 which was Thirteen days after the delivery of judgment and within the 30 days provided for filing an appeal under **Section 79G Civil Procedure Act.** I find that the appeal and the application were filed timeously. There was no delay.

11. The applicant has not indicated his willingness to provide security. However, under **Order 42 rule 6(b)** it is the court which is supposed to order a party to provide security and the kind of security to be offered. Failure by a party to plead that he is ready to provide security will not bar the court from granting an order of stay and order a security for the due performance of such decree or order.

12. I have considered the grounds of opposition that the provision under which the application is brought are not applicable. The application is brought under various provisions of **Civil Procedure Rules and Act.** Failure to Oile the correct provisions under which an application is brought is a procedural technicality which the court should overlook in favour of doing substantial justice. **Section 1A & 1B of the Civil Procedure Act** gives the overriding objectives of the Act which is to facilitate the just expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

Order 51 rule 10 Civil Procedure Rules provides:-

“Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.”

13. This means that even where a party fails to quote the provisions, the court will nevertheless proceed to hear the application.

14. Where the court is able to hear and determine the application it will ignore the objection based on the provisions of the law cited. The ground of opposition is therefore without merits.

15. In view of what I have stated, I find that the application has merits.

16. I order as follows:-

a) There will be stay of execution of the decree and Judgment in Baricho Principal Magistrate’s Civil case No. 36/2018 pending the hearing and determination of the appeal herein.

b) The applicant will provide security by depositing half of the decretal sum that is Kshs 750,000/- in a joint interest earning account in the names of the Advocates of the parties in one of the reputable banks.

Alternatively:-

The applicant to deposit a security worth Kshs 1,500,000/- in court.

c) The applicant to comply with the order to provide security within Twenty One (21) days.

d) Failure to comply with the order to provide security, the order of stay shall lapse.

e) Costs to the applicant.

Dated at Kerugoya this 13th day of November 2019.

L. W. GITARI

JUDGE