



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCA NO. 15 OF 2019

JOHN MUGO MATHAI.....APPELLANT

VERSUS

JOHN KIBICHI.....RESPONDENT

RULING

1. The substantive prayer of the Notice of Motion dated 4/10/19 is that:

“That pending the hearing and determination of the application herein, this honourable Court be pleased to issue a stay of execution of the judgment dated 4th July 2019 and the consequent decree issued in Eldama Ravine Pmcc no. 11 of 2017 against the appellant/applicant”.

2. The principal grounds of the application as set out in the application were as follows:

a. Summons to enter appearance was not served upon the appellant/applicant.

b. The applicant was not aware of the trial suit in Eldama Ravine Pmcc no. 11 of 2017 due to lack of service of Summons and or pleadings upon him.

c. The appellant/ applicant became aware of the suit upon being served with a notice of attachment and warrants of sale of property on 26th September 2019, and

d. That the applicant did not instruct the firms of Ahmednasir, AbdiKadir & Co. Advocates who allegedly appeared on record for him and he does not know who they are and how they got involved in the said suit”.

e. The Respondent filed a Replying Affidavit setting out his case in Paragraph 3-11 thereof as follows:

*“3. **THAT** the application now before Court is defective, unmerited, and incompetent and does not meet the threshold for grant of the orders for stay of execution of the judgment delivered on 4th July 2019 and the consequent decree issued in **Eldama Ravine PMCC NO. 11 of 2017 (hereinafter known as ‘the suit’)** and as such should be struck out with costs.*

*4. **THAT** I am informed by my advocate on record which information I verily believe to be true that the application has not any competent, tenable appeal to warrant this Honourable Court the discretionary order of stay of execution of the judgment since the purported memorandum of appeal is filed out of time judgment having been delivered on 4th July 2019 and the said memorandum of appeal was filed on 4th October 2019.*

*5. **THAT** the allegations by the application that he was not aware of the suit is not true since the firm of Ahmednassir Abdikadir and Compay Advocates the applicant filed notice of appointment of advocates to act for the applicant together with the statement of defence both dated 17th October 2017. **Attached herein and marked JK1 a and b are copies of the notice of appointment and statement of defence respectively.***

*6. **THAT** I am further informed by my advocate on record which information I believe to be true that there is no way the said firm of advocates could have taken up that matter without being instructed to do so thus the allegations by the applicant that he became aware of the existence of the suit was after proclamation cannot hold water.*

*7. **THAT** I am further informed that every time the suit up in Court, there was always an advocate either holding brief or*

from the aforesaid firm representing the applicant. (Court is referred to proceedings).

8. **THAT** after the delivery of judgment on 4th July 2017, I am informed by my advocate on record that the applicant's advocate was immediately notified of the same vide judgment notice dated 9th July 2019 and sent through registered post. Attached herein and marked JK2 a and b are copies of the said notice and postage payment receipts respectively.

9. **THAT** the indications by the applicant in the purported memorandum of appeal that judgment was delivered on 2nd October 2019 is misleading since the date for the delivery of the said judgment was on 4th July 2019. **Attached herein and marked JK3 is a copy of the said judgment.**

10. **THAT** I am further informed by my advocate on record which information believe to be true that this application should be struck out since it is filed by a firm of advocate which is not properly on record for the applicant. That having been previously represented in the lower Court, any other firm coming on record should do so by leave of Court.

11. **THAT** the applicant is abusing the Court process since he has filed application in the subordinate Court in Eldama Ravine and same is pending inter-parties hearing on 31st October 2019 whereas he was denied stay orders. **Attached herein and marked JK4 is a copy of the said application.**

4. Counsel for the parties then made oral submissions on 28/10/19 urging their respective contentions, and ruling was reserved for 7/11/19 and later adjourned to 14/11/19.

Determination

5. The power of the High Court as an appellate Court to grant stay of execution of decree or order pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules as follows:

“(6) Notwithstanding anything contained in sub rule (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”.

6. In this case, the appeal is preferred against the order of the trial refusing to certify urgent the application for, and grant in the interim, stay of execution for the judgment of the trial Court of 4/7/2019 as shown in the Memorandum of Appeal dated 4/10/2019 as follows:

“MEMORANDUM OF APPEAL

JOHN MUGO MATHAI the Appellant herein being aggrieved by the ruling of **HON. J TAMAR P.M** in Eldama Ravine CMCC No. 11 of 2017 delivered on 2nd October, 2019 appeals against the said ruling on the following grounds among other:-

1. **The trial Magistrate erred in law and fact by refusing to grant stay of execution of the decree of the Court.**

2. **That the trial magistrate erred in law and fact in refusing to certify that the application dated 2nd October, 2019 is urgent and required hearing on priority basis when there was clear evidence that the Appellant's property was at the verge of been attached and offered for sale in a public auction.**

3. **That the trial magistrate erred in law and fact in failing to appreciate the Appellant position that he was not served with summons to enter appearance in the main suit and it would be prejudicial for the appellant if it finally found that he was indeed not served with summons to enter appearance long after execution process was finalized.**

4. **That the trial magistrate erred in law and fact in refusing to grant the orders of stay sought by the Appellant in a summary manner.**

5. **That the trial magistrate erred in law and fact in failing to appreciate the arguments tendered by the Appellant to the effect that he did not instruct the counsel on record and thereby issue orders of stay of execution to preserve the status quo pending inter-parties hearing of the motion.**

6. **That the trial magistrate erred in law and fact in failing to appreciate the weight of the legal issues raised by the Appellant in the application for stay.**

7. **That the trial magistrate applied wrong principles of law in denying the Applicant stay of execution of the judgment.**

REASONS WHEREFORE, the Appellant prays that the Court be pleased:-

i. To set aside the orders issued by the trial magistrate on 2nd October, 2019.

ii. Grant the Appellant stay of execution of the judgment issued on 4th July, 2019 pending the hearing of the application dated 2nd October, 2019.

iii. Cost of this appeal.

DATED at NAKURU 4TH Day of October, 2019”

7. There is, with respect, no appeal from the judgment of the trial Court of 4/7/2019 for which stay of execution is sought by the application before the trial Court and this Court. Does the Court then have jurisdiction to interfere the application for stay of execution?

Jurisdiction to grant stay of execution

8. Order 42 of the Civil Procedure Rules provides as follows:

“[Order 42, rule 6.] Stay in case of appeal.

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 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.

9. It is clear in Order 42 Rule 6 of the Civil Procedure Rules that jurisdiction to stay execution arises only where there exists **an appeal** in the High Court by the Memorandum of Appeal filed in accordance with Rules. It is for this reason that the Rules in Order 42 Rule 6 (4) provides that for purposes of an appeal to the Court of Appeal. The filing of a Notice of Appeal in accordance with the rules of that Court is sufficient to invoke the jurisdiction to stay execution pending appeal. Order 42 rule 7 applies where an appeal is already pending.

10. Even the Proviso in Rule 6 (6) of Order 42 allowing the High Court to grant in exercise of appellate jurisdiction “*temporary injunction on such terms as it thinks just*” is conditioned upon “*the procedure for instituting an appeal from a subordinate Court or tribunal [having] been complied with*”.

11. But the appeal need not be from the Decree sought to be stayed itself. Order 42 Rule 9 provides classically as follows:

“[Order 42, rule 9.] Exercise of powers in appeal from order made in execution of decree.

9. The powers conferred by rules 6 and 7 shall be exercisable **where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree.**”

12. The present appeal is “**from an order made in execution of such decree**”. The appellant having filed a Memorandum of Appeal from the decision of the trial Court on the application for execution, there is pursuant to rule 9 of Order 42 jurisdiction in the Court to deal with the application for stay of execution under Order 42 rule 6 and 7 of the Civil Procedure Rules.

13. Accordingly, the Court has jurisdiction to deal with the application for stay of execution of the judgment and decree of the Court of 4/7/19, having filed on 4/10/19 an appeal from the order of trial Court in the decision of 2/10/2019 on an application for stay of execution of the decree of 4/7/19.

Principles of exercise of discretion to stay execution

14. Order 42 Rule 6 of the Civil Procedure Rules requires “sufficient cause” for stay of execution. Over time, case-law authorities have established that cause is shown where the applicant demonstrates:

- i. An arguable case for presentation to the appellate Court, and
- ii. Where the failure to grant the stay of execution shall render the appeal nugatory.

See *J.K. Industries v. Kenya Commercial Ltd & Anor.* (1987) KLR 506 and *Scott & Anor. v. Kago & 2 Ors.* (1987) KLR 503 that –

“The purpose of an application for stay of execution is to preserve the subject-matter in dispute so that the rights of an appellant, who is exercising his undoubted right of appeal, are safeguarded and the appeal if successful is not rendered nugatory.”

15. In addition there is the statutory injunction of requirement of security by Order 46 Rule 6 (2) of the Civil Procedures that:

“(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.”

Principle for interfering with discretion of the trial Court

16. Of course, in its refusal to grant an order for interim stay of execution on 2/10/2019, the trial Court exercise its discretion, and the principle for the interference by an appellate Court with the discretion of the trial Court is set out in *Mbogo v. Shah & Anor* (1968) EA 93, per Newbold, P. as follows:

“A Court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice.”

17. The question before the Court at this stage, therefore, is whether there is an arguable case that the trial Court erred in its denial of the order for stay as to justify at the hearing of the appeal the interference by this Court with the discretion of the trial Court.

Arguable case

18. I consider that the appellant/applicant has an arguable case whether his right to be heard was infringed by want of service of Summons on him as the defendant. Section 20 of the Civil Procedure Act requires service of the suit on the defendant as follows:

*“20. Where a suit has been duly instituted **the defendant shall be served** in manner prescribed to enter appearance and answer the claim”.*

If the appellant as defendant was not served with the suit papers and, therefore, could not defend the suit, his right to be heard enshrined in the Constitution under Article 50 (1) of the Constitution shall have been infringed. Courts have held that orders made without hearing a party must be set aside *ex debito justitiae*.

19. There is also a question whether, if the Counsel on record for the defendant was not instructed by the defendant, whether he could validly be deemed to have been on record for the defendant to warrant judgment in the matter as a defended case and also require the filing of Notice of Change of Advocates in accordance with the Rules as urged by the Counsel for the Respondent.

20. It has been held that the existence of one arguable case is sufficient to justify grant of stay of execution and the arguable case does not mean one that must eventually succeed upon hearing of the appeal. See *Stanley Kangethe Kinyanjui v. Tony Keter & 5 Ors* (2013) eKLR. Civil Appl. No. 31of 2012.

21. I find that the appellant/applicant has arguable case in respect of the twin issue of service on defendant under section 20 of the Civil Procedure Act and representation by Counsel or firm of Advocates that the defendant did not instruct.

Whether appeal may be rendered nugatory

22. If stay is not granted, the appellant may be compelled to meet the decretal sum in the trial suit, a sum of 827,600/= plus costs and interests at Court rates if he is to avoid the sale of his attached motor vehicle KAH 941C. He may never be able to recover the money or the vehicle, if it sold in execution of the judgment of the trial Court in the meantime, should this appeal eventually succeed. I would find that the appeal shall be rendered nugatory if stay is denied to stop recovery of the decretal sum, costs and interests claimed at Ksh.1,079,669/= as at the date of Proclamation on 26/9/2019.

Other consideration

23. There is further consideration in this appeal and the application before the trial Court in the question whether an advocate who entered appearance for a party without instructions is validly on record so as to call for the process of Notice of Change of Advocates, which I consider an issue of general public importance as to warrant stay of execution. The practice of insurance firms instructing advocates to enter appearance and defend their insured persons who are sued for traffic accidents is prevalent and guidance of the Court in circumstances similar to the present matter is useful.

Security

24. Order 42 Rule 6 of the Civil Procedure Rules requires provision of security for the due performance of the decree. I consider that the security should be commensurate to the amount of money the subject of the warrant of sale of property in execution of the decree at **Ksh.1,079,669/=**.

Orders

25. Accordingly, for the reasons set out above, there shall be an order for stay of execution in terms of prayer no. 4 of the Notice of Motion subject to the provision of security as 24 above.

26. The appellant shall as a condition for the grant of the stay of execution deposit the sum of **Ksh.1,079,669/=** into Court or into a joint-account in a reputable bank in the names of the Counsel for the appellant and for the Respondent herein within fourteen (14) days hereof or file in Court an Insurance Bond of the same amount within the same period, in default of which the orders for stay herein shall lapse and be of no effect.

27. In the interests of expedition in the presentation and prosecution of the appeal, the stay of execution granted herein shall last for a period of sixty (60) days only.

28. Liberty to apply.

29. Costs in the cause.

Order accordingly.

DATED AND DELIVERED THIS 14TH DAY OF NOVEMBER 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Waiganjo & Co. Advocates for the Appellant.

M/S E. Juma & Ombui Advocates for the Respondent.