



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**HIGH COURT CIVIL APPEAL NO. 7 OF 2019**

**JOHN WANJOHI.....PLAINTIFF**

**VERSUS**

**GERALD WANJOHI.....DEFENDANT**

**RULING**

1. The applicant, John Wanjohi filed the application dated 15/2/2019 under a certificate of urgency seeking orders that the court be pleased to order a stay of execution of the Judgment in Baricho SPMCC No. 53/2013 and all the consequential orders thereto pending the hearing and determination of the application and the intended appeal. That the court be pleased to grant order for stay of execution of the Judgment of 13/12/2018 and all consequential orders thereto pending hearing and determination of the intended appeal.

2. The application is based on the following grounds:-

- a) That Judgment was delivered by the Honorable M. Kivuti (Senior Resident Magistrate) delivered on 13<sup>th</sup> December, 2018 SPMCC 53/2013 in favor of the Respondent herein.
- b) That the applicants are aggrieved by the said Judgment and have lodged an appeal.
- c) That the instant application is timely made and without undue delay.
- d) That the applicant stands to suffer substantial and irreparable loss and damage as there is a likelihood that the Applicant will be unable to recover the decretal sum awarded herein from the Respondent should the intended appeal succeed.
- e) That unless this application is allowed, the Applicant's appeal will be rendered nugatory.
- f) That the applicants are ready willing to comply with such reasonable conditions that this court may grant to enable the applicants pursue their appeal including depositing the decretal sum in this Honourable Court accounts pending the outcome of the appeal.
- g) That the applicants have a strong arguable appeal which has high chances of success.
- h) That the application is made in good faith and the Respondent will not suffer any prejudice or any damage that cannot be compensated by way of costs if this application is allowed.
- i) That the applicants are apprehensive that the Respondent may levy execution against the applicants.

3. The respondent filed grounds of opposition and contends that the application is incompetent and bad in law. That the applicant has not annexed any documents to show that the respondents are in the process of executing the decree or have threatened to do so. That the Memorandum of Appeal has not raised fundamental grounds to demonstrate that the appeal is arguable or has any chances of success. That the application is only meant to delay the matter and deny the respondent his right to enjoy fruits of judgment. That there was inordinate delay which has not been explained and is in excusable. That the application is incurably defective and does not meet the threshold of granting the orders sought. That the application should be dismissed with costs.

4. The application proceeded by way of oral submissions. For the applicant it was submitted that the respondent has not demonstrated the ability to repay the decretal sum if stay is not ordered and that it will lead to appeal being rendered nugatory. The applicant also stands to suffer substantive loss. The applicant further submits that they are ready to provide security as may be ordered by the court.

5. For the respondent, it is submitted the application has not met the required threshold as they have not demonstrated that they will suffer

substantial loss. That there was delay in filing the appeal and the delay is unreasonable and has not been explained. That the applicant has not demonstrated that he has an arguable appeal. The applicant has not demonstrated that the respondent is in the process of execution. That the applicant has not stated that they are willing to provide security.

6. I have considered the application. The issues which arises is whether the court should order stay of execution. Stay of execution is provided for under **Order 42 Rule 6(2) of the Civil Procedure Rules** which provides:-

*“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. A party seeking a stay of execution of decree/Judgment or order must demonstrate that:-

- Substantial loss may result to the applicant unless the order is made.
- The application has been made without unreasonable delay.
- Security as the court orders for the due performance of such decree.

8. The application invokes the discretionary powers of the court. It is trite that the court discretion must be exercised judiciously. The application must therefore meet the threshold for the granting of the stay of execution.

9. The Court of Appeal in the case of **Butt –v- Rent Restriction Tribunal (1982) KLR 417** set down the guidelines which the court will consider in exercising discretion to grant stay of execution. The court held:-

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

b) 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.

c) 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 proceedings.

d) The court in exercising its discretion whether to grant (or) refuse an application for stay, will consider the special circumstances of the case 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.

e) 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 for stay of execution to lapse.

10. Based on these principles the first consideration is whether the applicant has demonstrated that he will suffer substantial loss. The applicant submits that the respondent has not demonstrated the ability to repay the decretal sum if stay is not ordered and the appeal succeeds. In his submissions counsel for the respondent submits that the applicant has not demonstrated that he will suffer substantial loss. The Court of Appeal in the case of **National Industrial Credit Bank Limited –v- Aquinas Francis Wasike & Another 2006 eKLR** held as follows:-

*“This court has said before and it would bear repeating that while the local duty is on an applicant to prove the allegation that an 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 resources he has since that is a matter which is peculiarly within his knowledge.”*

11. The respondent has not disclosed that he has means to refund the applicant the decretal sum should the appeal succeed. The income of the respondent has not been disclosed not has it been disclosed whether he is engaged in any economic activity that generates income. The applicant has demonstrated that he is likely to suffer substantial loss if stay is not ordered secondly in the event that the appeal succeeds and he is unable to recover the decretal sum, the appeal shall be rendered nugatory. The Court of Appeal in **Kenya Hotel Properties Limited –v- Willesden Properties Limited Civil Application Nai 322/2006** reiterated in **Housing Finance Company of Kenya –v- Sharok Kher Mohamed Ali Hirji & Another (2015) eKLR** stated that even in an application involving money decree a stay of execution pending appeal may be granted so as to alleviate any undue hardship the applicant would suffer if stay is refused.

12. The second consideration is whether the appeal was filed without unreasonable delay. The decision of the trial magistrate was delivered on 13/12/2018. This application was filed on 18/2/2019 together with the Memorandum of Appeal. Under **Section 79G of the Civil Procedure Act** the appeal is supposed to be filed within 30 days. **Order 50 rule 4 Civil Procedure Rules** provides that the period between

Twenty first (21) of December in any year and the Thirteenth (13) day of January in the year next following both days included, shall be emitted from any computation of time. Considering this computation of time, the delay cannot be termed to be inordinate. I find that there was no delay on the part of the applicant in bringing this application.

13. Finally the other consideration the issue of security. The applicant in its grounds in support of the application, paragraph (1) has expressed his readiness to furnish security for the due performance of the decree. Though the respondent submits that the applicant has not offered security, **Order 42 rule 6(2)(b)** provides that it is the Court which is required to determine the security, it states:-

***“Such security as the court orders for the due performance of such -----“***

14. It implies that once the court grants an order for stay, it will determine the kind of security that the applicant will provide.

15. I find that the question as to whether the appeal is arguable is not a ground for consideration when dealing with an application for stay. Such a consideration would prejudice the hearing of the actual appeal.

16. Earlier, the applicant had urged the court to strike out the grounds of opposition for being filed out of time. I find that failure to file the grounds of opposition as provided under **Order 51 rule 14** is a procedural technicality. **Section 1A & 1B of the Civil Procedure Act** provides for overriding objectives of the Act which are to facilitate the just expeditious affordable, proportionate resolution of Civil disputes governed under the Act. The court is called upon when exercising its powers to give effect to the overriding objectives. The court should therefore seek to do substantive justice other than determine matters on procedural technicalities. The applicant was not prejudice. I believe I have given reason for not allowing the striking out of the grounds of opposition.

**17. In Conclusion:**

I find that the application has merits. I allow it and order as follows:-

- a) There be stay of execution pending of the judgment of the trial Magistrate in Baricho SPMCC No. 53/2013 and all consequential orders pending the hearing and determination of the appeal.
- b) The applicant shall provide security by depositing the decretal sum in an interest earning Bank account in one of the reputable banks in the joint names of the Advocates of the parties.
- c) The decretal sum be deposited within Twenty one days from the date of this ruling.
- d) Failure to deposit the security within 21 days the order of stay shall lapse.
- e) Costs to the applicant.

**Dated at Kerugoya this 13<sup>th</sup> day of November 2019.**

**L. W. GITARI**

**JUDGE**