



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL APPEAL NO. 5 OF 2019

KENYA WILDLIFE SERVICE.....APPELLANT

VERSUS

FARAH RASHID ABDI (Suing as Legal Administrator of the Late

Aden Rashid Abdi).....RESPONDENT

RULING

1. By a Notice of Motion dated 30/4/2019, the Applicant sought orders for stay pending hearing and determination of the appeal plus costs.
2. The same is brought under Order 42 Rule 6 Civil Procedure Rules inter alia. It is supported by grounds on the face of the Notice of Motion.
3. The Respondent filed grounds of opposition to oppose the application. The respondent had lodged suit in lower court which was heard and on 28th March, 2019 a Judgement rendered in favour of the Respondent as follows:

Ø The compensation due to the Plaintiff Kshs.5,000,000/=.

Ø Special damages Kshs.59,100/=

Ø Costs of the suit.

Ø Interest on (a) and (b) above at court rates from the date of this judgement.

4. Being dissatisfied with the judgment and decree of the lower court appealed to this Honourable Court by way of a Memorandum of Appeal dated 26th April 2019 and filed on even dates.

In the instant motion the parties filed submissions to canvass the application and articulated their respective cases and their arguments.

APPLICANT'S SUBMISSION

5. Applicant submits that a reading of Order 42 Rule 6 of the Civil Procedure Rules reveals the principles that governing courts in applications for stay of execution as follows;

i. The application should be made timeously and;

ii. The applicant must demonstrate that he would suffer substantial loss if the stay is not granted and;

iii. The applicant must give security for the performance of the decree that would ultimately be binding on him.

iv. The court may grant stay if any other sufficient reason is demonstrated.

6. The applicant contends that; the instant application was filed timeously after becoming aware of the existence of the impugned judgement. Secondly, the Applicant has in its supporting affidavit stated that it will suffer substantial loss if the sought orders are not granted.

7. It is submitted that the Respondent has not in any way demonstrated that he is in the position to refund the decretal sum in the event the appeal succeeds.

8. It cites the case of *M.O.M Amin Transporters Limited & Another vs Alexander Ndungu Mbugua & 2 Others [2017] eKLR* where the court stated;

“Indeed, substantial loss does not only connote loss of a particular amount of money, rather, it alludes to a situation where a successful litigant is likely to suffer hardship in recovering monies he would have paid before an appeal was heard.”

9. It is settled that once an applicant raises fear of loss in the event stay is not granted the evidential burden shifts to the Respondent to demonstrate that he is not a man of straw. It cites the case of *Telkom Kenya Limited vs Edward Kinoti [2018] eKLR* where the court held that;

“In an application for stay, once an applicant positively alleges that if the decretal amount is paid over and the appeal succeeds, the same might be irrecoverable, the evidentiary burden of proof shifts to the respondent show that he is not a man of straw. That he is capable of refunding the money if it is paid over to him and the appeal ultimately succeeds. In this case, the respondent did not demonstrate that he can refund the money if it is paid over to him. In this regard, I am satisfied that the applicant will suffer substantial loss if the stay sought is not granted.”

10. The applicant submits that, the intended appeal is not frivolous as can be noted in the memorandum of appeal. Further, as regards to provision of security, it submits that the Applicant has stated that it is ready and willing to provide security if this honourable court deems it fit and just in as much as the Applicant prays that such an order ought not to be made considering the fact that, the Applicant is a public body capable of meeting the decree in the event its intended appeal fails.

11. Thus urges this honourable court not to impose any condition on security because there is no doubt that the Applicant is a body corporate capable of satisfying the decree and there is anything to indicate that the situation will change to the Respondent’s detriment.

12. It relies on the case of *Kenya Wildlife Service vs Geoffrey Kirimi Mwiti Civil Appel No. 12 of 2017* at Marsabit (unreported) where the court held that;

“The Respondent is a public corporation which has been in existence for many years. The Applicant’s capacity to settle the decretal sum is not in doubt.....I do find that it would be imprudent for this court to impose conditions on the applicant while granting the prayer for stay of execution. I am satisfied that the applicant is in a position to satisfy the decretal sum. The court imposes conditions where the applicant’s status in relation to settling the decree is doubtful or may change and disadvantage the decree holder. That cannot be said of the applicant.”

RESPONDENT’S SUBMISSIONS

13. The Respondent has responded by way of grounds of opposition and list of authorities dated 13th June 2019 to 17th June, 2019.

14. He relies on the case of *Masisi Mwita vs Damaris Wanjiku Njeri [2016] eKLR* while dealing with such an application, while commenting on Order 42 Rule 1 stated thus;

“It is clear from the wording of Order 42 Rule 6 (1), for an applicant to succeed in an application of this nature, he must satisfy the following conditions, namely; (a) substantial loss may result to the applicant unless the order is made; (b) The application has been made without undue delay; (c) Such security as to costs has been given by the applicant.”

15. The respondent submits that, mere execution of a lawful decree cannot per se result into loss of anyone. In fact, a lawful decree imputes that the judgement debtor has a legal obligation to satisfy the decree. The satisfaction of legal duty cannot in any way be said to result into loss, let alone substantial loss. Such reasoning would be flawed.

16. He also cites **Ringera J** in *Lalji Bhimji* put it succinctly when he stated thus;

“...He (the applicant) must persuade the court that the decree holder is a man of straw from whom it will be nigh to impossible or at least very difficult to obtain back the decretal amount in the event the intended appeal succeeding. Such persuasion must spring from affidavits or evidence on record.”

17. Also relies on *Mutua Kilonzo vs Kioko David [2008] eKLR* warned such persona as Doreen Mutunga when his Lordship stated:

“Let this also be a warning that so far as possible, executives in Insurance Companies and advocates for the parties should unless absolutely necessary or clearly from the record desist from swearing affidavits on contested matters and for which they have no personal knowledge.”

18. The respondent contends that the decree in question is evidently a money decree. Courts have numerously held that the success of the Appeal would not be rendered nugatory if the decree is a money decree unless it is proved that the Respondent is a man of straw. This was the position candidly held in *Kenya Hotel Properties Limited vs Willesden Investments Limited [2007] eKLR*.

19. The respondent argues that, the judgement was delivered on 28th March, 2019. The instant application was filed on 8th May 2019. The Appellant has not cared to avail any explanation of the delay in filing the Application or even seek the indulgence of the Honourable Court. See **Anthony Kaburi Kario & 2 Others vs Ragati Tea Factory Company Limited & 10 Others [2014] eKLR**.

20. In **James Kanyiiita Nderitu vs Attorney General & Another [2019] eKLR** the Court of Appeal recently in finding that unexplained delay is inordinate clearly stated thus;

“In ordinary civil suits, when delay is established, unless it is well explained, it is deemed to be inexcusable.”

21. The respondent submits that, the mere fact that an Appellant is capable of depositing any kind of security as in this case should not be allowed to be the reason why litigants who succeed in litigation are denied their fruits of litigation. This is in fact proof that the Defendant is capable of settling the entire decretal amount if only it had the will.

ISSUES, ANALYSIS AND DETERMINATION:

22. After going through the record, pleadings proceedings and the parties’ submissions, I find the issues are; **whether the threshold for grant for orders sought has been established? If above in affirmative, what is the condition for the grant of the stay? What is the order as to the costs?**

23. Under Order 42 Rule 6 (1), for an applicant to succeed in an application of this nature, he must satisfy the following conditions, namely; **“(a) substantial loss may result to the applicant unless the order is made; (b) The application has been made without undue delay; (c) Such security as to costs has been given by the applicant.”**

24. In the case of **M.O.M Amin Transporters Limited & Another vs Alexander Ndungu Mbugua & 2 Others [2017] eKLR** the court stated that;

“Indeed, substantial loss does not only connote loss of a particular amount of money, rather, it alludes to a situation where a successful litigant is likely to suffer hardship in recovering monies he would have paid before an appeal was heard.”

25. It is settled that once an applicant raises fear of loss in the event stay is not granted the evidential burden shifts to the Respondent to demonstrate that he is not a man of straw.

26. See the case of **Telkom Kenya Limited vs Edward Kinoti [2018] eKLR** where the court held that;

“In an application for stay, once an applicant positively alleges that if the decretal amount is paid over and the appeal succeeds, the same might be irrecoverable, the evidentiary burden of proof shifts to the respondent show that he is not a man of straw. That he is capable of refunding the money if it is paid over to him and the appeal ultimately succeeds. In this case, the respondent did not demonstrate that he can refund the money if it is paid over to him. In this regard, I am satisfied that the applicant will suffer substantial loss if the stay sought is not granted.”

27. The respondent has not rebutted that he is a man of stray and that in event he is paid Ksh. 5million and appeal succeeds, he would be able to refund the same. Thus the first condition of grant of orders has been established.

28. On the element of delay, the judgement was delivered on 28th March, 2019. The instant application was filed on 8th May 2019. This is a delay of about a month or so which this court does not find to be inordinate in the circumstances of this matter.

29. On the third element, the applicant has offered security in line with the provisions of the law cited. However, the applicant also seeks to be exempted from depositing security.

30. It states that Applicant being a body corporate capable of satisfying the decree and there is nothing to indicate that the situation will change to the Respondent’s detriment. It relies on the case of **Kenya Wildlife Service vs Geofrey Kirimi Mwititi Civil Appel No. 12 of 2017** at Marsabit.

31. The court is not persuaded by that submission as there is no evidence to demonstrate the applicant’s financial status thus court will grant the orders sought conditionally. The court thus makes the following orders;

a. The stay of execution pending appeal is granted as prayed on condition that Ksh. 1million will be paid to the respondent and Ksh. 4 million to be deposited in a joint interest earning account in the names of the parties advocates in the next 30 days. In default execution to issue.

b. Costs in the appeal.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT GARISSA THIS 13TH DAY OF NOVEMBER, 2019.

C. KARIUKI

JUDGE