



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 178 OF 2012**

**REBECCA PETER FRANCESKIDES.....PLAINTIFF/RESPONDENT**

**VERSUS**

**LUCAS OLOO OPONDO.....1<sup>ST</sup> DEFENDANT**

**JOSEPH MUISYO practicing as**

**MUISYO & CO. ADVOCATES (DECEASED).....2<sup>ND</sup> DEFENDANT**

**JOHN KHAMINWA & ALBERT KHAMINWA ADVOCATES**

**practicing as KHAMINWA & KHAMINWA ADVOCATES.....3<sup>RD</sup> DEFENDANT**

**MORRIS MTANDA.....4<sup>TH</sup> DEFENDANT**

**STANDARD CHARTERED BANK LTD.....5<sup>TH</sup> DEFENDANT**

**CORAM: Hon. Justice R. Nyakundi**

**Muranje Advocate for the Appellant**

**Nyongesa Advocate for the Respondent**

**RULING**

The Judgment of the Court was delivered on 19.12.2018 awarding the Respondent various reliefs in the following terms.

- a) Quantum 55,000 Euros or Kshs.5,632,550/=.*
- b) Motor vehicle registration No. KBS 372P or payment of 25,000 Euros.*
- c) A motorbike payment of 1,400 Euros being money given to the defendant by the plaintiff for purchase of the motorbike.*
- d) 30,000 Euros being the money given to the defendant by the plaintiff on the strength of individual agreements entered on 14.11.2012.*
- e) Return of diamond eternity ring or payment of 4,500 Euros being the value of the ring Kshs.145,000/= being payment for repairs on motor vehicle registration KBR 458J.*
- f) 639,99 Euros for the damaged iphone mobile phone.*
- h) 150 Euros for the damaged Samsung mobile phone.*
- i) An order directed on the 5<sup>th</sup> defendant to transfer 3000 Euros from the 1<sup>st</sup> defendant account No. 0100320292700 interest on the Judgment and costs of the suit.*

Being aggrieved with the Judgment, the appellant filed a notice of motion dated 18.4.2019 expressed to be brought under Order 42 Rule 6 of the Civil Procedure Rules. The main prayer in the application is for this court be pleased to grant stay of execution of the Judgment and decree dated 19.12.2018 pending the hearing and determination of the appeal.

The grounds addressed by the applicant in his affidavit are:

- 1) *That he has already preferred an appeal.*
- 2) *That the respondent is in the process of execution as outlined in the notice of motion dated 20.3.2019.*
- 3) *That the applicant is offering the same parcel of land as security for the performance of the said decree in the event the intended appeal is not successful.*

**Mr. Nyongesa**, learned counsel for the Respondent submitted and urged the court to take into account the grounds under Order 42 Rule 6 of the Civil Procedure Rules. According to learned counsel it was incumbent upon the applicant to show that he will suffer substantial loss if the application is denied. Further, learned counsel submitted that the applicant could not possibly move the court to stay execution on conditions that the same property subject matter of execution be offered as security for the due performance of the decree.

Hence in view of the learned counsel the applicant has failed to make a case to demonstrate that there are grounds and sufficient cause to justify exercise of discretion to stay execution of the Judgment pending appeal.

On the materiality of his submissions, learned counsel cited the principles in the following authorities **Gladwell Wangechi Kibiru v Lord Melvin John Blackburn & 4 others [2015] eKLR, G. N. Muema P/A (Sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another [2018] eKLR, Omondi Odero & Another v ESS (suing on behalf of a minor EJZ (E) [2019] eKLR**

In addition to the learned counsel submissions on behalf to the respondent, a replying affidavit dated 20/5/2019 was also admitted as a factual matrix of the procedural background of the matter.

The applicant also filed written submissions dated 18.4.2019 urging this court that on the reasons stated in the body of the motion and affidavit in support of **Lucas Oloo Opondo** to grant stay of execution pending the hearing and determination of the appeal.

#### **Analysis**

I have carefully considered the application, affidavit, evidence from both sides to the dispute. Further, the brief submissions on the legal principles for and against the grant of stay of execution and the relevant cases has also been perused and appraised.

It is trite which conditions qualify for an applicant to be entitled the discretion of this case for a stay of execution of the valid Judgment pending appeal.

Under Order 42 Rule 6 of the CPR it reads inter alia

***“An appeal shall not operate as a stay of execution of Judgment or of proceedings under the decisions appealed from unless the applicant satisfies the following conditions:***

- a) *That the application has been filed without undue delay.*
- b) *That the applicant would suffer substantial loss that may not be compensated on damages.*
- c) *That there is proof for security in due performance of the decree.*
- d) *That also in view of the court denial of stay may otherwise render the intended appeal or an appeal to be rendered nugatory.”*

The principles to grant or deny stay execution in terms of Order 42 Rule 6 of the CPR. The power and jurisdiction of the court being equitable must be exercised based on sound legal principles. In the case of **Joseph Gachie T/A Joska Metal Works v Simon Ndeti Muema 2012 eKLR** The key principles on stay of execution are aptly stated as follows:

***“It is not sufficient merely to state that the decretal amount is a lot of money and the applicant would suffer if the money is paid. In an application of this nature, the applicant should show the damages it will suffer for stay if as granted, since by granting stay would mean that status quo should remain as it were before Judgment and that would be denying a successful litigant of the fruits of Judgment which should not be done if the applicant has not given to the court sufficient cause to enable it exercise discretion in granting the order of stay.”***

In formal practice of disposing the application under Order 42 Rule 6 of the Civil Procedure Rules an applicant has to discharge all the three conditions on delay, substantial loss and security for due performance of the decree (**See Kiambu Transporters v Kenya Breweries**) The argument and Judgment in the persuasive case of **Standore Invest A/S and others v Sah Kim Wal 2010 SGHC** disposes of the principles commonly that apply in exercise of discretion in the following passage:

***“While the court has the power to grant stay, and this is entirely at the discretion of the court, the discretion must be exercised judicially i.e, in accordance with well-established principles.”***

The first principle is that, a general proposition, the court does not deprive a successful litigant of the fruits of his litigation and lock up funds to which he is prima facie entitled pending an appeal. There is no difference whether the Judgment appealed against was made on a summary basis or after a full trial.

This is balanced by the second principle. When a party is exercising his undoubted right of appeal, the court ought to see that the appeal if it can be shown by affidavit. That, if the damages and costs are paid, there is no reasonable probability of getting them back if the appeal succeeds.

The third principle follows, and is an elaboration of the secured principle, that an appellant must show special circumstances before the court will grant stay.

The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** developing the jurisprudence with a Kenyan identity with other common law jurisdiction affirmed the broad principles underlying the procedure and weight to be accorded the criterion outlined under Order 42 Rule 6 of the CPR for grant or refusal of stay of execution pending an appeal.

The higher threshold for stay of execution pending an appeal, is the test whether the applicant would suffer substantial loss.

The principles governing this ground were laid down in the case of Stanley **Karanja Wainaina & Another v Ridon Anyangu Mutubwa HCA 427 of 2015** where the test is:

***“It is not enough for the respondents to merely swear that fact in an affidavit without going further to provide evidence of his liquidity.”***

In **Lucy Nyamu v Lawrence Mburu Muthiga 2006 eKLR** the court held:

***“An applicant must demonstrate substantial loss by showing that the respondent is not a person of means and payment in decretal sum prior to appeal would put the same beyond reach of the applicant.”***

The above principles are in tandem with the arguments and submissions by the respondent counsel that the applicant has failed to bring himself within the ambit of Order 42 (6) of the CPR. In the instant application it can be deduced from the affidavits and submissions ventilated by counsel that reason of being dissatisfied with the Judgment an appeal has been preferred to the Court of Appeal.

Unfortunately, the merit of the intended appeal is not a matter within the purview of this court. The least expected of the applicant to claim the equitable remedy is that the enforcement of the Judgment being appealed against will occasion substantial loss and irreparable harm not adequately compensated by way of damages. Given the nature of the case one would hardly think that justice can be done without considering the aspect on security for due performance of the decree. The applicant has proposed that the suit property likely to be the only asset in the event an execution and enforcement of the Judgment was to be triggered by the respondent. The question therefore is what is the nature of substantial loss when an applicant is required by law to satisfy a Judgment debt obtained on the merits. Am not even sure, whether the applicant is aggrieved with the entire decretal sum as ordered by the court or a portion of it. The applicant has not delved into any of those issues though seemingly they will be canvassed on appeal.

In **Arun C. Sharma v Ashana Raikundalla T/A Raimudama & Co. Advocate** the court held:

***“The purpose of the security needed under Order 42 Rule 13 to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the Judgment debtor. Civil process is quite different because in civil process the Judgment is like a debt hence the applicants become and are Judgment debtors in relation to the respondent.”***

***That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for due performance such a decree or order as may ultimately be binding on the applicant. I presume the security must be one which can serve the purpose.”***

On this basis the respondent rejoinder against the applicant assertion that if he allowed to offer the title to the suit property negates the principle in the **Arun case (Supra)**. There is ample evidence to prove that the applicant has not discharged the burden of proof on condition number 2 and 3 with regard to substantial loss and offering security for due performance of the decree. There is even nothing to demonstrate that the applicant will suffer irreparable harm not capable of compensating him by way of damages or cost. Further, that if stay of execution pending the intended appeal is denied he will be prejudiced or occasioned a merit of injustice. That the appeal proceedings would render him completely ruined.

I have considered the affidavit evidence by the applicant and the respondent rejoinder with regard to the motion of 20.3.2019. as discussed by the applicant that appears to the only security there is to enforce the Judgment.

The respondent’s only objection to the orders applied for in the notice of motion of 20.3.2019 is hinged on the basis that the applicant is a foreigner while the respondent would clearly prefer that the orders to extend enforcement of the Judgment be suspended until the intended appeal is heard and determined. The gravamen of all these application is an execution and enforcement of a civil Judgment.

Significantly this court being aware of the ramifications both applications have on the entire adjudicatory process for all the foregoing reasons the motion is denied.

*1) That the notice of motion dated 5.4.2019 for stay of execution fails the threshold on all the two central grounds under Order 42 Rule 6 with regard to substantial loss and provision of security for due performance of the decree.*

*2) In the alternative, the notice of motion dated 20.3.2019 the mover being the Judgment creditor is hereby allowed by validating prayer no 2 & 3.*

*3) In the matter of the notice of motion of 20.3.2019, the inherent jurisdiction of the court is invoked to direct the Deputy Registrar in exercise of Ministerial powers under 49 of the Civil Procedure Rules to prepare a scheme to comply with the orders in the aforesaid motion.*

DATED, SIGNED AND DELIVERED AT MALINDI THIS 5<sup>TH</sup> DAY OF NOVEMBER 2019.

.....

R. NYAKUNDI

JUDGE