



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 310 OF 2003

YUSUF MOHAMED ALAMBO.....PLAINTIFF

VERSUS

AIRLAND TOURS & TRAVEL LIMITED.....1ST DEFENDANT

VIOLET GATEI.....2ND DEFENDANT

HARBOUR HELP (K) LIMITED.....3RD DEFENDANT

RULING

1. The Notice of Motion application dated 13th December 2018 seeks orders for leave to file an appeal and stay of execution of the ruling and order issued by the Deputy Registrar on 12th November 2018 pending hearing and determination of the intended appeal against the said ruling and order.
2. The application is anchored on the provisions of Order 42 Rule 6, Order 49 Rule 7 (2) and (3) and Order 50 Rule (6) of the Civil Procedure Rules, 2010.
3. The same is based on the grounds on the foot of the motion and reiterated in the Affidavit of Violet Gatei sworn on 13th December 2018 wherein she avers that she was unable to file the application in good time due to illness. She further states that she is unable to pay the amount awarded by the Deputy Registrar as she is impoverished, ailing and aged.
4. The respondent opposed the application through the Replying Affidavit sworn on 24th January 2019 after which parties agreed to canvass application by way of written submissions which I have carefully perused. 6. The main issue for determination is **whether the Applicant has made out a case for the granting of the orders sought in the application.**
7. Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

“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 sub rule (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 sub rule (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 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.”

8. On whether the application was filed within reasonable time, I find that the explanation advanced by the applicant for the delay given in respect to leave to appeal out of time is a plausible and I therefore allow the prayer for leave to file appeal out of time. I further find that the delay was not inordinate and is excusable.

9. On the limb of substantial loss, I find that the applicant did not suggest that she will not be able to recover the decretal amount from the respondent unless the stay orders are granted. The only contention by the Applicant is that the decretal sum of Kshs. 5,000,000 is such a colossal amount that she cannot raise as she is old, sickly and impoverished. I find that the reasons advanced by the applicant do not fall within the conditions stated under Order 42 Rule 6 of the Civil Procedure Rules under which an order for stay of execution may be granted.

10. In *Shell Ltd v Kibiru and Another* [1986] KLR 410 Platt JA set out two different circumstances when substantial loss could arise as follows:

“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts...”

11. The learned Judge further stated that: -

“It is usually a good rule to see if Order XLI Rule 4 of the civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.” (emphasis added)

12. Earlier on, **Hancox JA** in his ruling observed that:

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the questions of whether to refuse it would,..... render the appeal nugatory.

This is shown by the following passage of Cotton L J in Wilson -Vs- Church (No 2) (1879) 12ChD 454 at page 458 where he said:-

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.”

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

14. Courts have also taken the position that they must be careful in dealing with the application for stay of execution so as balance the interests of all the parties while at the same time avoid determining the merits of the appeal at the application stage. This was the position taken in *Mohammed Salim T/A Choice Butchery v Nasserpuria Memon Jamat* (2013) eKLR wherein the court upheld the decision of *M/S Portreiz Maternity v James Karanga Kabia Civil Appeal No. 63 Of 1997* and stated that:

“That right of appeal must be balanced against an equally weighty right that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right”

15. In this case I find that the words stated in *Nduhiu Gitahi and Another v Anna Wambui Warugongo* [1988] 2 KAR, citing the decision of *Sir John Donaldson M. R. in Rosengrens v Safe Deposit Centres Limited* [1984] 3 ALLER 198 are apt:

“We are faced with a situation where a judgment has been given. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff..... It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal.....” (See also *James Wangalwa & Another –Vs- Agnes Naliaka Cheseto [2012] eKLR.*)

16. My further finding is that this type of application nonetheless invokes the discretionary powers of the court. Needless to say, discretionary powers must be exercised judiciously and only in the most deserving cases. The Court of Appeal in **Butt v Rent Restriction Tribunal** [1982] KLR 417 gave guidance on how a court should exercise discretion and held that:

“1. 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.

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 judge’s discretion.

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 proceedings.

4. 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 appellant 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 for stay of execution to lapse.”

17. The above cited case interprets the applicable statutory principles in deciding whether or not to grant a stay of execution of decree pending appeal. In the Court of Appeal case of Nairobi Civil Application No. 238 of 2005 **National Industrial Credit Bank Limited v Aquinas Francis Wasike & another (UR)** as cited by the High Court in **Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa** [2016] eKLR it was held 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 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 what resources he has since that is a matter which is peculiarly, within his knowledge.”

18. In the instant case, the Respondent has not disclosed any source of income that he would use to refund the Applicant the decretal amount should the appeal succeed. It follows that if the Respondent executes the judgement and the Applicant’s appeal succeeds, then not only will the Applicant suffer substantial loss but the appeal will also be rendered nugatory.

19. Having regard to the findings and observations that I have made in this ruling and bearing in mind the need to balance the rights of the applicant to pursue the intended appeal and the respondent’s right to be assured of the fruits of his decree, I find that a conditional stay of execution will be appropriate in this case. Consequently, I allow the application dated 13th November 2018 in the following terms:

(i) There shall be stay of execution of decree given by Hon. Elizabeth Tanui pending hearing and determination of this appeal but on condition that the applicant/appellant shall within thirty (30) days of today deposit full decretal sum awarded in a financial institution in good standing in an interest-bearing account in the joint names of the parties’ advocates. The financial institution shall be agreed upon by counsel and in default of agreement the Court shall appoint such financial institution.

(ii) In the alternative to the order contained in (1) hereinabove, the Applicant may provide a bank bond for the full decretal sum from any reputable bank as a guarantee for the due performance of the decree within 30 days from the date thereof.

(iii) In default of making the deposit or bank guarantee within the appointed time, the order of stay shall automatically stand vacated and be discharged unless such orders are enlarged by the court.

(iv) The applicant is granted leave to appeal out of time

(v) The costs of this application shall be in the appeal.

Dated, signed and delivered in open court at Nairobi this 13th day of November 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Sewe for Amollo for plaintiff/applicant

Mr. Mumbe for Miller & Co. Advocate for plaintiff

