



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 44 OF 2019

SHADRACK MUGIIRA.....APPELLANT

VERSUS

UNITED STAR SACCO.....RESPONDENT

RULING

INTRODUCTION

1. The Appellant's Notice of Motion application dated 31st January 2019 and filed on 1st February 2019 was brought pursuant to the provisions of Order 42 Rule 6, Order 50 Rule 1 of the Civil Procedure Rules, 2010 and all enabling provisions of the Law. Prayer Nos (1), (2) and (3) were spent. It sought the following remaining orders:-

1. Spent.

2. Spent.

3. Spent.

4. There be a stay of execution pending the judgment of the judgment (sic) and decree of Hon Kithinji C in Cooperatives (sic) Tribunal Suit No 526 of 2016; (sic) United Star Sacco vs Shadrack Mugiira pending the hearing and determination of the Appeal.

5. Costs of the application be in the Cause.

6. Any other orders that meets the ends of justice.

2. Despite having been given ample time to file his Written Submissions, the Appellant did not do so. However, the Respondent's Written Submissions were dated 13th June 2019 and filed on 14th June 2019.

3. The Respondent requested the court to deliver its decision based on its Written Submissions which it relied upon in its entirety. The Ruling herein is therefore based on the said Written Submissions.

THE APPELLANT'S CASE

4. On 31st January 2019, the Appellant swore an Affidavit in support of his present application.

5. He stated that he had applied for the certified copies of the proceedings and the judgment and also filed a Memorandum of Appeal. He pointed out that he had filed the present application without delay.

6. It was his contention that his Appeal had raised weighty issues and had high chances of success. He averred that he was ready to abide by any conditions that were set out by the court.

7. He further stated that he would suffer irreparable harm and prejudice if his application was not allowed.

8. He thus urged this court to allow his said application as prayed.

THE RESPONDENT'S CASE

9. In response to the said application, on 26th April 2019, the Respondent's General Manager, Purity Kagwiria swore a Replying Affidavit on behalf of the Respondent herein. The same was filed on 3rd May 2019.
10. The Respondent stated that whereas the Appellant had contended that he would suffer substantial loss, he had not demonstrated the same and the court could not therefore speculate on the substantial loss that he would suffer. It also stated that he had not offered to deposit the decretal sum or offered any indication of the security he would offer.
11. It pointed that in the event that this court was inclined to grant him a stay of execution pending appeal, then he ought to pay it three quarters of the decretal sum and deposit the balance in a joint earning savings account held in the names of the advocates or that the entire amount be deposited in court.
12. It averred that it had been pursuing repayment of the loan from the Appellant for a period of three (3) years and it therefore stood to suffer if the application was allowed as it would be denied what rightly belonged to it.
13. It stated that the present application had failed to attain the threshold of attaining the orders the Appellant had sought and thus urged this court to strike it out.

LEGAL ANALYSIS

14. The Respondent submitted that the Appellant had not demonstrated that he had satisfied any of the conditions that had been set out in Order 42 Rule of the Civil Procedure Rules. It placed reliance on the cases of **Antoine Ndiaye vs African Virtual University [2015] eKLR**, **Machira t/a Machira & Co Advocates vs East African Standard (No 2) [2002] KLR 63** and **Kenya Shell Limited vs Benjamin Karuga vs Benjamin Karuga Kibiru & Another (1982-1988) KAR 1018** where the common thread was that if no substantial loss was shown to the satisfaction of the court, then the order for stay of execution should not be granted.
15. It also referred the court to the case of **Tabro Transporters Limited vs Absalom Dova Lumbasi [2011] eKLR** where Gikonyo J held that the discretionary relief of stay is to administer the justice that the case deserves. It added that in the case of **Kenya Shell Limited vs Benjamin Karuga vs Benjamin Karuga Kibiru & Another** (Supra) it was stated that the court should balance the interests of parties to ensure that the successful litigant was not deprived of his fruits of judgment.
16. Order 42 Rule 6(2) of the Civil Procedure Rules provides as follows:-
- “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”.**
17. This means that an applicant has to demonstrate:-
- a. That he will suffer substantive loss if the order of stay was not granted;**
- b. That he had filed his application for a stay of execution timeously; and**
- c. That he was willing to provide security.**
18. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is **“and”**. It connotes that all three (3) conditions must be met simultaneously.
19. This court noted that save for stating that his Appeal had raised weighty issues, he did not state which those issues were. This was, however, not a concern of this court as it should only be satisfied that an applicant should have met the conditions set out in Order 42 Rule 6 (2) of the Civil Procedure Rules.
20. A perusal of the Appellant's affidavit did not point to the substantial loss he was likely to suffer if his application was not granted. He did not also demonstrate that he filed his application without undue delay. The court had to look at the Memorandum of Appeal on the court record and established that he filed the present application three (3) weeks after the decision of the Co-operative Tribunal. In that respect, this court was satisfied that his application was filed without undue delay.
21. Having said so, although he indicated his willingness and readiness to abide by the conditions set by the court, there was no reference to the decretal sum anywhere in his affidavit evidence and that of the Respondent. The court had to go back to the court record and noted that judgment was entered in favour of the Respondent against the Appellant herein for the sum of Kshs 2,116,953/= plus interest and costs.
22. It was therefore clear to this court that the Appellant had only satisfied two (2) conditions that had been set out in Order 42 Rule 6(2) of

the Civil Procedure Rules and because he had to meet all the three (3) conditions therein, he was not entitled to the order for stay of execution pending appeal.

23. However, bearing in mind that the Respondent was not too averse to him being granted an order for stay of execution pending appeal on condition that he furnished security, this court was of the view that it ought to grant the Appellant the said order purely to do substantive justice.

DISPOSITION

24. For the foregoing reasons, the upshot of this court's decision was that the Appellant's application that was dated 31st January 2019 and filed on 1st February 2019 though not merited, purely for purposes of doing substantive justice him, the said application is hereby allowed in terms of Prayer No (4) therein in the following terms:-

- 1. THAT there shall be a stay of execution pending the judgment of the and decree of Hon Kithinji C in Co-operatives Tribunal Suit No 526 of 2016 United Star Sacco vs Shadrack Mugiira pending the hearing and determination of the Appeal herein.**
- 2. THAT the Appellant shall deposit into a joint interest earning account in the names of his advocates and those of the Respondent the sum of Kshs 2,116,953/= within sixty (60) days of this Ruling i.e. by 5th March 2019.**
- 3. For the avoidance of doubt, in the event, the Appellant shall default on Paragraph 24(2)hereinabove, the conditional stay of execution shall automatically lapse.**
- 4. The Appellant shall file and serve a Record of Appeal within sixty (60) days of this Ruling i.e. 5th March 2019.**
- 5. Costs of the application herein will be in the cause.**
- 6. Either party is at liberty to apply.**

25. The Deputy Registrar of High Court of Kenya Milimani Law Courts Civil Division is hereby directed to facilitate all the prerequisite processes to ensure the hearing of the Appeal herein without delay.

26. It is so ordered.

DATED and DELIVERED at NAIROBI this 11th day of December 2019

J. KAMAU

JUDGE