



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 13 OF 2019

WILSON IRERI WILLIAM.....1ST APPELLANT/APPLICANT

MUTHEE CHARLES.....2ND APPELLANT/APPLICANT

VERSUS

MARY MUMBI KARIUKI.....RESPONDENT

R U L I N G

A. Introduction

1. This ruling pertains to the application dated 11th September 2019 in which the 1st applicant seek for orders for stay of execution of the decree and orders of the trial court in Embu CMCC No. 7 of 2018 pending the determination of the instant appeal.

2. It is the 1st applicant' case that he stands to suffer substantial loss if the orders sought are not granted as execution may issue at any time. The 1st applicant' further state that they have an arguable appeal that raises prima facie triable issues and failure to grant stay will render the appeal nugatory. The 1st applicant also states that he is willing to offer security in the form of half the decretal sum to be deposited as directed by court.

3. In rejoinder, it is the respondent's case that that the 1st applicant seeks to obtain orders through material non disclosure and deceit as there is a similar application pending before this court dated 13th June 2019 which was stood over generally. The respondent further state that the 1st applicant filed a similar application for stay in the lower court and the same was dismissed for lack of merit.

4. The respondent thus submits that the instant application is res judicata and should be dismissed as the respondent will continue to suffer prejudice if execution is stayed.

5. The parties filed submissions to dispose of the application

B. Appellants' Submissions

6. It is submitted that the respondent is not a person of means capable of settling the judgement sum in the event the appeal succeeds. The 1st applicant also submits that he is willing to offer security in the form of half the decretal sum.

7. The 1st applicant further submit that his memorandum of appeal raises serious triable issues that ought to be determined on merit and as such denying to order stay of execution renders the appeal nugatory.

C. Respondent's Submissions

8. It is submitted that the 1st applicant herein failed to disclose that they had filed a similar application before the lower court which was dismissed and this constituted a non-disclosure and deceit and as such the instant application ought to be dismissed as was held in the case of **Emilio Muriithi Muriuki & 2 Others v Geoffrey Justus Mwenda [2017] eKLR.**

9. It is submitted that the 1st applicant has failed to demonstrate that he will suffer irreparable loss if the orders for stay are not granted as in the unlikely event that the appeal succeeds, the deceased's estate will be able to refund the decretal amount. Reliance is placed on the case of **Masisi Mwita v Damaris Wanjiku Njeru [2016] EkLr** where the appellant failed to prove substantial loss therefore the court dismissed the application for stay of execution.

10. On security the respondent submits that the 1st applicant should be required to furnish the entire decretal amount and deposit the same in court. Reliance was placed on the case of **Francis Kirwa Magut & Another v Grace Agiso [2015] eKLR** where the court dismissed an application for stay on the ground that it had not been furnished with evidence that the respondent would not be in a position to refund the decretal sum as ordered.

D. Analysis & Determination

11. I have considered the issues before me; the respondent has raised a preliminary that that the 1st applicant seek to obtain orders through material non-disclosure and deceit as there is a similar application pending before this court dated 13th June 2019 which was stood over generally.

12. I have perused the court record herein and note that indeed there is an application herein dated 13/6/2019 that sought similar orders to those sought herein. However, I do note that the aforementioned application was never prosecuted or determined. The respondent also asserts that there was an application before the lower court by the 1st applicant herein on stay of execution that was dismissed. The respondent has not favoured this court with any evidence of this application or proceedings before the lower court and as such it is my considered view that this does not apply. As such the doctrine of res judicata does not apply to the instant suit in relation to the application dated 13/06/2019.

13. Further, it is my considered opinion that this case differs from the case of **Emilio Muriithi Muriuki** (supra) cited by the respondent. In this case the 1st applicant is yet to have their matter ventilated before this court and subsequently obtain any orders. In any case, the respondent will not face any prejudice if the instant application proceeds.

14. Consequently, the only issue before me is whether or not, in the circumstances, I ought to grant stay of execution of the order of the Magistrates Court, pending the hearing of the appeal. The applicable provision of law is **Order 42 rule 6** of the **Civil Procedure Rules 2010**.

15. **Order 42, rule 6** states:

“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.”

16. The 1st applicant needs to satisfy the Court on the following conditions before they can be granted the stay orders:

a) *Substantial loss may result to the applicant unless the order is made.*

b) *The application has been made without unreasonable delay, and*

c) *Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.*

17. It is submitted for the 1st applicant that if stay of execution is not granted the 1st applicant will suffer substantial loss as the respondent has commenced execution proceedings and further as the respondent is not person of straw who has not shown in any way that she is capable of refunding the said sum if the same was paid to her and the appeal succeeds. The respondent on her part states that in the case that the appeal is successful and stay having been denied, the deceased's estate will refund the decretal sum.

18. In the case of **Stanley Karanja Wainaina & Another v Ridon Ayangu Mutubwa Nairobi H.C.C.A. 427/2015** it was stated:

“It is not enough for the Respondent to merely swear that fact in an affidavit without going further to provide evidence of his liquidity. In my view the Respondent has evidential burden to show that he has the resources since this is a matter that is purely within his knowledge. The Court of Appeal while dealing with a similar situation in National Industrial Credit Bank Limited -V- Aquinas Francis Wasike and Another (UR) C.A. 238/2005 stated:-

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 the respondent or lack of them. Once an applicant expresses that 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.”

19. It is my considered view that the respondent bears the evidential burden to prove that she is not a man of straw as alleged. The respondent has not made any attempt to discharge this burden. It is expected that a respondent would depone and show the means she has to refund the decretal sum. It is enough for the applicant to depone that she is not able to refund. He cannot be expected to dig deep into the financial standing of the respondent, that is for the respondent to produce and prove.

20. The contention by the respondent that the applicant has not shown that he will suffer substantial loss cannot stand. If the decree is executed the appeal will be rendered nugatory as he is not likely to recover the said amount. I am of the view that the applicant has proved that he is likely to suffer substantial loss and the appeal may be rendered nugatory. The authority of Kenya Shell Limited v Kariga 1982-88 1 KAR where the Court of Appeal held that, “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”, is not in favour of the respondent.

21. I have stated that the respondent has failed to prove that she is in a position to refund. This was held in Lucy Nyamu Kimani -V- Lawrence Mburu Muthiga (2006) eKLR: –

“An applicant demonstrates 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.”

22. This was also held on Antoine Ndiage -V- African Virtual University (2015) eKLR. The 1st applicant has discharged the burden of proof that he is likely to suffer substantial loss. This is what has to be prevented by the Court by ordering stay of execution. It is the corner stone which determines whether the Court should exercise discretion to order stay. I am of the view that there is need to order stay so that the appeal is not rendered nugatory.

23. The 1st applicant has argued that the appeal has reasonable chances of success. All what the applicant needs to show are the three grounds under Order 42 rule 6 Civil Procedure Rules (supra). The law does not require this Court to determine the application based on the merits or otherwise of the appeal.

24. The second consideration is security. The 1st applicant has deponed that he is ready to provide security where there is no specific offer by the applicant, it is the court which determines the security upon ordering stay to ensure the due performance of the the decree. It is therefore sufficient to depose that he is ready to provide security. The applicant has submitted that he has ability to provide security as will be ordered by the Court and is ready to offer half the decretal sum to e deposited in court. In Arun C Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates Justice Gikonyo the Court stated that:

“The purpose of the security needed under Order 42 is 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 1st applicant 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 of such decree or order as may ultimately be binding on the 1st applicant. I presume the security must be one which can serve that purpose.”

25. Where the applicant proposes to provide security as the 1st Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The 1st Applicant has offered to provide security and has therefore satisfied this ground for stay.

26. The other consideration is whether there was undue delay. The judgment was delivered on 12th February 2019 and the Memorandum of Appeal was filed on 12th March, 2019. The appeal was filed timeously during the same month. There is no doubt that the appeal was filed without undue delay. The application for stay was initially filed after two months on the 13th June, 2019 and subsequently another application filed on the 11th September 2019. My view is that having filed the appeal within the stipulated time a delay of three months cannot be said to be unreasonable. It is my considered view that the applicant ought to be given an opportunity to ventilate the appeal.

27. It is my considered view that the application has met the threshold for granting the orders of stay pending appeal. The application is allowed pending the hearing and determination of the appeal on the following terms: -

a) That the applicant deposits half of the decretal amount within 30 days in an interest earning account in the names of the counsels on record for the parties.

b) That in default of the deposit the orders for stay to be automatically vacated.

28. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 4TH DAY OF DECEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mbwiria for Omwaga for Applicant