



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

MISC. CIVIL CASE NO. 11 OF 2018

NJERU JIM KENNEDY.....APPELLANT

VERSUS

STEPHEN NGURURU KARANJA.....RESPONDENT

RULING

The applicant by a notice of motion filed in court on 14th February, 2018 and brought under order 42 Rule 6, order 51 Rule (1) of the Civil Procedure Rules 2010, and section 65(1) (b) of the Civil Procedure Act. The applicant prays for the following orders:

- 1. That pending the inter-parties hearing of this application this Honourable Court be pleased to grant a temporary stay of execution of the judgment and orders in Kajiado SRMCC No. 233 of 2015 made by Hon. Chesang on 15th September, 2017.**
- 2. That this Honourable Court be pleased to extend time to file a Memorandum of Appeal against the judgment and orders made in Kajiado SRMCC No. 233 of 2015.**
- 3. That pending the hearing and determination of the applicant's intended appeal, this honourable Court do grant a stay of execution of the judgement and orders of the subordinate court in Kajiado SRMCC 233 of 2015 made by Hon. Chesang on 15th September, 2017.**
- 4. That the costs of this application be provided for.**

The application is supported by the grounds on the face of the notice of motion and the affidavit sworn by Caroline Kimeto dated 13th February, 2018.

In opposing the application the respondent Stephen Ngururu Karanja filed a replying affidavit. During the hearing of the application inter-parties the court was told that if the execution of the judgment proceeds the applicant would suffer irreparable loss. I have perused the respective affidavits touching on the evidence material and the grounds in support of the application.

An application for stay of execution made under order 42 rule 6 must meet various requirements

- (a) There is an appeal pending before an appellate court.**
- (b) There is a probability of success of the appeal**
- (c) The applicant will suffer substantial loss if the stay is not granted.**
- (d) The appeal has been made without unreasonable delay**
- (e) The applicant has given such security as the court may order for the due performance of the decree or order which may eventually be bending on him.**

In the cases of *Lalji Bhimji R. Sanghani Builders and Construction v. Nairobi Golf Hotels Kenya Ltd and Kiambu Transporters v. Kenya Breweries Ltd (2000) eKLR* the conditions the applicant must establish before the High Court in order to be granted stay are well settled as only expressed in order 42 Rule 6 of the Civil Procedure Rules. It is no doubt that an application seeking a stay of execution must also demonstrate that unless the application is allowed the intended appeal or appeal, if successful would be rendered nugatory.

This test is subjective to the circumstances of each case as was stated in *Reliance Bank Ltd v. NorLake Investments Ltd 2002 1 EA 227*. Along with this the court must be satisfied that the application for stay of execution is not frivolous meaning that the applicant has an arguable appeal.

A stay order of execution should not be seen to defeat the ends of justice. This was affirmed in *Global Tours and Travels, Nairobi, the winding up cause No.43 of 2000* where the court held:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice. The sole question is whether it is in the interest of justice to order stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order”

By virtue of the above principles it is clear that the court might not grant a stay of execution unless there are good reasons and an applicant has brought himself/herself within the provisions of order 42 Rule 6 of the Civil Procedure orders that therefore affirms the position in law that a stay order does not lie as a matter of course because one has preferred an appeal. In exercising the appellate discretion under order 42 Rule 6 is recognized that the court does not deport a successful party to a dispute of the fruits of his judgment just because the looser is dissatisfied with the outcome of the case.

That is why inquiries as to the likelihood of the appellant suffering substantial loss in case the order is refused is of paramount importance. As to the test or the issue of substantial loss the court in the cases of *Equity Bank Ltd v Rose Kuria Nairobi Civil case No. 224 of 20001 UR and Machira T/A Machira & Co. Advocates v East African Standard No. 2 of 2002 KLR 63 reaffirmed* the grounding principles to be relied upon in proving substantial loss. Such loss has usually been expressed in monetary terms although there have been expressions in some other cases touching on other assets like land. It is not enough under this test for litigant to come to court and show some figures in the impugned judgment to sufficiently prove substantial loss.

Being an evidential issue the burden of proof is on the applicant/appellant to satisfy the court that the substantial loss is real and the respondent is a man of straw who would most likely not pay back the money in the event the appeal succeeds.

In light of the above has the applicant presented a proper case for grant of stay of execution?

In the present case judgment was decided on 15th September, 2017. The applicant filed the notice of motion pursuant to order 42 rule 6 of the Civil Procedure Rules on 14th February, 2018. In the affidavit the applicant has demonstrated that he was served with the notice for the delivery of the judgment in the lower court from the record. It has been observed that the learned trial Magistrate pronounced and delivered the impugned judgment in absence of the parties or their respective counsels. That therefore explains the lapse of time from 15th September, 2017 and 14th February, 2018 when the application for stay of execution was lodged before this court.

In our present case the impugned judgement order comprises an award of damages of Kshs, 950,000 plus costs and interest. The circumstances of the case before the trial court can be described from the pleadings and final judgement. The suit which gave rise to the judgement was presented on a claim for damages grounds on tort following a Road Traffic Accident involving Motor vehicle registration No. KPB 430L and Motorcycle KMCS 211K, along Kitengela/Isinya road. As a result of the accident the plaintiff Stephen Karanja suffered loss and damage. It is apparent from the affidavits by the applicant that the respondent does not have the financial muscle to make good the payment in the event the appeal succeeds. In the circumstances substantial loss will befall the appellant/applicant unless stay order of execution are granted. This court is aware that in cases of this nature furnishing of security for due performance of the decree has to be ordered to the satisfaction of the court.

In the case of *Ntege Mayambala v Christopher Mwanje 1993 KALR 97* the court stated.

“There are several measures why depositing of security by the applicant in this type of application is necessary. One of the reasons is to maintain the status quo among the parties, another reason is to ascertain that the purpose of the application is not merely intended to defeat the course of justice by delaying tactics whereby after execution has been stayed the decree holder is made to wait indefinitely for the fruits of his success. By providing security the judgment debtor is also trying to prove how serious he is in his application for stay of execution”

Applying these principles to the present case I am satisfied that the applicant has met the legal criteria set out in order 42 Rule 6 of the civil procedure Rules for me to exercise discretion to grant stay of execution pending the hearing and determination of the appeal. Further in compliance with the Rule 1 order that the applicant do deposit partial security to the tune of Kshs, 600,000 in a joint earning interest of both advocates to the appeal within 30 days from today’s date. The costs of the application to abide the appeal.

Dated, signed and delivered in open court at Kajiado this 4th day of April, 2018.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Kamwaro for Kibatia for the applicant