



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL (APPLICATION) NO. 15 OF 2018

Arising from the judgment by the Hon. Mrs. L. Ambasi,

Chief Magistrate, in Meru CMCC No. 250 of 2016

delivered on 23rd January, 2018

(CORAM: GIKONYO J)

AMEDO CENRE KENYA LIMITED.....APPELLANT

-VERSUS-

PATRICK KAARIA NTONJIRA.....1STRESPONDENT

THE ATTORNEY GENERAL.....2NDRESPONDENT

RULING

Stay of execution pending appeal

[1] The significant orders sought in the Notice of Motion dated 14th February, 2018 are:

1. Stay of execution of the judgment and decree of the Chief Magistrate's Court at Meru, Civil Case No. 250 of 2016 (by the Hon. Mrs. L. Ambasi, Chief Magistrate) delivered on 23rd January, 2018 pending the hearing and determination of this appeal; and

2. Costs of the application do abide the result of the appeal.

[2] The said Motion is expressed to be brought under **Order 42 Rules 6 (1), (2), (3) & (6) and Order 51 Rule 1 of the Civil Procedure Rules 2010, Sections 1A and 1B of the Civil Procedure Act** and all other enabling provisions of the law. And is premised upon grounds set out in the Motion, supporting affidavit and a supplementary affidavit sworn on 7th February 2018 and 2nd March 2018, respectively, by Elizabeth Kanini, the human resources assistant and submissions filed in court.

Grounds argued in support of application

[3] From the papers filed by the Appellants, it emerges that the Appellants are aggrieved by the judgment delivered in Meru CMCC NO. 250 of 2016 on 23rd January 2018 against them, in which an award, amongst others, of general damages in the sum of Kshs. 2,000,000 as compensation for malicious prosecution was made in favour of the 1st Respondent. And have preferred an appeal thereto which they have high probability of success, and, will be rendered nugatory unless stay of execution is issued. As the stay of execution for 30 days which had been granted at the time of delivery of the judgment herein has lapsed, the appellants are now apprehensive that the 1st Respondent may execute the decree anytime.

[4] Elizabeth Kanini in the supplementary affidavit of 2nd March 2018 deposed that giving of security for performance of decree is at the discretion of the court. She averred that despite claims by the 1st Respondent to own properties, houses and a home, he has not produced a copy of the titles and valuation report of his home. Also his bank or Mpesa statements cannot in any way demonstrate his financial status. The award given is of enormous amount and if the appeal succeeds, the 1st Respondent may not be able to return the money, thus, the Appellant

will suffer a lot of prejudice. The Applicants adumbrated this fact in their submissions dated 5th March 2018 and argued that, as the decretal sum is a substantial amount of money, it may cause it to close down its shops. This was evidenced when the Applicant sought execution by way of attachment of the Applicant's goods which were not sufficient to satisfy the decretal sum. The Applicants, however, appreciates the 1st Respondent's right to enjoy the fruits of its success. However, his conduct in pursuing execution smacks of bad faith to the detriment of the Applicant.

[5] The Applicants claimed that the 1st Respondent concealed from the court and Applicant the fact that he had obtained warrants of attachment for execution when they appeared in court on 28th February 2018 for hearing of the application. Immediately after court he proceeded to the Applicant's shop and served them with a proclamation notice for 7 days which lapsed on the same day the parties were going back for inter-parties hearing of application. That the 1st Respondent was aware that at the time of taking a date in court that he was going to serve the warrants of attachment and a proclamation notice whose period would lapse and execution commenced even before the Applicant's stay application is heard.

[6] The Applicants did not stop there. They urged that the 1st Respondent has retained a firm of auctioneers where he himself is a manager which raises a serious conflict, bias and prejudice, for he cannot be independent as an auctioneer in his own cause. The said firm proceeded to issue its bill of costs, which is excessive and oppressive, to the Applicant just one day after it had issued the warrants of attachment and the proclamation notice even before the proclamation period lapses. According to the Applicants, the 1st Respondent is engineering the whole exercise to embarrass and prejudice the Applicants. What's more, in extracting the decree, the 1st Respondent did not share a draft decree with the Applicant for comments and/or approval before sending it to the court for approval and execution. The Applicant alleged that they were kept in the dark on extraction of the decree which is in contravention of the law.

[7] The Applicant urges the court to intervene and stop the 1st Respondent's conduct which is intended to disadvantage and defeat the Applicant's right of appeal. To them, the 1st Respondent has not demonstrated any prejudice. They beseeched the court to direct expedition of the appeal. Nonetheless, if this court deems just to order for deposit of security for performance of the decree, it be mindful of the economic implications that the decretal sum will have on the Applicant.

1st Respondent's arguments

[8] I am able to discern from the replying affidavit of Patrick Kaaria Ntonjira sworn on 27th February 2018 and sub missions dated 28th February 2018, that the following arguments have been presented in opposition to the application:-

a. That the application is bereft of merit as it offers no security for due performance of the decree herein.

b. He is able, ready and willing to make a refund should the appeal succeed. In support thereof, he stated that he worked for the Appellant as a senior manager for about 15 years and during that time he invested heavily in real estate. He has built a home worth Kshs. 2,000,000 and rentals which give him Kshs. 60,000 per month. He bought a vehicle last year worth Kshs. 720,000 which he uses as a taxi and he gets an average income of Kshs. 3,000 per day. He is also employed by Quickline Auctioneers as their Meru and Tharaka Nithi Manager Representative and earns a salary of Kshs. 70,000 per month as well as 10% commission of the revenue that his office raises. His income from that stream averages Kshs. 360,000 per month. Thus, there is no reason for the stay. The court should therefore be guided by the principle that a successful party is entitled to the fruits of his judgment and decline the request for stay of execution.

DETERMINATION

[9] I will not spill or expend any more judicial ink and brain on the prescriptions of law on stay of execution pending appeal. The subject has been sufficiently discussed. I will only seek to find out whether there is any sufficient cause shown to order stay of execution. And in doing so, the court must be satisfied:-

a. That the application has been made without unreasonable delay;

b. That substantial loss may result to the Applicant unless the order is made; and or

c. Provision of 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."

[10] Of these prescriptions, see Order 42 Rule 6 of the Civil Procedure Rules, 2010 which provides that:

"(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 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.”

[11] See also the case of **Electric Link (East Africa) Limited & another v Mary Mueni Kioko & another [2015] eKLR** where it was stated that:

“Whether or not to grant stay of execution of decree pending appeal is a matter of judicial discretion to be exercised in the interest of justice. The purpose of stay of execution of decree pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. See Butt Vs Rent Restriction Tribunal Madan, Miller and Porter JJA. However, in doing so, the court has to weigh against the success of the litigant who should not be deprived of the fruits of a lawfully obtained judgment. The court is therefore called upon to ensure that neither party suffers prejudice.”

Timely application

[12] Judgment herein was delivered on 23rd January, 2018. This application was filed on 16th February, 2018. There was no delay in filing the application. I will now consider its merit or otherwise.

Of substantial loss occurring

[13] This is the cornerstone of the exercise of jurisdiction in Order 42 rule 6 of the Civil Procedure Rules. I am aware that both parties have rights; the Appellant has right of appeal which includes prospects that it will not be rendered mere aspiration; the Respondent has right to immediate realization of the fruits of his judgment and that right should not be postponed unless for good lawful reason. In balancing these competing rights, judicial art, masterly and grace comes at regulated command so that none of the parties is prejudiced. What considerations are relevant here?

[14] In this case, the Applicant argued that it will suffer substantial loss unless stay is granted. They put forth two points thereto. One; that the 1st Respondent has not shown he is of means and so he may not be able to refund the decretal sum if the appeal succeeds. Two; that execution of this decree which is of substantial sum will force them to close shop. For coherence, I will discuss the second point under security.

[15] In much persuasive decision in the case of **Sewankambo Dickson vs. Ziwa Abby HCT-00-CC MA 0178 of 2005** the High Court of Uganda at Kampala stated that

“...substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal”.

[16] Accordingly, inability to make a refund of decretal sum if the appeal succeed is a loss of real worth or value to a successful appellant. This is what should be prevented by a court of law. On this, see the decision of the Court of Appeal in the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** 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 the lack of them. Once an Applicant expresses a reasonable fear 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 — see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya”

[17] The Applicant contended that the 1st Respondent will not be able to pay back the decretal sum should the appeal succeed. The 1st Respondent repudiated the allegation. He states that he is a man of means and he would be able to refund. He is able, ready and willing to make a refund should the appeal succeed. In support thereof, he stated that he worked for the Appellant as a senior manager for about 15 years. This was not refuted by the Appellant. He also stated that, during that time he invested heavily in real estate. He said that he has built a home worth Kshs. 2,000,000 and rentals which give him Kshs. 60,000 per month. He bought a vehicle last year worth Kshs. 720,000 which he uses as a taxi and he gets an average income of Kshs. 3,000 per day. He is also employed by Quickline Auctioneers as their Meru and Tharaka Nithi Manager Representative and earns a salary of Kshs. 70,000 per month as well as 10% commission of the revenue that his office raises. This again was not rebutted. He asserted that his income is an average of Kshs. 360,000 per month. I do not find anything to doubt these facts or to call for affidavit of means or provision of evidence of specific matters raised by the Respondent.

[18] The above notwithstanding, what order is appropriate for the sake of justice? From the outset, the conduct of the 1st Respondent after this application was filed has not been the best example of good faith. It has been stealth and veiled oppression. That aside, I also consider that the Appellant have right of appeal and I must take a path that does not prejudice that right. I also reckon that the Respondent has right to the fruits of his judgment. Similarly, I must tread a route in deference to that rights. In balancing these rights, and in the interest of justice, I am inclined at granting a stay of execution but on conditions that are appropriate.

Of security: “Execution will cause financial difficulties”

[19] At first instances, one is bewildered at the Applicant's claim that, if stay of execution is not given it may have to close shop. A person who is not meticulous will get more astonished as hearing the Applicant say that, when the 1st Respondent came to the Appellant's shop for execution by way of attachment of their goods there was no sufficient goods. No supporting evidence was provided thereto. Nonetheless, recapitulation of these facts brings me to a point where I must tap from judicial wit and say the following. I am aware that a judgment-debtor is obliged in law to satisfy the decree. And, the decree-holder has the right to execute a decree that has not been satisfied against the judgment-debtor. I am also aware that a judgment-debtor may apply for payment of a decree to be postponed or be paid in instalments. The argument of diminished asset or financial base of the judgment-debtor may be quite potent here. On the latter argument, see Order 21 rule 12(1) which provides that:-

12. (1) Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

[20] The above notwithstanding, however, the argument by the Applicant that execution of a decree of such substantial sum of money will force them to close shop should be understood properly within the framework of appellant's right of appeal. It is not the policy of the law to stifle possible appeals or punishing exercise of appellant's right of appeal by asking for astronomical security; instead, it is to facilitate and make the right exercisable without pain. See the case of ***Sewankambo Dickson(supra)*** where the High Court of Uganda at Kampala further stated that

"...insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals – especially in a Commercial Court, such as ours, where the underlying transactions typically tend to lead to colossal decretal amounts".

[21] Guided by the said policy of law, there shall be a conditional stay of execution of decree in Meru CMCC NO. 250 of 2016 on 23rd January 2018 in the following terms:

- 1. The Appellants shall pay the 1st Respondent a sum of Kshs. 500,000 within 30 days from the date thereof.***
- 2. The balance thereof shall await the outcome of the appeal.***
- 3. The appellant shall file and serve record of appeal in 30 days.***
- 4. The appeal be fast tracked. In relation thereto, parties and their respective legal counsels to act in accordance with their statutory obligation under the principle of overriding objective.***
- 5. The costs of this application shall be in the appeal. It is so ordered.***

Dated, signed and delivered in open court at Meru this 3rd day of May 2018

F. GIKONYO

JUDGE

In the presence of:

Mr. Mutuma J advocate for Mr. Mutai for Waweru Gatonyi for applicant.

Kithinji advocate for Mbogo advocate for 1st respondent

Attorney General for 2nd Respondent – absent.

F. GIKONYO

JUDGE