



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 44 OF 2016

NORMAN MWITI.....1ST APPELLANT

MARTIN BUNDI MIRITI.....2ND APPELLANT

-VERSUS-

SIMON WANJOGU KARIUKI

(Suing as the legal Representative

of Felix Muriithi Wanjogu (DECEASED).....RESPONDENT

RULING

Stay of execution

[1] Stay of execution pending appeal has been sought in the Notice of Motion application dated 6th December 2017. The Motion is expressed to be brought pursuant to Order 42 Rule 6 (1) (2), Order 51 Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law. The judgment to be stayed if is of this court and was delivered on 9th October, 2017 by Hon Justice A.C Mrima.

[2] The application is premised on the grounds set out in the application, the affidavit sworn by Simon Munene Wachira, counsel for the Appellants and submissions filed. It was deposed inter alia that on 9th October 2017, judgment was entered against the Appellants herein after their Appeal was dismissed. The decision aggrieved the Appellants and they now intend to file an appeal to the Court of Appeal. However, in the meantime, they are reasonably apprehensive that if the decretal amount herein is paid over to, the Respondent would not be in a position whatsoever to make a refund should the intended appeal succeed. This would rendered their intended appeal nugatory cause them irremediable loss and damage. Hence, the need for stay of execution.

Claim application offends mandatory provisions

[3] The application was opposed via Notice of Preliminary Objection filled in court on 14th December 2017, in which the Respondent contended: (1) that the motion offended the mandatory provisions of Rule 58 of the Court of Appeal Rules, having been filed without leave of the court; (2) that the Appellants were guilty of inordinate delay; (3) that there were no valid grounds to stay execution; and (4) that the Appellants remedy, if any, lie in the purview of the Court of Appeal.

Preliminary objection was taken up

[4] When the matter came up for hearing on 18th December 2012, the court directed that the application and the Preliminary Objection be heard together by way of written submissions. It was submitted for the Appellants that this court had powers to order a stay of execution pursuant to Order 42 Rule 6 (4) and that there had been no delay in filing the application as the parties had been attempting amicable settlement in lieu of the appeal to the Court of Appeal and that the Respondent could now not turn around and say the application had been filed out of time.

[5] On the other hand, the Respondent submitted that the Appellant had not filed any appeal at the Court of Appeal and that even so, the alleged Notice of Appeal was filed out of time and without leave of the court, yet, Rules 5 and 58 of the Court of Appeal Rules were clear and express that the Appellants ought to have sought stay of execution at the Court of Appeal. Further, it was argued that the Appellants application was not supported by their affidavits but rather by one sworn by their counsel. The Respondent thus contended that the application was incompetent and defective and urged the court to uphold the preliminary objection and dismiss the Appellants application.

Analysis, finding and decision

[6] I have carefully considered this application, the Notice of Preliminary Objection, the rival pleadings by the parties and the authorities relied upon. The law on Preliminary objections is now well settled; it is a point of law which is not entangled in factual wool and if successful, must be potent to determine the case. See **MUKHISA BISQUITS MANUFACTURING CO. LTD vs. WEST END DISTRIBUTORS (1969) E. A 696** that:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication of pleadings or which arises by clear implication of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.”

Sir Charles P Newbold added as follows at page 701:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any facts are to be ascertained or if what is sought is the exercise of judicial discretion”.

[7] Further eminent reading is found in the decision of Ojwang J (as he then was) in the case of **ORARO V MBAJJA [2005] eKLR** where he rendered himself thus:

I think the principle is abundantly clear. A preliminary objection, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement...that „?where a court needs to investigate facts, a matter cannot be raised as a preliminary point.?

[8] In the instant case the Respondent contended that the instant application offends the mandatory provisions of Rule 58 of the Court of Appeal Rules having been filed out of time and without leave, that the Appellant was guilty of inordinate delay and that the Appellants only remedy was within the purview of the Court of Appeal. The issues raised by the Respondent do not meet the threshold of a preliminary objection as they would certainly require interrogation by this court. Accordingly the Notice of Preliminary Objection dated 15th December 2017 is without merit and the same is hereby dismissed in its entirety.

Stay of execution

[9] This subject is provided for in Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules. Of the essence is that:-

2. No order of stay 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 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

[10] In the case of **Patriotic Guards Ltd v James Kipchirchir Sambu [2017] eKLR**, the Court of Appeal stated as follows;

“The principles that govern grant of stay of execution of judgments or rulings from the High Court pending appeal are well settled. To be successful an applicant must, firstly, show that it has an arguable appeal which is the same as to say that the appeal is not frivolous. Such an applicant, upon satisfying that principle, has the additional duty to demonstrate that the appeal, if successful, would be rendered nugatory in the absence of stay – see, for an enunciation of the principles governing grant of stay of execution pending appeal to this Court, the case of **Trust Bank Limited and Another v. Investech Bank Limited and 3 Others Civil Application Nai. 258 of 1999 (unreported) where the following passage appears:**

“The jurisdiction of the Court under Rule 5(2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case -----”

[11] The application before me was filed two months from the date of the judgment to be appealed from. Merely stating that the delay was caused by negotiations between parties is not sufficient explanation for the delay herein. However, in the interest of justice and in order to ensure a balance of rights to the parties, I will allow a conditional stay of execution, provided that the appellant pays one half of the decretal sum to the respondents and deposits the other half in an interest earning account in the joint names of counsels to the parties in 60 days. It is so ordered. Each party to bear own costs.

Dated, signed and delivered in open court at Meru this 8th day of May 2018

F. GIKONYO

JUDGE

In the presence of:

Mr. Kiogora advocate for respondent

Mr. Kiongo advocate for Mr. Ngigi advocate for applicant

F. GIKONYO

JUDGE