



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 95 OF 2017.

HITESH BIKHULA KHETIA.....APPELLANT

VERSUS

PATUMA JAMA MOHAMED.....RESPONDENT

(Being an appeal against the order by Hon .C. OBULUTSA, Chief Magistrate in

Eldoret Civil Case No.833 of 2015 between PATUMA JAMA MOHAMED

and HITESH BIKHULA delivered on 28th July, 2017).

JUDGMENT

Background.

1. The matter before this court is an appeal from the order of Hon. C. OBULUTSA in Civil Case No. 833 of 2015 delivered on 28th July, 2017. It is an application dated 23rd November, 2017 brought under certificate of urgency. The Appellant Hitesh Bikhula Khetia seeks interim orders for stay of execution and/or further execution of the decree in Eldoret CMCC no 833 of 2015 pending the hearing and determination of the application inter partes. He also seeks interim orders of stay of execution and/or further execution of the decree herein pending the hearing and final determination of the appeal.
2. Among the grounds listed on the face of the Notice of Motion, was that the Appellant had lodged an appeal. It is also a ground that the subordinate court granted stay of execution orders on condition that:-
 - a) The plaintiff do pay further court fees of Kshs. 60,000/-
 - b) The defendant to pay the plaintiff half (1/2) of the decretal sum within 30 days.
 - c) The defendant to deposit half (1/2) of the decretal sum in a joint interest earning account in the names of both counsels on record within 30 days.
3. The application was filed with a supporting affidavit sworn by Reece Mwani Mukhabani, an advocate in conduct of this matter, on behalf of the Appellant. It was deponed *inter alia* that judgment was entered on 28th July, 2017 for a sum of Kshs. 1,812,300/- as general damages.
4. The Appellant is apprehensive given the fact that the Respondent's means are unknown and should the appeal succeed, the Respondent may not be in a position to refund the money advanced to her pending the hearing and determination of the appeal.
5. The Appellant further states that he is willing to deposit the entire decretal sum in a joint interest earning account in the names of both counsels on record.
6. Lastly, the Appellant states that the application was filed without undue delay since the lower court orders were issued on 3rd November, 2017 and the present application was filed on 27th November, 2017.
7. The application is opposed by the Respondent through a replying affidavit sworn by Patuma Jama Mohamed and filed on 26th January, 2018.

8. In her response, she states that the Appellant filed a similar application before the subordinate court upon which the court granted conditional stay which the Appellant did not comply with. Instead, after expiry of the stipulated time, the Appellant filed an application dated 21st December, 2017 seeking extension of time within which to comply. That application has since been withdrawn.
9. The Respondent further states that the Appellant is guilty of laches. This is because he filed the application but failed to have it heard urgently in November and instead he filed another application to extend time. This, it is urged is evidence of abuse of court process.
10. Lastly the Respondent contends that she is a successful litigant who ought to enjoy the fruits of the judgment and that should the appeal filed succeed, she will be able to refund the decretal sum paid to her.
11. The application came up for hearing on 10th April, 2018. M/s Odwa, Counsel for the Appellant, made brief oral submissions on behalf of the Appellant and urged the court to allow the application. There was no response from M/s Keter Nyolei, Counsel for the Respondent.
12. The conditions for granting a stay of execution pending Appeal are now settled. An order of stay of execution is a discretionary one but that discretion is fettered by the conditions set out in **Order 42 rule 6(2)** of the **Civil Procedure Rules 2010** that:
- a) **the application must be made without undue delay.**
 - b) **the Applicants must demonstrate that they will suffer substantial loss unless the order sought is granted.**
 - c) **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.**
13. On the first condition on whether the application was filed without undue delay, it is noted that the ruling by the trial court for the application dated 17th August, 2017 seeking stay of execution was delivered on the 3rd November, 2017. The Application herein was filed on the 27th November, 2017. This was a period of twenty four (24) days from the date of the ruling which, in my view, was reasonable time.
14. Regarding the second condition of substantial loss likely to be suffered by the Appellant if stay of execution is not granted; it was deponed that the Respondent will not be able to refund the decretal amount paid to her. In response to this assertion, the Respondent in her replying affidavit deponed that should the appeal filed succeed, she will be able to refund the decretal sum that would have been paid to her.
15. The Court of Appeal while dealing with a similar situation in the case of **National Industrial Credit Bank Limited Vs Aquinas Francis Wasike & Another (UR), Civil Application No. 238 of 2005** stated thus:
- “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 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.”**
16. It is noted that though the Respondent alleges that she will be able to refund the decretal sum advanced to her, she has not attached any evidence by way of bank statements or other documents as proof that she indeed has the resources to make good her assertions. It is not enough for her to merely swear to that fact in an affidavit without going further to provide evidence of means. The Respondent has the evidential burden to show that she has the resources since this is a matter that is purely within her knowledge.
17. On the third condition, the court has noted the offer by the Appellant to furnish security by depositing the entire judgment sum in a bank account to be opened in the joint names of the two firms of the Advocates on record. In the alternative, the Appellant is amenable to securing the money in any other manner as may be prescribed by the court.
18. The Respondent submitted on the provision of **Order 42 rule 6(1)** of the **Civil Procedure Rules** and argued that the Appellant had been granted a stay of execution by the trial court and the present application is therefore an abuse of the court process. **Order 42 rule 6(1)** does allow a party to file another application for stay of execution in the High Court whether the application for such stay shall have been granted or refused by the court appealed from.
19. The Respondent argued that once an application has been dealt with by a court of competent jurisdiction and between the same parties, a similar application cannot be filed before another court as that would amount to an abuse of the court process, or would be *res judicata*. In the present case however, the principle of *res judicata* does not apply because this is a higher court.
20. The decision of the Chief Magistrate cannot operate as *res judicata* in the High Court case, since the Chief Magistrate’s court which decided the former suit is not clothed with jurisdiction to try the current suit, which is the subsequent suit in this instance. The doctrine of *res judicata* is set out under **section 7** of the **Civil Procedure Act** as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”

21. Be that as it may, the orders sought by the Appellant cannot be granted, having failed to comply with the conditional orders of stay that were granted by the trial court. The learned trial magistrate exercised his discretion in setting out the aforesaid conditions and no sufficient reasons were advanced by the Appellant to warrant this court's interference with the learned magistrate's discretion. Of note on this is the case of **Mbogo Vs. Shah [1968] EA 93** in which it was held thus:

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters which it should not have acted upon or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

22. The conditions that were imposed by the trial court are reasonable considering that there was no dispute as to the Appellant's liability for the injuries suffered by the Respondent. What was in dispute was the quantum of damages payable for the Respondent's injuries. There is no reason given for the Appellant's noncompliance with the said conditions.

23. The Appellant's argument that the appeal would be rendered nugatory if the order of stay of execution pending appeal is not granted is not satisfactory. The Appellant has also failed to demonstrate that he will suffer substantial loss unless the orders sought are granted. The decisions which lend themselves to the circumstances of this case are to be found in the case of **Adah Nyabok vs Uganda Holding Properties Limited (2012)**, in which Mwera J (as he then was) stated that:

“Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending appeal.”

and **Daniel Chebutul Rotich & 2 Others vs Emirates Airlines Civil Case No. 368 of 2001**, in which Musinga, J (as he then was) explained substantial loss in the following terms:

“... 'substantial loss' is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.”

24. In addition to putting himself in good stead for the grant of the prayers sought, the Appellant ought to have demonstrated his compliance with the orders of the lower court. This he has not done. Court orders have to be obeyed as soon as they are issued and it matters not whether the Appellant agrees with them or not. In **Hadkinson vs Hadkinson (1952) All ER 567**, the court maintained that:

“Orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to move the court to discharge the same. To blatantly ignore it and expect that the court would turn its eye away is to underestimate and belittle the purpose for which the court is set up.”

25. This point was emphasized in **Kanchanben Ramnikal Shah vs. Shamit Shantilal Shah & 6 Others (2010) eKLR** by Njagi, J (as he then was) as follows:

“A Court Order is valid and effective from the moment it is made. It is born mature and has no period of infancy, and therefore commands obedience forthwith.”

In light of the foregoing, it would be a mockery of justice for the court to exercise its discretion in favour of a party who has failed to comply with the orders of another court of competent jurisdiction. The discretion of the court must be exercised judiciously.

For the foregoing reasons, the application dated 23rd November, 2017 is therefore found to be lacking in merit and is accordingly dismissed with costs to the Respondent.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF JUNE 2018

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L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT ELDORET THIS 5TH DAY OF JULY 2018.

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HELLEN OMONDI

HIGH COURT JUDGE