



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

Civil Miscellaneous Application No. 3 Of 2018

(DEFAMATION OF CHARACTER)

(CORAM: R. E. ABURILI – J)

PASCAL OBONYO AGWENA.....1ST APPLICANT

PETER WERE AJULU.....2ND APPLICANT

EDWARD OCHAYE.....3RD APPLICANT

ROSEMARY OGUTU.....4TH APPLICANT

VERSUS

SIMON JUMA ODIYO.....RESPONDENT

(On an application for stay of execution of decree in Bondo PM CC No. 102 of 2016, pending appeal)

RULING

1. By a Notice of Motion dated 21/5/2018 brought under the provisions of Sections 1A, B, 3A and 79G of the Civil Procedure Act and Order 42 Rule 6 (1), (2) and Order 51 Rule 1 of the Civil Procedure Rules. The four applicants seek two main orders -

(i) Leave to appeal out of time against the judgment and decree in **Bondo PMCC No. 102 of 2016, Simon Juma Odiya VS Pascal Obonyo Agwena, Peter Were Ajulu, Edward Ochaye, Rosemary Ogutu** passed on 11/4/2017.

(ii) Stay of execution of the decree and judgment pending appeal.

2. The prayer for leave to appeal out of time was granted by consent of all the parties' advocates present on 11th June 2018 and the parties' advocates were directed to file written submissions to canvass the prayer for stay pending appeal. The applicants were granted ten days from 11th June 2018 within which to file and serve the Memorandum of appeal.

3. This ruling therefore determines the prayer for stay of execution of decree in Bondo PM's Court Civil Suit No. 102 of 2016 pending the hearing and determination of the intended appeal.

4. The Plaintiff in Bondo PM Civil Suit No.102 of 2016 - Simon Juma Odiyo is the Respondent in this application and the intended appeal. He instituted suit against the Defendants –Pascal Obonyo Agwena, Peter Were Ajulu, Edward Ochaye and Rosemary Ogutu by way of Plaint dated 10/10/2016 seeking damages for defamation. The matter proceeded to trial whereby the Plaintiff testified and called one witness in support of his case while the 1st Defendant was the only witness on the part of defence.

5. The issues for determination in the lower court were: whether the contents of the letter dated 19/8/2016 were defamatory, whether the Plaintiff suffered any damage capable of compensation and who was to bear the costs of the suit. On 11/4/2017 the court found that the Plaintiff had proved his case against the Defendants on the standard required by law and entered judgment against the Defendants jointly and severally, awarding general damages of Kshs. 600,000/= plus costs and interest from the date of the judgment. A stay of execution was subsequently issued for 30 days.

6. Aggrieved and dissatisfied with the decision of the lower court the Defendants now Applicants/Appellants filed a Memorandum of Appeal dated 21/5/2018 seeking that their Appeal be allowed by setting aside the judgment or in the alternative, the awarded sum of damages be set

aside and in its place a lower and more reasonable sum be made and the costs of the Appeal be awarded to them the Defendants.

7. The application is supported by the annexed Affidavit of the 2nd Applicant- Peter Were Ajulu dated 21/5/ 2018 and a further affidavit dated 22/6/2018. In the two Affidavits by Peter Were Ajulu, he avers in acknowledgment that that they the Applicants/ Appellants were required by dint of Section 79 (G) of the Civil Procedure Act, to have filed their Appeal against the lower court's judgment of Bondo within thirty (30) days from date of judgment being 11/5/2018 but were precluded from doing so in time as the typed proceedings and judgment were only available on 25/4/2018 as shown on the date stamp impression of the court, without which the Applicants could not adequately instruct an advocate to read through and lodge an appeal hence the delay of 6 days in filing the Appeal.

8. In the Affidavit of 21/5/2018, it is also acknowledged that the stay of execution orders lapsed on 10/5/2018 and that their apprehension is that if interim orders of stay are not granted, the Respondent may execute the same at any time rendering the Appeal nugatory and causing prejudice and inconvenience to the Applicants. It is further contended that the application has been made without unreasonable delay and ought to be granted in the interest of equity and justice.

9. In the Further Affidavit of 22/6/2018, the Applicants contend at paragraph 4 that in line with the provisions of Order 42 Rule 1 and 2, an aggrieved party seeking interim orders of stay of execution ought to deposit a security with the court to show its commitment in honouring the outcome of the Appeal whether the outcome favors the party or not. It is asserted further that the decretal sum of Kshs.600,000 is a huge sum for the Applicants to raise as they are mere farmers and as such can only offer land parcels as security which they do and urge court to consider taking up the Title Deeds of Land Parcels No. SIAYA/NYAGUDA/1242 and SIAYA/NYAGUDA/2235 as security whose value when combined stands at Kshs. 1,500,000/=.

10. The Applicants submit that the Further Affidavit of Peter Were Ajulu dated 22/6/2018 be considered as part of their submissions. Submitting further that the law as contemplated by Order 42 Rule 6 (1) & (2) (b), gives discretion and authority to court to consider an application by an aggrieved party and to consider such security as the court orders for due performance of such decree or order and implore upon court to consider the two Title Deeds of Land Parcels No. SIAYA/NYAGUDA/1242 and SIAYA/NYAGUDA/2235 whose total estimated value is about Kshs.1,500,000/= as sufficient security/ collateral and duly issue an interim stay of execution pending hearing and determination of their Appeal so as to not render the Appeal a nugatory.

11. They further urged the court to apply the principles in **Nairobi Court of Appeal Civil Application No.6 Of 1979, Butt Vs Rent Restriction Tribunal 1979** eKLR where the Court of Appeal held:

“1. The power of a court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal

2. The principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.....”.

12. On the part of the Respondent in his written submissions dated 22/6/2018, it is argued that the grant of stay pending appeal is not an automatic right and that essentially certain statutory conditions must be met. Firstly, that the Applicant must demonstrate the substantial loss they are likely to suffer and that in the present case, no evidence has been presented to demonstrate any loss likely to be suffered in the event that the orders for stay sought are refused.

13. It was further submitted that the requirement that an Applicant must deposit security as a condition precedent for grant of stay has not been complied with as the Applicant has not given nor offered any security nor has any intention to offer any security as required by law and as such the application is a smack of arrogance by the applicant and a mere attempt to frustrate the respondent from enjoying the fruits of his judgment. It is added that at the time of filing the present application, there was no Appeal and therefore the orders of stay would not have been granted in any event but now having been granted the leave to have their Appeal filed, the statutory requirement under Order 42 Rule 6 (2) must be complied with.

DETERMINATION

14. I have carefully considered the application by the applicants/ appellants. In my humble view, the issues for determination in this matter are:

1. Whether the Applicants/ Appellants are entitled to orders of Stay of execution pending appeal.

2. What is the time frame for furnishing security in respect to decretal sums?

Stay of Execution

15. **Rule 6(2) of Order 42 of the Civil Procedure Rules, 2010** stipulates that an applicant for stay of execution of decree must demonstrate:-

(a) That the application for stay has been made without unreasonable delay

(b) That substantial loss may result to the applicant unless the order is made.

(c) That such security as the court may order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

16. On the first requirement, ordinarily, stay of execution of decree is sought immediately after delivery of the decree or order however, the explanation for the delay given in respect to leave to appeal out of time is a plausible explanation in respect to stay of execution thus the application for stay of execution was without unreasonable delay.

17. On the limb of substantial loss, it has not been stated that there is a likelihood that the Applicant will not recover the decretal amount/security which is substantial. The only contention by the Applicants in the Further Affidavit of 22/6/2018, and is that the decretal sum of Kshs.600, 000 is a huge sum for the Applicants to raise as they are mere farmers and as such can only offer land parcels as security which they do and urge court to consider taking up the Title Deeds of Land Parcels No. SIAYA/NYAGUDA/1242 and SIAYA/NYAGUDA/2235 as security whose value when combined stands at Kshs. 1, 500,000/= and there is no averment to the fact that the respondent may not be able to revert the decretal amount or titles if the tables were to turn in the appeal.

18. The Applicants on that account have failed to substantiate or even mention this ground. They have not demonstrated how they stand to suffer any substantial loss unless the stay sought is granted as per the pre requisites of **Order 42 Rule 6(2)** of the Civil Procedure Rules. In **David Mbuba & Another v Victoria Mwangeli Kimwalu & another [2017] eKLR citing WINFRED NYAWIRA MAINA –VS- PETERSON ONYIEGO GICHANA (2015) ECLR** where it was held:

“The Substantial loss under Order 42 Rule 6 of the Civil Procedure Rules especially where money decree is involved lie in the inability of the Respondent to pay back the decretal sum should the appeal succeed. The legal burden of proving this inability lies with the Applicant and it does not shift.”

19. On the question of time frame for furnishing security in respect of decretal sums, the Applicants attached copies of Land title deeds to their Further Affidavit dated 22/6/2018 which was filed alongside their submissions on 25/6/2018. It should be noted that at the very time on the 25/6/2018 the Respondent too filed their submissions. Thus by this time the Respondent and the court had proceeded with the application as though no security had been filed as to warrant the orders of stay if any.

20. In my humble view, if an Appeal is contemplated, security be furnished before or at the time of filing appeal or at the time of filing such an application as the one before this court or at the very least before the submissions stage so that the court and the contending respondent are properly informed.

21. This type of application nonetheless invokes the discretionary powers of the court. Of course discretionary powers must be exercised judiciously. It is brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 which empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the Rule 6(2) in the following language:

“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.”

22. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gives guidance on how a court should exercise discretion and held that:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

23. The above cited case interprets the applicable statutory principles in deciding whether or not to grant a stay of execution of decree pending appeal.

24. In the Court of Appeal case of **Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited v Aquinas Francis Wasike & another (UR)** as cited by the High Court in **Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa [2016] eKLR** it was held 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 lack of them. Once an applicant expresses 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.”

25. In the instant case, the Respondent has not by way of an affidavit disclosed any source of income that he would use to refund the Applicants the decretal amount should the appeal succeed. It follows that if the Respondent executes the judgement and the Applicants' appeal succeeds, then not only will the Applicants suffer substantial loss but the appeal will also be rendered nugatory.

26. A perusal of the memorandum of appeal shows that the Applicants are appealing against the decision on liability and quantum. Much as this court does not wish to speculate on the outcome of the appeal, I do not think that the Respondent will leave this court empty-handed if the appeal fails and which appeal can be fast tracked for hearing and determination.

27. This court further observes that the respondent never swore any replying affidavit opposing the application for stay of execution pending appeal. He only filed written submissions urging the court to dismiss the application for stay.

28. In the circumstances, I allow the prayer for stay of execution of decree in Bondo PMCC No. 102 of 2016 pending hearing and determination of the appeal. I direct that the applicants' Land Title Deeds in their original forms together with professional valuation reports for the respective parcels of land Nos. SIAYA/NYAGUDA/1242 and SIAYA/NYAGUDA/2235 and their current Search certificates shall be surrendered in court to serve as security for performance of the decree as condition for stay of execution of decree in the subordinate court pending hearing and determination of the appeal. The said Land Title documents shall be delivered into court for verification and admission by the Deputy Registrar of this court within the next 10 days from the date of this ruling in default the application shall stand dismissed.

29. The costs of the application shall abide the outcome of the appeal and shall follow the cause.

Dated, signed and delivered at Siaya this 19th Day of September, 2018

R.E.ABURILI

JUDGE