



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 36 OF 2015

JULIUS GATUKU NYAGA.....APPLICANT/ APPELLANT

V E R S U S

JOHN NYAGA.....RESPONDENT

R U L I N G

A. Introduction

1. The applicant in his application under a certificate of urgency dated the 15th December 2016 seeks for orders that this honourable court be pleased to stay execution of orders issued on 25th October 2016 till hearing and determination of this application.
2. The application was based on the following grounds: -
 - a) That the Respondent has taken out warrants of arrests against the applicant and the applicant may be arrested and detained in prison at any time now*
 - b) That the applicant has appealed against a ruling delivered in Embu CMCC No. 36 of 2015.*
 - c) That on 25th October 2016 a Notice to Show Cause against the applicant proceeded ex parte leading to issuance of warrant of arrest.*
 - d) That the applicant shall suffer gravely if this application is not granted while the respondent shall suffer no prejudice if this application is allowed.*
3. The application was supported by the annexed affidavit of the appellant.

4. The respondent in his replying affidavit on the 19th December 2016 de a further affidavit to his application on the 20th of January 2017.

B. The Responses

5. The respondent filed a replying affidavit deposes that the applicant/ appellant was in extreme abuse of court process as he does not attend court and further that he was appealing for stay on the ground that he had filed an appeal.
6. The respondent further stated that there was no stay of execution and that litigation must end as his matter had started back in 1999 over a debt of Kshs. 50,000/= that now stood at Kshs. 172,867.50 as per the execution order.
7. The respondent further deposed that this court had on three different occasions ordered the arrest of the applicant but the applicant always obtained stay; that the applicant had unsuccessfully appealed to the High Court and that he had admitted that he owed the money claimed.
8. The respondent further deposed that the applicant had not appealed to the Court of Appeal and that he applicant should deposit the decretal amount in court, as he is a vexatious litigant.
9. In his further affidavit dated 20th December 2016, the applicant deposed that he had filed an appeal, which would be rendered nugatory if the orders sought in his present application were not granted.
10. The applicant further deposed that he even if litigation must end, he must be allowed to exhaust every avenue permitted to him and that

the respondent was lying by claiming he had received decrees from this court in his favour and that he had appealed to this court and was unsuccessful.

11. The applicant further deposed that he never admitted owing money to the respondent and that he was condemned unheard in the trial court. He concluded by deposing that this was the first time he was moving this court and as such moving to the Court of Appeal does not arise.

12. On the 19/12/2016, when the matter came up for hearing, upon consent of both parties, this court granted an interim stay of execution of orders issued on 25th October 2016.

13. On the 17/10/2017, this matter came up for hearing and the parties consented to dispose the appellant's application dated 15/12/2016 by way of written submissions. Court directed each party to file the said submissions within 14 days starting with the applicant.

C. Respondents' Submissions

14. The respondent submits that the applicant's application for stay is meaningless as it does not disclose what the applicant would do if stay is granted and further that the applicant would not suffer irreparable damages if stay was not granted as he had admitted liability.

15. The respondent concludes with urging this court to follow the decision of the Court of Appeal, which binds this court, in the case of **GIKUBU MBUTHIA VS JIMBA CREDIT & P.N. MUGO, Court of Appeal Civil Application No. NAI. 35 of 2001** wherein the court of appeal held that the application was an unnecessary prolonging of the litigation and was in effect burdening the 2nd respondent with vexatious litigations and as such the court dismissed the application. As such, the respondent prayed that the appellant's application for stay was an abuse of court process and should be rejected.

D. The Determination

16. The issue for determination is whether the Court should order stay of execution. This application invokes the discretionary powers of the court. Of course, discretionary powers must be exercised judiciously. Although this application is brought under **Order 22, Rule 22 of the Civil Procedure Rules, 2010**, the law applicable is **Order 42 Rule 6(1) of the Civil Procedure Rules, 2010**.

17. This provision empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending hearing and determination of the appeal.

18. The conditions to be met before stay is granted are provided by the **Rule 6(2)** as follows: -

“No order for stay of execution 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 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.”

19. The above-cited case captures the applicable principles in deciding whether or not to grant a stay of execution pending appeal. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously.

20. On whether the application was filed without undue delay, the record shows that there is a memorandum of appeal from the ruling of Hon. Nyakundi delivered on 25th August 2015, filed on 23rd September 2015 that is pending. The orders the appellant seeks stay over were delivered on 25th October 2016. The present application for stay was filed 15/12/2016. This is roughly a month and a half later. The court has to consider whether the delay was unreasonable. The Applicant has not explained this delay and thus does not satisfy this limb.

21. On substantial loss, it is worth noting that where execution of a money decree is sought to be stayed. In considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes a relevant issue. The court cannot shut its eyes where it appears the possibility of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal is doubtful.

22. The court has to balance the interest of the applicant who is seeking to preserve the *status quo* pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.

23. It is submitted for the Applicant that if stay of execution is not granted the applicant will suffer substantial loss. This mere allegation is not enough to satisfy this court to grant orders of stay. In an application of this nature, the applicant should show that he will suffer the damage if the order for stay is not granted. The applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay.

24. This was stated by **Kuloba, J** in **MACHIRA T/A MACHIRA & CO. ADVOCATES VS EAST AFRICAN STANDARD (No. 2) [2002] KLR 63:**

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

25. Further in This was held in **LUCY NYAMU KIMANI VS LAWRENCE MBURU MUTHIGA [2006] eKLR –**

“An applicant demonstrates substantial loss by showing that the respondent is not a person of means and payment in decretal sum prior to appeal would put the same beyond reach of the applicant.”

26. The case of **SOCFINAC COMPANY LIMITED VS NELPHAT KIMOTHO MUTURI [2013] eKLR and VAN DEN BERG (K) LIMITED VS CHARLES OSEWE OSODO [2015] eKLR** that stated that it is the applicant who has the burden to prove that the decree holder is a man of straw are persuasive decisions. Once the applicant alleges that the respondent is a man of no straw who cannot refund the decretal sum, the evidential burden shifts to the respondent.

27. I am aware that the law appreciates that it may not be possible for the appellant to know the respondent’s financial means. An applicant can reasonably be expected to know that the respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the respondent to see if there is any money there. The same was stated in the case of **KENYA POSTS & TELECOMMUNICATIONS CORPORATION VS PAUL GACHANGA NDARUA [2001] eKLR;**

“The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum.”

28. In this case, the applicant did not deem it fit to address the issue of whether or not if the decretal sum is paid, he may not recover it from the respondent and as such, the burden has not shifted and remains on the applicant. In this scenario, the burden is upon the applicant to prove that the respondent will not be able to refund to the defendants any sums paid in satisfaction of the decree.

29. The same emerged from the Court of Appeal sitting in Kisumu in the case of **CANELAND LTD MALKIT SINGHPANDHAL & ANOTHER VS DELPHIS BANK LTD [2000] eKLR.**

30. The applicant has argued that the appeal has reasonable chances of success. All what the applicant needs to show are the three grounds under **Order 42 rule 6 Civil Procedure Rules**. The law does not require this Court to determine the application based on the merits or otherwise of the appeal. The application for stay was filed after two months. This was after the applicant realized the execution of the decree was imminent. The applicant has failed to explain the delay which is unreasonable.

31. The second consideration is security. It is noteworthy that in **FOCIN MOTORCYCLE CO. LIMITED VS ANN WAMBUI WANGUI & ANOTHER [2018] eKLR, L.W. Gitari, J.** referred to the statements of **Gikonyo, J.** in the case of **ARUN C. SHARMA VS ASHANA RAIKUNDALIA T/A RAIRUNDALIA & CO. ADVOCATES** where **Gikonyo, J.** while addressing the issue of security as required under Order 42 stated: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor..... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

32. The applicant deemed it fit not to address this court on the issue of security which is a requirement under Order 42.

33. In conclusion, it is my considered opinion that the applicant/ appellant has failed to satisfy the requirements under Order 42 of the Civil Procedure Rules.

34. The application fails and is hereby dismissed with costs.

35. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF NOVEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriuki for P. N. Mugo for Respondent