REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NUMBER NO. 21 OF 2018

MESHACK MUMO STEPHEN.....APPELLANT/APPLICANT

VERSUS

BENJAMIN MUTUA MATOLO.....1ST RESPONDENT

THE HON. ATORNEY GENERAL.....2ND RESPONDENT

RULING

1. This appeal arises from Machakos CMCC No. 768 of 2009 in which the 1st Respondent sued the Appellant herein, then a minor, through the appellant's father and next friend, **Meshack Mumo Stephen**, for damages for malicious prosecution arising from a complaint by the appellant herein to the police. Upon attaining the age of majority, the appellant's father was discharged from the suit and the appellant became the substantive 1st Defendant.

2. By a judgement delivered on 1st February, 2018, the learned Trial Magistrate, **Hon. Kahuya, I M, SRM**, found that liability as between the appellant and the 1st defendant had been proved on a 50:50 basis but dismissed the suit against the 2nd Respondent. After taking into consideration the apportionment of liability, judgement was entered for the 1st Respondent against the appellant in the sum of Kshs 227,970/= with costs and interests.

3. In this application, the applicant seeks that this Court stays execution of the said judgement pending the hearing and determination of this appeal.

4. According to the appellant, the Court having found that one of the elements of the tort of malicious prosecution, that is the absence of reasonable and probable cause, was not proved, a cause of action for malicious prosecution was therefore not proved and the suit ought to have been dismissed hence his appeal is not frivolous.

5. The appellant averred that he was a third year student at the University of Nairobi, Chiromo Campus studying Bachelor of Commerce and due to graduate in July, 2019. He was therefore not gainfully employed and was not in a position to satisfy the judgement. He was therefore apprehensive that the 1st Respondent would most likely seek to have the judgement executed against his person and such a process would interfere with and have very serious and dire consequences and that substantial loss would be occasioned to him as the said action would impact negatively on his studies.

6. It was his case that the 1st Respondent would not be prejudiced in any way by the grant of the orders sought herein since in the event that his appeal is unsuccessful, he would by then be in a better position to satisfy the judgement as he shall by then have graduated and hopefully secured a job.

7. The application was however opposed by the 1st Respondent who deposed that the appellant had not demonstrated that he was a student as alleged. According to the 1st Respondent, the appellant is an adult who is capable of taking care of his own debts and once he attained the age of majority, he replaced his father as the 1st defendant and is therefore capable of dealing with his own issues. It was the 1st Respondent's position that had the appellant succeeded in the case, he would have pushed for the fruits of his judgement his student status notwithstanding hence he cannot purport to benefit from the law selectively.

8. The 1st Respondent's position was that the appellant had not met the threshold for the grant of stay under Order 42 Rule 6 of the ***Civil Procedure Rules***. Since the applicant is incapable of giving any security, it was contended that that automatically disentitles him to an order

of stay. It was further averred that since judgement was delivered on 1st February, 2018 and this application was only served on 7th June, 2018, the application was brought after inordinate delay and ought to be dismissed with costs.

Determination

9. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the ***Civil Procedure Rules*** which provides as follows:

> **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.**

10. To the foregoing conditions I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the ***Civil Procedure Act***, the Court is nolonger limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the ***Civil Procedure Act*** or in the interpretation of any of its provisions. According to section 1A(2) of the ***Civil Procedure Act*** "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

11. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the ***Civil Procedure Act*** are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.** This was the position of **Warsame, J** (as he then was) in **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where he expressed himself as hereunder:

> **"Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court…The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant…For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss…Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation…At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions."**

12. In this case the appellant contends that he is a student at the University. Although the Respondent contends that there is no evidence of the same, it is not in doubt that at the time the suit was commenced the appellant was a minor. If the appellant's contention that he is in his Third Year at the University is correct, and I have no reason to find otherwise, then it is clear that in the event that the appellant is unable to satisfy the decree, he may be personally held liable with the result that his university education may well come to a premature end.

13. In the circumstances of this case it would cause more injustice to compel the appellant to furnish security as that may well compel him to abandon his appeal. Since there is no evidence that there was imminent threat of execution by the 1st Respondent, I find that the delay herein though long cannot be said to be inordinate for the purposes of a stay pending appeal.

14. In the premises I find merit in the Notice of Motion dated 27th March, 2018 and I grant stay of execution of the decree in Machakos CMCC No.768 of 2010 pending the hearing and determination of this appeal. The costs of the application will be in the appeal.

15. It is so ordered.

Read, signed and delivered in open Court at Machakos this 3rd day of December, 2018.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Muumbi for Mr Mwanya Mbithi for the Applicant

Mr Nzioka for Mr Mulei for the Respondent

CA Geoffrey