REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 83 OF 2016

JOHN KAMAU WAWERU ….....APPLICANT

VERSUS

JOSEPH MURIU WAITHAKA …..... RESPONDENT

(Being an Appeal from the ruling of Hon.F. Muguongo, Magistrate dated 18th July, 2016 in Nakuru CMCC No.1333 of 2015 between Joseph Muriu Waithaka and John Kamau Waweru)

RULING

1. Before me is an application brought by the appellant, John Kamau Waweru under **Order 42 rule 6(1)** of the **Civil Procedure Rules and Section 3A of the Act.**

The applicant seeks an order of stay of execution of the *exparte* Judgment issued on the 16th March 2016 in Nakuru **CMCC No. 1333 of 2015.**

In his supporting affidavit, the applicant deposes that the *exparte* judgment appealed from was so entered because the appellants Advocate Mr. Cheche Olaly had no valid practicing certificate and did not take any action in the matter on his behalf leading to the *exparte* judgment, that he now seeks to stay execution thereof.

2. The application arises from a sale and purchase of a motor vehicle whereof the appellant sold and handed over all transfer documents to the respondent and now seek refund of the purchase price as directed in the judgment. It is deponed that the decretal sum being Kshs.525,490/= if paid would cause the appellant irreparable loss and as respondent has both the ownership and possession of the motor vehicle, subject of the primary suit.

3. The application is opposed. In his Replying affidavit sworn on the 8th November 2016 the respondent deposes that as required by law a stay of execution was not sought in the lower court in the first instance and therefore it is procedurally defective.

Further it is stated that the applicant has not met the legal requirements stated under **Order 42 Rule 6 of the Civil Procedure Rules** in that there was inordinate delay in bringing the application, a period of seven months that has not been explained and that no substantial loss was established.

It is further deponed that the applicant has not shown that the respondent would be unable to repay the money if paid should the appeal be successful.

4. I have considered the affidavit evidence as well as oral submissions by both counsel.

For an order of stay of execution pending appeal to be granted, provisions of **Order 42 Rule 6 of the Civil Procedure Rules** ought to be complied with.

5. **Sub rule 6(1)** requires that an application for stay of execution must in the first instance be made before the court that issued the decree whether or not it is allowed.

Rule (6) (2) of the said order states:

> ***"No order of 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 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.***

6. I have noted that the decree is a money decree in the sum of Kshs.525,490/=. The applicant has not demonstrated to the court what substantial loss he would suffer if he pays the money to the Respondent. He has not demonstrated that if paid and the appeal succeeds, the respondent would be unable to repay it back.

That he has failed to demonstrate. It is not enough just to state. Stating that the appeal has high chances of success is not enough. This is compounded by the fact that very limited information has been availed to the court.

7. In the case **Kenya Shell Ltd -vs- Benjamin Karuga Kibiru & Others (1982-88) I KAR, Platt J,** stated:

> ***"An intended appeal does not automatically operate as stay. The application for the stay made before the High Court failed because the first of the conditions set out in Order 41 rule 4 of the Civil Procedure Rules was not met.***
>
> ***There was no evidence of substantial loss to the applicant either in the matter of paying damages awarded which would cause difficulty itself or because it would lose its money if payment was made, since the respondents would be unable to repay the decretal sum plus costs in the two court."***

The said Judge of Appeal continued to state that:

> ***"Substantial loss is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore without evidence it is difficult to see why the respondents should be kept out of their money."***

8. The above good pronouncements were adopted in the case of **David Mwenje -vs- Jubilee Insurance Co. Ld (2005) e KLR** when Justice Mwera observed that:

> ***"a stay order does not lie as a matter of cause because one has appealed. One has to show likelihood of suffering substantial loss in case the order is refused."***

Coupled with no evidence shown by the applicant of substantial loss, the applicant has also failed to explain why it had to take seven months from date of judgment to apply for the order of stay.

9. An order of stay ought to be made without unreasonable delay – see order **6 Rule 2(a)**. No attempt at all was made to give any explanation for the delay which in my view is inordinate.

The applicant is also under a duty to offer security for the due performance of the decree **Order 6**

Rule1(b). Other than a statement in the affidavit in support, no tangible security was offered. This requirement is aimed at cushioning the successful litigant that should the appeal fail, there would be no difficulty enforcing the order or executing the decree. The applicant in my view came to court with the presumption that an oder of stay would be granted as of course. This is not so. It is by no means automatic. An appeal does not operate as stay. Basic requirements ought to be satisfied by the applicant.

10. The respondent has a right to enjoy the fruits of his judgment and the applicant too has a right to appeal under the law. Likewise the court is under a duty to dispense justice to both parties. The court has a discretion whether to grant or deny an order of stay, and is designed on the basis that no one would be worse off by virtue of an order of the court as both parties have rights.

11. Having so stated, and more so that the applicant has not proved that he would suffer substantial loss which is the cornerstone under **Order 42 rule 6 Civil Procedure Rule,** I am not persuaded that granting an order of stay would be balancing the two parties interests and rights. See **Mary Mwaki Masinde -vs- County Government of Vihiga & 2 Others (2015) e KLR.**

12. For those reasons, I find no merit in the application dated 18th October 2016.

It is dismissed with costs. The interim orders of stay of execution issued on the 25th October 2016 are hereby discharged.

It is so ordered.

Dated, Signed and Delivered this 19th Day of January 2017.

J.N. MULWA

JUDGE