

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 84 OF 2012

BERNADETTE WANGUI WAKINI.....APPELLANT/APPLICANT

VERSUS

LAWRENCE KINYUA MUCHIRI.....RESPONDENT

RULING

By a notice of motion dated 1st April, 2016 and filed under **order 22 rule 22** of the **Civil Procedure Rules, section 1A and 1B** of the **Civil Procedure Act** and **article 15** of the **Constitution of Kenya** the applicant sought for a temporary stay of proceedings/execution in Nyeri Chief Magistrates Court Civil Case No. 169 of 2010 and taxation of the respondent's bill of costs dated 12th March, 2016 pending the hearing and determination of this motion inter partes and ultimately, pending the hearing and determination of her appeal to the Court of Appeal.

The motion was supported by the affidavit of the counsel for the applicant sworn on 1st April, 2016. In that affidavit, counsel has sworn that after his client's first appeal to this honourable court was dismissed on 26th February, 2016, the respondent filed his bill of costs for taxation in the magistrates' court and also an application seeking the release of the decretal sum.

According to the learned counsel, it is necessary that the proceedings in the magistrates' courts for the taxation of the bill of costs and for the release of the decretal sum be stayed pending the hearing and determination of his appeal in the Court of Appeal lest his client suffers loss; it is his position that the respondent is a man of straw and his client is unlikely to recover the decretal sum from him should her appeal succeed.

The respondent opposed the application and his counsel swore and filed a replying affidavit to that effect. According to counsel, the application is only meant to delay the respondent from enjoying the fruits of his judgment considering that the judgment was delivered more than four years ago. He also swore that the previous conduct of the applicant shows that she is not interested in the conclusion of this matter.

Counsel swore that there was a previous order staying the execution of the decree but such stay was pegged on the hearing and determination of the appeal in this court which appeal has now been determined and hence the respondent should be allowed to access the decretal sum which only remained deposited in court as security for the performance of the decree in the event the applicant's appeal failed.

After considering submissions by both counsel for the applicant and the respondent, it is apparent that the applicant is essentially seeking stay of execution of the decree issued against her in the magistrates' courts pending the hearing and determination of her of appeal in the Court of Appeal. It must be remembered that this is the same decree that was the subject of the appeal which was struck out by this court. The applicant's appeal to the Court of Appeal is thus a second appeal. If I proceed on this premise, the appropriate provision that the applicant ought to have invoked is **order 42 rule 6(1)** of the Civil Procedure Rules which provides for stay of execution upon appeal at first instance or on second appeal; it states as follows: -

6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order,

and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

If the applicant had proceeded under this rule, she would have been enjoined to demonstrate, that unless the order for stay of execution of the decree is made, a substantial loss may result to her. She would also be required to show that she has provided security for the performance of the decree and finally, she would have been required to show that the application for stay of execution was made without unreasonable delay. If the applicant satisfied these conditions, it would be left to the discretion of the court to grant or to refuse the order for stay of execution.

But the applicant did not rely on **order 42 rule 6** of the Civil Procedure Rules; she instead invoked **order 22 rule 22** thereof. The question that follows is whether this particular rule is applicable to the applicant's situation and in order to find the appropriate answer it is necessary to reproduce that rule here; it states:-

22. (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

This rule is self-explanatory that it is only where a decree has been sent to another court for execution that this latter court may stay it for such time as is reasonable pending the judgment-debtor's application to the court which issued the decree or to an appellate court for stay of execution of that decree. If that be the case, it is obvious that this rule has been misapplied in the applicant's application for the simple reason that the decree issued in the magistrates' court has not been sent to this court for execution; to this extent, I would agree with counsel for the respondent that the application is misconceived.

But even if the applicant had invoked the appropriate rule I would still be hesitant to exercise my discretion in her favour because I am not satisfied that she has demonstrated she would suffer substantial loss if a stay of execution order is not made. The affidavit in support of her application was sworn by counsel and not the applicant herself. In that affidavit, the learned counsel merely stated, without providing the basis of his deposition, that the respondent is a man of straw. In the absence of any proof of this allegation, it follows that there is no reason to believe that the applicant will suffer substantial loss or that her appeal shall be rendered nugatory in the ultimate.

For the foregoing reasons, I do not find any merit in the applicant's application dated 1st April, 2016 and I hereby dismiss it with costs.

Signed, dated and delivered in open court this 17th day of February, 2017

Ngaah Jairus

JUDGE