



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 59 OF 2010

ASSOCIATED MERCANTILE & ALLIED

SERVICES LTD1ST APPELLANT

JOSEPH MUTURI GITAU

SAMUEL NDIBA KIHARA

MARY WAIRIMU (Sued in their capacity as chairman,

Secretary and treasurer of

SHANGILIA BABA NA MAMA SELF HELP GROUP.....2ND APPELLANT

VERSUS

ISAAC ONYWERE KABESARESPONDENT

RULING

This ruling determines the appellant/applicant's application dated 23rd June 2015 brought under the provisions of Order 22 Rules 22(1) and (3) Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, Sections 1A,1B and 3A of the Civil procedure Act Cap 21 Laws of Kenya.

The application seeks for stay of execution of the judgment delivered in Milimani CMCC 643 of 2009 pending the hearing and determination of this appeal. It also seeks for costs of the application. The said application is premised on the grounds that:-

- a. The judgment in Milimani CM CC 643 of 2009 was delivered on 13th February 2015.
- b. The applicants filed application dated 25th February 2015 which was dismissed on 18th June 2015.
- c. The applicants have appealed against the said judgment vide Civil Appeal No. 59 of 2015.
- d. The applicants are ready to deposit the entire decretal sum in court or in an interest earning account in joint names of the advocates on record pending hearing and determination of the appeal.

The application was further supported by the affidavit sworn by Samuel Ndiba Kihara the Managing Director of the 1st appellant and secretary of the 2nd appellant sworn on 23rd June 2015. It is further

supported by a supplementary affidavit sworn on 16th July 2015 by the same deponent Samuel Ndiba Kihara.

The applicants aver that the application was made without undue delay after the dismissal of their application for stay in the lower court; that they stand to suffer substantial loss if the execution proceeds against them and that the appeal shall be rendered nugatory; that the respondent is not a person of means and therefore would not be in a position to refund the decretal sum in the event the appeal succeeds and that the appeal has high chances of success since the evidence on record shows that the applicants did not ever receive any monies from the respondent and finally that it would be in the interest of justice that the orders sought be granted.

The supplementary affidavit annexes a certified copy of the ruling delivered on 18th June 2015 by Honourable Ngugi, dismissing the applicant's application for stay pending appeal on the grounds that the applicant's advocate did not file submissions to the main suit which is denied and that the appellants are willing to deposit the entire decretal sum in court or in an interest earning account in a joint account with his and the respondent's advocate pending the hearing and determination of this appeal.

The application for stay of execution pending appeal was opposed by the respondent who filed grounds of objection dated 14th September 2015 and filed in court on 15th September 2015 contending that:

1. The application is frivolous and vexatious.
2. The application is untenable in law.
3. The application does not meet the requirements of law and practice regarding application for stay of execution.
4. The appeal is not arguable and has no chances of success.
5. The application is meant to delay the decree holder from enjoying the fruits of his judgment.
6. The decree concerns out of pocket money paid to the appellants thereby demonstrating the respondent's ability to meet any financial obligation.

The parties agreed and filed written submissions to dispose of the application. The applicants filed theirs on 9th November 2015 whereas the respondent filed his on 10th November 2015.

In the applicant's submissions, it is contended, in addition to the grounds and supporting and supplementary affidavits filed and relied on that the respondent has not filed any replying affidavit to controvert the facts relied on in support of the application. Further, that the applicant has satisfied the requirements of the law Under Order 22 Rule 22(1) and (3) and Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules and all the conditions thereon for the grant of stay of execution of decree pending appeal. The applicants relied on **Fidelity Commercial Bank Ltd V Agritools Ltd & 2 Others and Hussein Banji & Another. Milimani HCC 1677/2000** (unreported) where the court found the 2nd objector had not satisfied the conditions under the law for stay of execution but nonetheless exercised his discretion and granted the applicant a conditional stay of execution. They also relied on **James Kariuki Nganga t/a Ndarugu Merchants V Joseph Ngae Njuguna & Another Milimani HCC 575/2003** (unreported) where the judge dismissed an application for stay pending appeal because the applicant did not aver in the supporting affidavit that the plaintiff had no means to pay back the decretal amount. They contended that in this case they had sworn to that fact of inability by the respondent to pay back the money should the appeal herein succeed, which deposition has not been controverted by an affidavit from the respondent or any other evidence. They urged the court to exercise its discretion and grant them stay of execution of decree of the lower court pending the hearing and determination of this appeal.

In his opposing submission, the respondent contended that the court can only entertain the matter and hear a party if that party is properly before the court; that the procedural and legal requirements under Order 42 Rule 2 (sic) and 22 Rule 22(1) of the Civil Procedure Rules require that "a certified copy of the decree" be filed together with the application but that no such copy of the certified decree is

annexed to the application; hence it is not possible for this court to determine how much is the decretal sum and as no execution proceedings are in place to compel this court to issue stay orders.

Further, that there are no sufficient grounds advanced to warrant stay orders since the fact of filing of an appeal is not sufficient cause and neither is the offer for depositing of the decretal sum.

On substantial loss, it was submitted that the applicants had not satisfied the requirement since they received the money from the respondent as out of pocket and for the purchase of a plot from the applicants, and that therefore having paid shs 224,100 to the applicants is a clear indication that he was possessed of means. It was further submitted that the Memorandum of Appeal contains wild and unsubstantiated allegations as it contains grounds which are unrelated to the matters that were before the court for trial and therefore laughable since the trial court gave clear and concise reasons when entering the judgment in his favour and hence it is unfair to accuse the trial court without justification.

The respondent urged the court to find the application for stay unmerited and dismiss it with costs.

I have carefully perused and considered the appellant/applicant's application for stay of execution pending appeal. I have also considered the grounds of opposition and the respective parties' advocates rival submissions on the matter. The only issue for determination is whether the applicant warrants a grant of the orders of stay of execution of decree in the subordinate court pending the hearing and determination of the appeal herein.

The applicable law relating to stay of execution of decree pending appeal is Order 42 Rule 6 of the Civil Procedure Rules and not Order 22 Rule 22 of the Civil Procedure Rules. The latter provisions relate to stay by a court to which a decree has been sent for execution and in this case, it would be the subordinate/trial court. The applicants have already demonstrated that they did file an application for stay before the trial court which application was dismissed on 18th June 2015 hence the filing of this application as required under Order 42 Rule 6 of the Civil Procedure Rules. That being the case, I find the objection by the respondent on the ground that the provisions of Order 22 Rule 22 of the Civil Procedure for a certified decree to be annexed being unfounded.

As stated above, the relevant provisions that the court must employ in determining whether or not to grant the appellant/applicant stay of execution orders pending hearing and determination of the appeal is Order 42 Rule 6 of the Civil Procedure Rules which provides that:

1. *No appeal or second appeal shall operate as a stay of execution of 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 from 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.*
2. *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 the application has been made without unreasonable delay; and*
 - b. *Such security as the court orders for due performance of such decree or order as may ultimately be binding on him has been given by the applicant.*

My appreciation of the above provisions of the law is that the court has unfettered discretion to grant a stay of execution pending appeal if sufficient cause is shown. Such stay is obviously to be granted upon such terms as to security as the court considers fit in the circumstances.

The court must also satisfy itself that the application has been made without unreasonable delay and that substantial loss may result to the applicant unless the order is made. Madan JA in **MM Butt V**

The Rent Restriction Tribunal CA Nairobi 6/1979 stated as follows regarding the first requirement that an applicant has to show that there will be substantial loss if stay is not granted.

“ It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying an execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, it successful, from being nugatory.....per Brett L.J. in Wilson V Church No. 212 CH D 1879 454.”

In this case, what the applicant needs to establish is that if the money is paid out in execution of the decree then the intended appeal will be rendered nugatory. Albeit no decree is attached to the application and neither is the judgment annexed, the submissions filed by the respondent show that the amount claimed or alleged to have been paid by the respondent to the appellant is kshs 224,100.

In **Kenya Shell V Karuga (1982-1988) 1 KAR (1022)** Platt JA stated that:

“.....is it usually a good rule to see if Order 41 Rule 4 (now Order 42 Rule 6) of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event.”

The applicants have stressed how they will suffer substantial loss because no money was paid to them, and that the respondent is not possessed of the means to reimburse them the judgment sum if it is paid in execution of the decree and the appeal herein which is said to have high chances of success succeeds. It is for that reason that the appellants are more than ready, able and willing to deposit the whole decretal sum into a joint interest earning account to be operated by both parties advocates until the appeal is heard and determined on its merits.

The respondent on the other hand maintains that the stay orders sought are not deserved, the appeal is frivolous and vexatious and that since the money claimed was liquidated, it had not been demonstrated that he is a man of no means to repay the money should the appeal be successful.

The purpose of an order for stay of execution pending appeal is to secure the interest of the appellant so that his appeal, if successful, is not rendered nugatory. It is therefore essential for an applicant to show that he will be unable to recover the decretal sum from his adversary if his appeal succeeds. It is not sufficient to make a wild allegation of the respondent's inability to repay the decretal sum should the appeal succeed, even if the respondent has not shown any affidavit of means since the court can often times, be misled into relying on sweeping statements that the respondent is not a person of means to grant stay, in the absence of any evidence to that effect. However, this is not to say that the respondent has no duty to demonstrate even by way of title to land or motor vehicle or business license that indeed he has the capacity to repay the decretal sum should the appeal succeed. Once the allegation of lack of means is made against him, the burden of proving otherwise shifts to him, which in this case he did not. It is not for this court to conclude that he has no means since on the face of it, nothing was produced to show that he is not a person of means or that he is a man of straw.

I would therefore in the circumstances exercise my discretion, bearing in mind the fact that while the respondent has the right to enjoy the fruits of his lawfully obtained judgment, the appellants too have a corresponding right to ventilate their complaints challenging the judgment of the trial court before the appellate court for consideration.

Accordingly, I allow the application for stay and order that there shall be an order of stay of execution of the judgment and decree of the trial court in Milimani CMCC 643/2009 made on 13th February 2015 pending hearing and determination of this appeal conditional upon the appellants depositing all the decretal sum into a joint interest earning account to be opened by both parties advocates within 21 days from the date hereof in order to secure interests of both the appellants and respondent. Such sums shall be so held until further orders of this court as to its disposal.

The costs of this application shall abide the outcome of the appeal and in any event to the successful party.

Dated, signed and delivered at Nairobi this 9th day of February 2016.

R.E. ABURILI

JUDGE