

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 37 OF 2015

SIMON WAHOME WACHIHI.....APPELLANT/APPLICANT

VERSUS

IRIAINI TEA FACTORY.....1ST RESPONDENT

EPHANTUS WAMBUGU KARIUKI.....2ND RESPONDENT

RUGONGO TEA BUYING CENTRE.....3RD RESPONDENT

RULING

By way of a chamber summons dated 19th November 2015, the applicant moved this court under certificate of urgency seeking orders *inter alia* that this Honourable court be pleased to issue an order for stay of execution of the decree arising from the judgement delivered on 19th August 2015 and that the Respondents be ordered to receive his green tea pending hearing and determination of his appeal

The applicant is not represented by an advocate, hence the prayers as drawn particularly prayer two is rather ambiguous and also the applicant has cited the wrong provisions of the law, that is Order 22 Rule 6, 7 (2) and 25 of the Civil Procedure Rules which are totally in applicable in an application of this nature. Nevertheless, I am alive to the need to determine matters without undue regard to technicalities of procedure as provided for under Article 159 (2) (d) of the Constitution of Kenya 2010, hence I will determine the application on merits. In fact the grounds stated in the certificate of urgency shed more light to what the applicant seeks. The said grounds are:-

(a) That this honourable court be pleased to issue an order of stay of execution pending the hearing and determination of the appeal herein.

(b) That the orders prayed for in the application if not granted in the first instance, the applicant will continue to suffer a lot of loss through the suspension illegally imposed on him by the Respondents in execution of the decree appealed against.

In my view, the correct provisions under which the application falls is **Order 42 Rule 6, Order 51** of the Civil Procedure Rules 2010. The application is premised on the grounds enumerated on the face of the application and the annexed affidavit of the applicant sworn on 19th day of September 2015. Essentially, the grounds relied upon are as follows:-

i. That the applicant has an arguable appeal with a high probability of success.

ii. That green tea leaf is a perishable product and the applicant has nowhere else to sell it and the applicant has his family rely on green tea for their livelihood.

iii. That no prejudice will be suffered by the respondents since they will also benefit from deductions made from the supplies.

The Respondent filed grounds of objection on 9th December 2015 and stated *inter alia* that :-

i. That the application is defective, misconceived and an abuse of the court process and that the applicant has not applied for stay of execution in the court appealed from as envisaged by order 42 of the Civil Procedure Rules.

ii. That the applicant has not demonstrated that he will suffer substantial loss and that the appeal has no chance of success and that the applicant has not offered security and that the application has not been filed without delay.

At the hearing of this application, the applicant adopted the supporting affidavit and his reply to the grounds of opposition to his application.

Counsel for the Respondent opposed the application and relied on the grounds of opposition filed in court and submitted that the application has no merits.

In his reply, the applicant stated that the grounds of objection were filed out of time and ought to be struck off. I am alive to the fact that striking off of pleadings is a drastic step and is usually used as a last resort and in rare but deserving cases. In this case, the applicant did in fact file a detailed reply to the said grounds and more important having replied as aforesaid it cannot be said that the applicant has suffered any prejudice, hence I see no justifiable reason to strike out the said grounds.

I have carefully considered the arguments advanced by both parties in this case and the relevant law and authorities as enumerated later in this ruling. As earlier mentioned, the application falls under Order 42 of the Civil Procedure Rules 2010 which provides as follows:-

(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 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 of stay 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

The policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. However, it is necessary to consider the considerations for granting applications for stay pending hearing and determination of an appeal.

It is clear from the wording of Order 42 Rule 6 (1), for an applicant to succeed in an application of this nature, he must satisfy the following conditions, namely; **(a) Substantial loss may result to the applicant unless the order is made;** **(b) The application has been made without undue delay;** **(c) such security as to costs has been given by the applicant.**

The corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted.^[1] What constitutes substantial loss was broadly discussed by **Gikonyo J** in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto*^[2] where it was held *inter alia* that:-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of **Silverstein vs. Chesoni**,^[3]the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”

In the present application, the applicant has not demonstrated that he would suffer substantial loss. In *Equity Bank Ltd vs Taiga Adams Company Ltd*,^[4] the court stated as follows:-

“In the application before me, the applicant has not shown or established the substantial loss that would be suffered if this stay is not granted. The only way of showing or establishing substantial loss is by showing that-----that is execution is carried out-in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the appellant.”

In *Elena D.Korir vs Kenyatta University*^[5] Justice **Nzioki Wamakau** had this to say:-

“the application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & another vs Thornton & Turpin Ltd*^[6] where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that **“The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must be made without unreasonable delay.**”

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo vs Straman EA Ltd*^[7](2013) as follows:-

“In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. **These twin principles go hand in hand and failure to prove one dislodges the other”.**”

On whether or not the application was brought without undue delay, the judgement was delivered on 19th August 2015 and the present application was filed on 1st December 2015 after a delay of about three and a half months. This delay has not been explained.

Unreasonable delay depends on the circumstances of each case. In *Jaber Mohsen Ali & Another vs Priscillah Boit & Another*^[8] the court held:-

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. **Even one day after judgement could be unreasonable delay depending on the judgement of the court and any order given thereafter.** In the case of *Christopher Kendagor vs Christopher Kipkorir*,^[9] the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, application ought to have come before expiry of the period given to vacate the land”

As observed above, no explanation has been offered for the delay in filing this application. In *Mbogo Gatuiku vs A.G.*^[10], **Mwera J** stated that ‘*even a delay of a day or two calls for an explanation*’.

In the case of *Abdulraham Adam Hassan vs National Bank of Kenya Ltd*,^[11] an unexplained delay of **three months** was found to be unreasonable. Similarly, in the case of *Kenfreight (E.A.) Limited vs Star East Africa Company Limited*^[12] **Onyango Otieno J** (as he then was) found a delay of **three months** to be unreasonable.

Apart from proof of substantial loss the applicant is enjoined to provide security.^[13] There is no offer of security coming from the applicant in satisfaction of the said requirement. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay.^[14] However, the offer for security must come from the applicant as a price for stay. See *Carter & Sons Ltd. vs. Deposit Protection Fund Board & 2 Others*.^[15]

In the above cited case of *Equity Bank Ltd vs Taiga Adams Company Ltd*^[16] it was held that:-

“.....of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought.....let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...” which principle was also emphasized in *Carter & Sons Ltd vs Deposit Protection Fund Board & 3 others*.^[17]

The importance of complying with the said requirement in my view was well emphasised in *Machira T/A Machira & Co Advocates vs. East African Standard (No 2)*^[18] where it was held that:-

“.....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”.

I have carefully considered the application before me and the law, I am persuaded that proof of substantial loss and proof that the appeal will be rendered nugatory have not been established as stated above. As was held in *Hassan Guyo Wakalo vs Straman EA Ltd*^[19]

“In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”.

I am fortified in my finding by the following excerpt from *Halsburys Laws of England*^[20] wherein the learned writers observe that:-

“The stay of proceedings is a serious, grave and fundamental interference in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceedings beyond reasonable doubt should not be allowed to continue.”

In the case of *Global Tours and Travels Ltd*^[21] it was held that:-

“.....Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the

need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.”
(Underlining provided)

The upshot is that applying the above principles, I hereby disallow the application before me and dismiss it with costs to the Respondents.

Right of appeal 30 days

Dated at Nyeri this 9th day of March 2016

John M. Mativo

Judge

[1] See Gikonyo J in HCC NO. 28 of 2014, Trans world & Accessories (K) Ltd vs Commissioner of Investigations & Enforcement

[2] HC Misc No. 42 of 2012 OR {2012} eKLR

[3] {2002} 1 KLR 867

[4] {2006}eKLR

[5] {2012}eKLR

[6] {1993} KLR 365

[7] {2013}eKLR

[8] High Court ELC No. 200 of 2012 or {2014} eKLR

[9]HC ELC 919 of 2012, Eldoret

[10]HCCC 1983 of 1980, High Court, Nairobi.

[11] Kisumu High Court Civil Case No. 446 of 2001

[12] {2002} 2 KLR 783

[13] See judgement in Republic vs Commissioner for Investigations & Enforcement, Misc App no 51 of 2015 (NBI),

[14] Ibid

[15] Civil Appeal No. 291 of 1997

[16] Supra note 6

[17] Supra note 14

[18] {2002} KLR 63

[19] {2013}eKLR

[20] 4th Edition, Vol 37 pages 330-332

[21] WC No. 43 of 200 (UR)