REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 571 OF 2015

MARTIN MAINA MBURU ..... APPLICANT/APPELLANT

VERSUS

PAUL MAINA KABECHA & GRACE NJAMBI MAINA

***(suing as the administrators of the estate of Stephen Kimani Maina)*..... RESPONDENTS**

R U L I N G

1. The Applicant **Martin Maina Mburu** filed an application dated 25th November, 2015 where he sought orders, to wit:-

> ***a) THAT this application be certified urgent and service be dispensed with in the first instance.***
>
> ***b) THAT the honourable court be pleased to issue a stay of execution of the judgment dated 30th October, 2015 in CMCC No. 2022 of 2014 pending the hearing of this application interparties.***
>
> ***c) THAT the honourable court be pleased to issue a stay of execution of the judgment dated 30th October 2015 in CMCC No. 2022 of 2014 pending the hearing and determination of the appeal.***
>
> ***d) THAT the judgment amount to be deposited with this honourable court pending the hearing and determination of this application.***
>
> ***e) THAT cost of this application be provided for.***

2. He deponed that he was sued in his capacity as the registered owner of motor vehicle registration No. KAA 273P which was involved in an accident on 24th April 2012. A judgment of Kshs. 1,693,860/- was entered against him on 23rd October, 2015. He averred that he filed an appeal against the decision and that he would suffer substantial loss if the Respondent proceeds to execute the judgment.

3. The Respondent in response filed grounds of opposition on the grounds that: The Application lacks merit as the mandatory conditions prescribed under order 42 Rule 6(2) of the Civil Procedure Rule 2010 have not been met and that the application is frivolous and vexatious and is merely intended to deny the Respondent the immediate access to the fruits of his judgment and thereby evade, obstruct or delay course of justice.

4. The parties filed their respective submissions. The Applicant argued that he has brought the application within the Rules as required and further that he has demonstrated his willingness to abide with any order of the court.

5. The Respondents on the other hand submitted that the wording of order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 that provides for grant of stay of execution pending appeal have not been complied with. They argued that Order 42 provides for compliance with 3 conditions before a party can be granted orders of stay. They contended that the Applicant has not shown how he shall suffer any substantial loss and has also not shown that they will be to refund the decretal sum.

They added that the burden of proof on whether or not they are capable of refunding the decretal sum lays with the Applicant who has not shown that they will not be in a position to refund the sum. They further argued that the grant of stay pending appeal is not absolute and mandatory right of the Applicant but a judicial discretion that must be exercised judiciously. They averred that it is not necessary to consider the requirement for security for due performance if the Applicant has failed to show substantial loss that he might suffer. They prayed that the Application be dismissed.

6. Having looked at the application and the supporting affidavit, it is apparent that the Applicant is seeking orders of stay of execution pending the hearing and determination of the Appeal. Order 42 Rule 6 (2) provides for the conditions to be considered before a court can grant the orders. The first condition is that the court will only grant orders of stay of execution if it is satisfied that substantial loss may result. The second condition is that the Applicant must have brought the Application without unreasonable delay and he must offer and be willing to give security that the court orders.

7. In this case, the Applicant deponed that he will suffer substantial loss. He did not illustrate how he will suffer substantial loss, he merely stated it. Substantial loss occurring to the Applicant is the corner stone in considering whether stay of execution orders should issue or not. The onus of proof normally rests on the Applicant, who is expected to illustrate the substantial loss he will suffer if execution is levied. It is not enough to claim that one will suffer substantial loss without expounding what loss that would be. In the case of ***Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR 63***, it was held as follows;

> ***"In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars… where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay..."***

8. On substantial loss see also the case of **Thomas Kimani Kabure Vs Isaac Mwangi Kamau (2008) eKLR** where the court in dismissing an application for stay of execution stated: -

> ***"There is no explanation as to why the applicant will be placed in difficulty. There is no averment or evidence that the Respondent will not be in a position to refund the decretal sum if paid. The Applicant has, therefore, failed to demonstrate the substantial loss that it is likely to suffer…."***

The decision of the Court of Appeal in the case of **Kenya Shell Limited Vs Kibiru & another (1986) KLR 410** is also very helpful in this case, wherein the court held: -

> ***"Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the Respondents should be kept out of their money."***

9. The court in dealing with an application for stay of execution has to balance the interests of the Applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgment. In other words, the court should not only consider the interest of the Applicant but has also to consider, in all fairness, the interest of the Respondent who has been denied the fruits of his judgment.

This was rightly started by Kuloba J, in the case of ***Machira*** (supra) as hereunder: -

> ***"to be obsessed with the protection of an Appellant or intending Appellant in total disregard or flitting mention of them so far successful opposite party is to flirt with one party as crocodile tears are shed for the other contrary to sound principles for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or if 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 principal, the court must have its sight firmly filed 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."***

10. Furthermore, the Applicant has not demonstrated to this court that the Respondent are not people of means, who cannot refund the decretal sum should the appeal be successful. I also note that the Applicant has not offered to deposit security as may be ordered by the court.

11. In the end, I find that the application has no merits and it is hereby dismissed with cost.

Dated, signed and delivered at Nairobi this 8th day of September, 2016.

…….

L NJUGUNA

JUDGE

In the Presence of

…… ***for the Appellant.***

…….. ***for the Respondent***