



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HCCA NO. 6 OF 2015

(Being an Appeal from Naivasha CMCC No. 540 of 2012)

FRANCIS KANYIRI WANJOGU.....APPELLANT

-VERSUS-

PATRICE ONSONGO OBUBA.....RESPONDENT

RULING

1. Before me is an Application for stay of execution pending appeal brought under Order 42 Rule 6 & 7 of the Civil Procedure Rules. The application is supported by the affidavits sworn by Dorry Wamugo and Veronica Waweru.
2. The gist of the two affidavits is that the Appellant is aggrieved by the judgment in the lower court and has filed an appeal. Although stay of execution was granted in the lower court, the Appellants were required to pay a sum of Kshs 700,000/= directly to the Respondent. They contend that the Appellant will suffer substantial loss if execution proceeds, as they have challenged the judgment of the lower court both on liability and quantum.
3. Further it is deposed that the Respondent will be unable to refund the decretal sum should the appeal succeed. The Appellant has offered to deposit the entire decretal sum into a joint interest earning account as security. In his Replying affidavit the Respondent supports the conditional stay granted in the lower court terming it reasonable and within the requirements of Order 42 Rule 6 of the Civil Procedure Rules.
4. The parties consented to dispose of the application by way of written submissions. A fair portion of the Applicant's submission was directed towards matters which in my view fall within the appeal. With regard to the question of substantial loss, the Applicant highlights the inability by the Respondent to refund any payments made to him in the event the appeal succeeds thereby rendering the appeal nugatory.
5. The Applicant reiterates the offer to deposit the entire decretal sum into a joint interest earning account, pending the outcome of the appeal. Reliance was placed on three authorities in support of the application:-
 1. **MOMBASA HCCA No. 40 OF 2014 Kenya Orient Insurance Co. Ltd –Vs- Paul Mathenge Gichuki & Others**
 2. **NAIROBI HCCA NO. 716 OF 2013 Johnson Mwiruti Mburu –Vs- Samuel Macharia Ngure**

3. **KAKAMEGA CIVIL APPEAL NO. 114 OF 2011 Mordekai Mwangi Wandwa –Vs- CFC Stanbic Bank Ltd**

6. For his part, the Respondent treated the present application as a challenge to the decision on stay that was made in the lower court, and defended the same. The Respondent argues that the said decision is within the four corners of Order 42 Rule 6 of the Civil Procedure Rules and should not be disturbed. The Respondent cited the decision of the Court of Appeal in **Civil Application No. (NAI) 183 of 1999 Kenya Co-operative Creameries –Vs- Jacob Kirima** where stay was granted upon the condition that a sum of Shs 1,000,000/= be paid to the Respondent. The second authority cited is in my view distinguishable from this case as it related to an Appellant who was in possession of immoveable property and was not a matter involving a money decree as such.
7. I have considered the affidavits and submissions filed with regard to the application. The application before me is brought under **Order 42 Rule 6 of the Civil Procedure Rules**. Sub rule (1) states in part that:

“.....whether the application for such stay shall be 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.....”

Of course, the considerations remain the same as provided in Order 42 Rule 6 (2) whether the application is before the court appealed from or appealed to.

8. While this court may not completely ignore the stay order and condition in the lower court for payment of Shs 700,000/= to the Respondent, I think that the said condition must be taken in the context of part execution of the decree: the court, in my view, ordered payment to the Respondent and not security as anticipated under Order 42 Rule 6 (2) (b) of the Civil Procedure Rules.
9. I have perused the Court of Appeal decision in **Kenya Co-operative Creameries Ltd –Vs- Jacob Kirima** where the court ordered direct payment to the Respondent. It does not seem that the said application was canvassed inter partes, but it must be recalled that one of the considerations in an application under Rule 5 (2) b) of the Court of Appeal Rules is the arguability of the appeal. From the ruling, the court in that case did consider the evidence in the case before making the order for stay and payment to the Respondent.
10. Arguability of the appeal is not a ground for consideration in an application before the High Court for stay of execution pending appeal. Hence I would be reluctant to apply the decision cited by the Respondents to the facts of the present case. Having said so, I am alive to the fact that proof of substantial loss in an application for stay pending appeal is also a requirement under Rule 5 (2) of the Court of Appeal Rules.
11. **Platt Ag JA**, as he then was, observed in the quintessential case of **Kenya Shell Ltd –Vs- Benjamin Karuga Kiburu & Ano. [1986] eKLR** as follows:

“But this court must look at the matter from the point of view of rule 5 (2) of Court of Appeal Rules and here, the test would be whether the appeal would be rendered nugatory, unless payment of the decretal sum were stayed. It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made.....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. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented.....”

12. With regard to the application before me, there is no doubt that the Applicant moved this court in a timeous manner and has offered security in the form of a deposit of the entire decretal sum.
13. Regarding substantial loss, the Respondent has not tendered any material to controvert the

Applicant's assertion that he has no means for refunding any sums paid over to him in the event of the appeal succeeding. As **Kasango, J** noted in **Kenya Orient Co. Ltd –Vs- Paul Mathenge Gichuki & Others [2014] eKLR**:

“.....the burden of proof that the Respondent can refund the decretal sum if the appeal succeeds shifts to the Respondent the moment the Appellant states that it is unaware of [the] Respondent's resources”

14.The learned Judge was relying on the decision of the Court of Appeal in **Civil Application No NAI 15 of 2002 ABN AMRO Bank –Vs- Le Monde Foods Ltd**: where the court stated interalia:

“.....So all an Applicant in the position of the bank (Appellant) can reasonably be expected to do is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”

15.In the instant application, the Applicant swears to the inability of the Respondent to refund any monies paid over in the event of the appeal succeeding, but on his part the Respondent has not discharged the evidential burden that has shifted to him. He has merely defended the lower court order for payment of part of the decretal sum to himself, in other words, execution albeit partial. I am therefore satisfied on the material before me that the Applicant stands to suffer substantial loss, and the appeal rendered nugatory should execution, whether partial or otherwise, be allowed to proceed.

16.I do therefore allow the Appellant's application in terms of prayer 4 on condition that the Applicant deposits the entire decretal sum in an interest earning account in the joint names of the parties' advocates within 21 days of today's date.

Delivered and signed at Naivasha this 2nd day of June, 2015.

In the presence of:

For Applicant

For Respondent

Court Assistant Stephen

C. W. MEOLI

JUDGE