



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 87 OF 2015

AGGREY MAULA MALUNGU.....APPELLANT

VERSUS

JOSEPH SANYA MWAKAVI.....RESPONDENT

RULING

The Application

The application before the court is a Notice of Motion dated 15th May 2015 filed by the Appellant under the provisions of Order 40 Rules 1 and 4 of the Civil Procedure Rules, and sections 1A, 1B and 3A of the Civil Procedure Act. The Appellant is seeking orders that pending the hearing of this appeal, there be stay of execution of the judgment entered against the Appellant in **Makindu Principal Magistrate's Court Civil Case No. 48 of 2011** on the 22nd April 2015.

The Appellants application is premised on the grounds that he has already filed an appeal herein; that the Respondent has started the exercise of execution against him, that his appeal will be rendered nugatory if execution is levied; and that this application has been brought without any delay.

The Appellant relied on a supporting affidavit he swore on 15th May 2015, wherein he deponed that the suit before the Resident Magistrate's Court Makindu was brought against him for a claim of Kshs.86,947/=, and judgment was pronounced against him for the sum claimed on 22nd April 2015. He attached a copy of the said judgment. He also stated that he is aggrieved by the judgment for reasons that the trial Court did not consider his counter claim and defence in the said suit.

The Appellant further averred that the decree has already been issued by the trial court and the Respondent is now at liberty to execute against him. Further, that he moved with speed to obtain the proceedings and judgment, which were made available to him on the 28th of April and 4th of May 2015 respectively.

The Response

The Respondent opposed the Appellant's application in a replying affidavit he swore on 23rd June 2015, wherein he stated that the application does not meet the required conditions for grant of stay of orders, and that in any event being a businessman if the appeal herein succeeds he will be able to refund the amount claimed in the alleged counter-claim by the Appellant. The Respondent also averred that if the application is allowed, the court should order the Appellant to pay him the balance of the amount not claimed in the counterclaim, and/or in the alternative to deposit the entire amount in court pending the hearing and determination of the intended appeal.

The Issues and Determination

The parties at the hearing of the application on 21st September 2015 adopted and wholly relied on their respective affidavits. I have read and carefully considered the pleadings filed. The issue to be determined is whether the judgment in **Makindu Principal Magistrate's Court Civil Case No. 48 of 2011** should be stayed pending the hearing of this appeal.

I note that the Appellant in this regard relied on the provisions of Order 40 Rules 1 and 4 of the Civil Procedure Rules, which apply to the issue of temporary injunctions. However, stay of execution pending appeal is specifically governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provides 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.

(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 that 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.”

For a stay of execution to be granted, an applicant must satisfy the three conditions stated in rule 6 (2) to the effect that:

- (a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;
- (b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and
- (c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

The essence of an application for stay pending appeal is to preserve the subject matter of litigation to avoid a situation where a successful appellant only gets a paper judgment.

In the present appeal, as regards the first condition for stay, the Appellant deponed that the application for stay was made without undue delay. The judgment of the lower Court was delivered on 22nd April 2015. The Appellant's present application was filed on 15th May 2015. In my view the application was in the circumstances brought timeously and there was no unreasonable delay in doing so.

On the fulfillment of the second condition, the Appellant did not set out in his affidavit in support what substantial loss he would suffer if stay was not granted. He in this regard stated that unless the stay of execution is granted as prayed, his appeal will be rendered nugatory. However, the requirement is for an applicant to show the specific loss that he or she is going to suffer in this regard which was not done by the Appellant. Lastly, the Appellant did not depon that he was ready to give any security, and consequently did not meet the third requirement for stay of execution.

I however note that the Respondent may not be opposed to a stay of execution if the Appellant pays him the balance of the amount not claimed in his counterclaim, and/or in the alternative deposits the entire decretal amount in court pending the hearing and determination of the intended appeal. Accordingly, the orders that commend themselves to me are that the Appellant's Notice of Motion dated 15th May 2015 is allowed only in the following terms:

1. There shall be a stay of execution of the judgment in Makindu Principal Magistrate's Court Civil Case No. 48 of 2011 pending the hearing and determination of this appeal on condition that Appellant shall deposit the decretal sum of Kshs 86,947/= in an interest earning account in the joint names of the Appellant's firm of advocates and the Respondent's name within thirty (30) days from the date of this ruling, failing which the stay orders herein shall stand vacated.
2. The costs of the Appellant's Notice of Motion shall follow the appeal.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 5th day of October, 2015.

P. NYAMWEYA

JUDGE