REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

PETITION CAUSE NO.25 OF 2014

MARY MWAKI MASINDE ..... PETITIONER/RESPONDENT

VERSUS

COUNTY GOVERNMENTOF VIHIGA .....1ST RESPONDENT/APPLICANT

VIHIGA COUNTY ASSEMBLY ..... 2ND RESPONDENT/APPLICANT

AND

THE NATIONAL LAND COMMISSION ..... INTERESTED PARTY

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By a Notice of motion dated 10th September, 2015, *Vihiga County Assembly, (the applicant)* has moved this court seeking an order of Stay of Execution pending the hearing and determination of an intended appeal to the Court of Appeal at Kisumu. The motion is based on the grounds that, the petitioner has already filed her Bill of Costs and may execute once taxation is finalised; that the applicant is aggrieved with the judgment of this court and intends to appeal; the applicant has filed *Civil Application No.42 of 2015* in the Court of Appeal seeking leave to appeal; and that the applicant will suffer irreparable loss if execution proceeds which will render the intended appeal nugatory.

The application is supported by a brief and short affidavit of *Daniel Chitwa*, the Speaker of the applicant Assembly, sworn on 10th September, 2015. The deponent says that the court entered judgment against the applicant for an award of damages for Kenya Shillings three million (Kshs.3,000,000/-) in favour of the petitioner/respondent, which judgment aggrieved the applicant who now intends to appeal to the Court of Appeal against that judgment, and has filed an application in that court being *Civil Application No.42 of 2015* seeking leave of that court to lodge a Notice of Appeal out of time. The deponent further says that the petitioner/respondent has already filed a bill of costs and may execute upon taxation. The applicant therefore fears that should execution proceed, the applicant stands to suffer irreparable loss and should the appeal succeed, it will be rendered nugatory.

The application is opposed by the petitioner/respondent who has filed an affidavit sworn on 12th October, 2015 and filed in court on even date. The petitioner/respondent has stated in her affidavit, that the applicant has not shown good grounds for grant of orders it seeks, has not shown what irreparable loss it will suffer; that she is able to refund the decretal sum should the appeal succeed, and generally denies that

there are execution proceedings pending since no decree has been extracted.

The petitioner/respondent has further stated that, in her view, she is a woman of means, who is gainfully employed and a business lady. She depones that she also has properties, thus she will be able to refund the decretal sum should the intended appeal succeed. She has therefore objected to grant of stay of execution saying that it is not merited.

During the hearing of the application, *Mr Didi* appeared for the applicant while *Mr Kubebea* was for the respondent. Mr Didi, learned counsel for the applicant moved the application, and submitted that if stay is not granted, the applicant would suffer irreparable loss saying the sum involved is colossal and therefore it is in the interest of justice that an order of stay of execution be granted.

Counsel further submitted, that the applicant has come to court in good time, that is without delay and it has already filed an application in the Court of Appeal, thus demonstrating its desire to have the matter heard and disposed of quickly. Counsel denied that by applying for stay of execution, the applicant was displaying impunity. He said that the applicant desires to have its day in the Court of Appeal, thus necessitating this court granting stay of execution.

Mr Kubebea, learned counsel for the respondent on his part submitted that the judgment is a money decree and for that matter stay should only be granted under special circumstances. Counsel further submitted that the applicant has not demonstrated such special circumstances to warrant the grant of an order for stay of execution. He referred to the case of *Kenya Shell Ltd vs Benjamin Kibiru, [1986] KLR 410* in advancing his opposition to the application for stay. Mr Kubebea went on to argue, that under *Order 42 rule 6* of the Civil Procedure Rules, there are conditions which an applicant must satisfy but which the applicant herein has not. In particular counsel argued that the applicant has not demonstrated what loss it will suffer if stay is not granted, and also that no security has been offered for the due performance of the decree. He concluded his submissions by saying, that the respondent is a person of means hence she will be able to refund the decretal amount should the intended appeal succeed. He urged the court to dismiss the application.

I have considered the application herein, affidavits by both parties and submissions by counsel. I have also taken into account the authority cited by counsel for the respondent. This being an application for stay of execution, the starting point, I think, should be *order 42 rule 6* of the Civil Procedure Rules, 2010 (the Rules).

Order 42 rule 6(2) of the Rules provides as follows:-

> *"No order for stay of execution 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 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."*

The rule lays down three considerations that the court should take into account when dealing with an application for stay of execution, namely; that it must be satisfied that there is likely to be substantial loss to the applicant should it not grant the order of stay, that the application for stay has been made in good time without delay, and that the applicant has given security for the due performance or fulfilment of the decree or order should the court finally find the applicant liable. In applying the last standard, the court has to bear in mind that the respondent has a decree or order in his favour hence there should be some form of assurance that should the applicant lose on appeal, the decree holder will have no difficulty in executing the decree or enforcing the order.

Application be made without delay

I will first dispose of the requirement that the application be made without dely. The judgment of the court was delivered on 9th July 2015, and at the time of delivery of judgment, the applicant herein made an oral application for stay for thirty (30) days which was duly granted. The present application was then filed on 11th September, 2015, about 60 days from the date of the judgment or 30 days after the expiry of the initial 30 days stay. Although the applicant has not explained why it took thirty days to file an application of stay, I do not think this period is inordinate and for purposes of this application, I find that the delay is no inordinate, or unreasonable and therefore the application was filed within a reasonable period of time.

Substantial loss

The second point I have to dispose of is on substantial loss. To my mind, substantial loss is the cornerstone in granting an order for stay of execution. Stay of execution involves exercise of discretion and that discretion has to be exercised judicially. An applicant is required to show that he will suffer substantial loss if stay is denied. This has to be done to the satisfaction of the court. In the case of *Kenya Shell Ltd vs Kibiru [1986] KLR 410* the Court of Appeal held:-

> *"It is not sufficient by merely stating that the sum of Kshs.20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand granting stay would mean denying a successful litigant the fruits of his judgment."*

I fully agree with their Lordships on the principle contained in their statement. If an applicant fails to show the substantial loss he will suffer should stay be declined, the application should not see the light of day. The applicant should show the loss to be suffered clearly and demonstrably. (see *Thugge vs Kenya Commercial Bank Ltd [1990] KLR 437*). In the case of *Halai Pamother vs Thornton and Turpin (1963) Ltd [1990] KLR 365,* it was stated that where there is no evidence of substantial loss the court's discretion cannot be exercised in favour of the applicant. Speaking on substantial loss in Kenya Shell Ltd (supra) Platt, J.A. said:-

> *"It is usually a good rule to see if order XLI 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. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay ... Without this evidence it is difficult to see why the respondents should be kept out of their money."*

What the above statement means is that an applicant must show other factors which demonstrate that should execution proceed, it will create a state of affairs that will irreparably affect the applicant should it succeed in its appeal. Otherwise it means nothing for simply saying that the applicant will suffer substantial and irreparable loss without justifying that assertion.

The applicant in its affidavit has simply stated at paragraph 5 of the affidavit in support of the application thus:-

> *"THAT should further proceedings and or execution take place, the 2nd respondent stand (sic) to suffer irreparable loss and further that if the appeal is successful the same shall be rendered nugatory."*

There is nowhere in the affidavit of seven paragraph, has the applicant shown what substantial loss it will suffer. In fact, in the entire application it is only paragraph 5 of the affidavit that mentions irreparable loss without attempting to demonstrate how. In the words of *order 42 rule 6(2)(a)* the court has to be satisfied that substantial loss may result if stay is not granted. That is what authorities also say. The applicant has to satisfy the court not merely repeat the words in the rule that it will suffer substantial loss.

I have perused the application and I have not come across any evidence of loss to be suffered by the applicant should stay not be granted.

The respondent on the other had has stated in her affidavit that she is in gainful employment and a business lady who is capable of refunding the money should the appeal succeed. Though served with that affidavit, the applicant has not controverted this statement under oath. The conclusion I arrive at is that the applicant has not demonstrated by evidence or satisfied the court by other means that it will suffer substantial loss as required under *rule 6(2)(a)* of the Rules.

Security

Turning to the question of security, the requirement for furnishing security is aimed at cushioning the successful litigant that should the appeal fail, there would be no difficulty in enforcing the order or executing the decree. The applicant has not offered any security and has not even stated that it is willing to provide security should the court order for provision of such security. The applicant has come to court as though stay of execution will be granted as a matter of course. The court may in granting stay on its own motion order provision of security. That is an exercise of discretion whether a party has offered to provide one or not. But it is usually the readiness of the applicant to provide security that shows the element of good faith on the part that applicant in seeking the court's exercise of discretion. The respondent has even said that the applicant is interested in the delaying payment and that is why it has not offered security.

Despite this short coming on the part of the applicant, I appreciate that the applicant is intent on exercising its statutory right of appeal which is granted to it by law. At the same time the respondent is a successful litigant who has a decree which she is entitled to execute. It is a right that has crystalised and which must also be protected. In balancing the two rights, the court should strive to ensure justice on both sides. I agree with the holding in the case of *Gabriel S. Imbali & Another vs Douglas Beru (suing for African Divine Church) [2014] eKLR* that:-

> *"Security under this head may be ordered as a discretion of the court and where the circumstances of the case demonstrate so. The discretion should however be exercised judiciously so as to meet the ends of justice."*

I also agree with the holding of the court in the case of *Absolom Dova vs Turbo Transporters [2013] eKLR* that

> *"The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any advantage but administers the justice the case deserves. This is in recognition that both parties have rights; the appellant to appeal which includes the prospect that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights success on their reconciliation which is not a question of determination."*

In all this, it is important to heed the words of the Court of Appeal in *Halai & Another vs Theounton* (supra) where it said:-

> *"The court ought not to place a successful litigant in such a disadvantageous position that should the appeal not be proceeded with, or withdrawn or fail the respondent would find it difficult to realise the fruits of his litigation due to the inadequacy of the security ordered."*

Having given due consideration to the application and the position of the parties herein, and in order to attain a balance of the rights of the parties in this matter, it is my considered view that a conditional stay will be appropriate not withstanding that the applicant is yet to file a Notice of appeal. Consequently the application dated 10th September, 2015 is hereby allowed as follows:-

1.) A stay of execution of the judgment of this court made on 9th July, 2015 is hereby granted on condition that the applicant do pay Kenya Shillings one million five hundred thousands (Kshs.1,500,000/-) to the respondent within the NEXT FORTY FIVE (45) days from the date hereof.

2.) The balance of Kenya Shillings one million five hundred thousand (Kshs.1,500,000/-) be deposited in an interest earning account in the joint name of the advocates for the parties herein within FORTY FIVE (45) days from the date hereof.

3.) In default of 1 and 2 above, the order for stay of execution shall stand discharged.

4.)The respondent shall have costs of this application.

Dated and delivered at Kakamega this 19th day of October, 2015.

E. C. MWITA

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