



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 189 OF 2011

NANCY MUSILI.....APPELLANT

VERSUS

JOYCE MBETE KATISI.....RESPONDENT

RULING

The Application

The application before the court for determination is a Notice of Motion dated 19th December 2011 filed by the Appellant under the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The Appellant is seeking orders that there be a stay of execution of the interlocutory judgment entered on 18th July 2007 in **Machakos CMCC 518 of 2007 - Joyce Mbete Katisi vs Nancy Musili** pending the hearing and determination of the Appellant's appeal.

The Appellant's application is premised on the grounds that she has appealed against the ruling delivered on 8th November 2011; that she stands to suffer substantial loss if stay is denied; that the Respondent will not be prejudiced in any way if stay is granted; and that the application has been presented without any undue delay.

The Appellant relied on a supporting affidavit she swore on 19th December 2011, wherein she deponed that she is dissatisfied with the ruling of the Chief Magistrate' Court Machakos delivered on 8th November 2011, and she has filed an appeal against the same. The Appellant in her pleadings stated that she was sued by the Respondent in the subordinate court over a debt, and that the said Respondent failed to serve her with summons to enter appearance consequent upon which an interlocutory judgment was entered. This is the judgment that the Respondent is seeking to execute against the Appellant, who further states that the claim in the subordinate court was not formally proved as required by law, thus rendering the intended execution premature and illegal.

The Appellant averred that she applied for setting aside of the interlocutory judgment but that the subordinate court failed to do so, despite the existence of a clear set of circumstances warranting setting aside. The Appellant further averred that she stands to suffer substantial loss if stay is not granted, in that if she is committed to civil jail she will lose her teaching job. In addition, that the Respondent is a person of straw from whom the decretal amount cannot be recovered in the event that she is paid it.

The Response

The Respondent opposed the Appellant's application in a replying affidavit filed on 19th January 2012, wherein she stated that she has never been served with the current appeal, and that the suit in the

subordinate court was filed on 14th June 2007 and summons taken out and served on the Defendant on 21st June, 2007. Further, that Notice of Entry of Judgment was duly served on 18th day of July, 2007 after default judgment was entered.

The Respondent averred that execution thereafter ensued through M/S Kandie Auctioneers, and objection proceedings were undertaken followed by application for stay of execution dated 28th August 2007 which was dismissed on the 1st December 2009. Further, that another similar application was filed on 28th October 2010, and the same was argued and dismissed for reason of indolence on the part of the applicant.

Lastly, the Respondent stated that the Appellant had not attached a certified decree of the order being stayed, and that her application is thereby incompetent. It was also argued that the Appellant has not undertaken to deposit the decretal sum in court.

The Issues and Determination

The parties canvassed the Appellant's application by way of written submissions, which they adopted wholly at the hearing of the application on 21st September 2015. I have read and carefully considered the pleadings and submissions filed. The issue to be determined is whether the judgment in **Machakos CMCC 518 of 2007 - Joyce Mbete Katisi vs Nancy Musili** should be stayed pending the hearing of this appeal.

Stay of execution pending appeal is 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 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 application, as regards the first condition for stay, the Appellant submission is that the execution against her was premature since the subordinate court has never pronounced any final judgment in favour of the Respondent. Further, that the Appellant filed this application without undue delay.

The Respondent on the other hand submitted on this point that the allegation that the judgment entered against the Appellant in Machakos CMCC No.518 of 2007 is not final is a misconception of the law, and that there was a valid judgment that can be subject to execution. Further, that the same did not need to be subjected to formal proof in view of the provisions of Order 10 Rule 4(1) of the Civil Procedure Rules, 2010.

On the fulfillment of the second condition, the Appellant urged that the sum involved in this matter is colossal. Further, that the Respondent is not shown to be engaged in any gainful employment, and that if she is put into possession of the amount she is claiming, it will be an uphill task for the Appellant to reclaim the same in the event of her success in the appeal. The Appellant submitted that she therefore stands to suffer substantial loss if stay is denied.

The Respondent however submitted that she is a person of means and has been deprived of her right to enjoy the fruits of her judgment for a long time, which delay has been occasioned by the Appellant. It was her submission that the Appellant's application is unfounded, incompetent and an abuse of the court process.

On the third condition required to be fulfilled, the Appellant submitted that the court has discretion to waive this requirement if circumstances exist to prove or show that inexcusable mistakes were committed in the lower court, and maintained that the Decree in the lower court was irregularly and prematurely issued. She urged the court to find that this is an application where she should be spared the agony of struggling to get a security for the due performance of the decree. The Appellant relied on the decisions in **Geoffrey Omondi & 2 Others vs Emergency Assistance Radio Service, NBI HCCA No. 340 of 1997 and Ouma vs Nairobi City Council, (1976) KLR 297**

The Respondent on the other hand asked the Court not to waive the requirement for security for the due performance of the decree, and submitted that from the history of this matter, it is clear that the Appellant has been frustrating the eventual conclusion of this matter and making many applications of this nature. The Respondent relied on the decisions in **Dr. Wilson Kipkore vs Hillary Rotich, NRB HCCC No. 108 of 2010** and **Bethuel Muiruri Benjamin vs Development Bank of Kenya, (2006) eKLR**

I have considered the arguments made by the parties herein and note that the arguments by the Appellant and the Respondent as to the finality of the judgment of the lower court goes to the merit of the Appellant's appeal, and cannot be decided at this stage. What is pertinent at this stage is whether the Appellant's application meets the conditions laid down in Order 42 Rule 6 of the Civil Procedure Rules as to stay of execution pending appeal.

I have in this regard perused the proceedings of the lower Court and the Memorandum of Appeal filed herein, and have various observations to make. The judgment of the lower Court that is sought to be stayed in this application is the interlocutory judgment entered by the lower Court on 18th July 2007. A perusal of the record of the lower court shows that various applications were subsequently made after the entry of the said judgment. The first one dated 28th August 2007 was for stay of attachment and execution by an objector; the second dated 7th September 2007 was for stay of execution of judgment by the Appellant, and the third application was for setting aside of the interlocutory judgment, and was made by the Appellant on 27th October 2010. There were also notice to show cause proceedings commenced, and a warrant of arrest issued against the Appellant by the Respondent.

The last ruling arising from these applications was delivered then on 8th November 2011. The Appellant filed her Memorandum of Appeal in this appeal on 25th November 2011, wherein she is appealing against

the said ruling delivered on 8th November 2011, which declined her request to have the interlocutory judgment set aside. I however note that the Appellant applied for stay of execution of the interlocutory judgment entered on 18th July 2007, against which she has not appealed.

In my view, and from a plain reading of Order 42 rule 6 (1) of the Civil Procedure Rules, it is only a decree or order that is appealed against that can be sought to be stayed pending appeal. Stay of execution can therefore only be considered against the decision of the lower court of 8th November 2011 which is the one appealed against, which in any event did not require any substantive action on the part of the Respondent that is capable of being stayed. Having not appealed against the decision to enter interlocutory judgment, the Appellant cannot ask for stay of execution of that judgment pending appeal.

It follows from the above that the Appellant's application is incompetent and misconceived and not supported by the law, as it seeks to stay a judgment or decree not appealed against. It therefore serves no purpose for me to consider whether the conditions for such an application under Order 42 Rule 6(2) of the Civil Procedure Rules were met, and I accordingly dismiss the Appellant's Notice of Motion dated 19th December 2011 for the above stated reasons.

The Appellant shall meet the costs of the said Notice of Motion.

Orders accordingly.

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

P. NYAMWEYA

JUDGE