



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APEAL NO. 142 'B' OF 2015

HERITAGE INSURANCE COMPANY LIMITED APPELLANT

VERSUS

PATRICK KASINA KISILUDEFENDANT

RULING

INTRODUCTION

1. The issue for determination in this ruling is whether the filing in the High Court of an application for stay of execution pending appeal during the pendency of a similar application for stay of execution in the court from which the appeal is preferred is competent. The ruling involves the consideration of the provisions of Order 42 rule 6 of the Civil Procedure Rules on the concurrent jurisdiction of, in the terminology of the Civil Procedure Rules, **the court appealed from** and the **court to which the appeal is preferred** to grant stay of execution pending appeal.

THE APPLICATION

2. The applicant's Notice of Motion dated 5th October, 2015 before this court is set out fully in material parts as follows:

“ORDERS

1. *That this matter be certified as urgent and heard ex parte in the first instance.*
2. *That there be a temporary stay of execution of the ruling and orders issued herein against the Appellant in Machakos CMCC No. 939 of 2014 on 28th August, 2015 pending inter partes hearing of this application.*
3. *That the court be pleased to grant interim stay of execution of the said ruling pending hearing and determination of the stay application dated 4th September, 2015 pending before the Magistrate's Court.*
4. *That in alternative to 3 above the court be pleased to order stay of execution of the said ruling and order issued on 28th August, 2015 as against the Appellant in Machakos CMCC No. 939 of 2014 pending the hearing and determination of this Appeal.*

5. That the costs of this application be in the cause.

GROUNDINGS:

a) *The Appellant lodged this appeal having been dissatisfied with the lower court's ruling and order of 28th August, 2015 issued in Machakos CMCC No. 939 of 2014.*

b) *Upon filing the Memorandum of Appeal the Appellant filed an application at the lower court on 4th September, 2015 seeking stay of execution pending appeal. The application was certified urgent and fixed for inter partes hearing on 14th September, 2015 but the duty Magistrate declined to grant interim stay of execution.*

c) *The trial court did not sit on 14th September, 2015. Consequently the Appellants Advocate's had the application mentioned before the duty Magistrate who fixed it for hearing on 28th September, 2015 but unjustifiably declined to grant interim stay order protecting the Applicant in the meantime.*

d) *On 28th September, 2015 the trial magistrate directed parties to file written submissions on the application and adjourned matter to 19th October, 2015 but again declined to grant interim orders of stay of execution.*

e) *The Appellant remains exposed to execution proceedings despite its best efforts at securing interim orders of stay pending appeal. The Magistrate's court refusal to grant stay is unjustifiable.*

f) *The Appellant is apprehensive that the Respondent could commence execution proceedings at any time at the Appellants detriment.*

g) *The Respondent's financial means and earning capacity is unknown to the Appellant. If the judgment sum is released to him, the Appellant will not be able to recover the same in the event the Appeal succeeds. That will render this Appeal nugatory.*

h) *The Appellant is ready and willing to furnish security for due performance of the judgment and any resulting decree by depositing the judgment amount in an account to be opened in the joint names of the two firms of Advocates on record or by furnishing any other security as may be ordered by the court."*

THE RESPONSE

3. The Respondent filed a replying affidavit sworn on the 22nd October 2015 whose primary objection was that *"the applicant has filed a similar application in the lower court being application dated 4/09/2015 in CMCC No. 939/2014 [and] that, now the applicant has brought similar application as to the one in the lower court after the lower court failed to issue stay orders.... [and] that the applicant is abusing the court process by filing numerous Applications in and deliberately mislead this Honourable Court."*

SUBMISSIONS BY THE PARTIES

4. At the invitation by the Court, the counsel for the parties made submissions on the question whether the application for stay of execution was competent and properly before the court in view of the pendency of a similar application before the lower court which had been scheduled for 19th October 2015 for the filing of submissions before ruling.

5. For the applicant, it was contended that as the lower court had failed to grant the applicant an interim order for stay of execution pending the hearing inter partes of the application for stay pending appeal, the

High Court had jurisdiction to grant the stay that the applicant may not be exposed to execution of the judgment and render the appeal nugatory. The applicant relied on the High Court's original and unlimited jurisdiction under Article 165 (3) of the Constitution and Order 42 rule 6 of the Civil Procedure Rules. Counsel for the applicant, Ms. Onkoba urged the Court as follows:

“We pray that the court has jurisdiction to entertain the application and grant the appellant stay pending hearing and conclusion of the stay application of 4th September 2015 at the Lower Court or alternatively stay of execution of the ruling and order of 28th August 2015 pending appeal to the High Court.”

6. For the respondent, it was contended by Mr. Makau that the court had no jurisdiction to entertain the application for stay of execution while a similar application was pending determination in the lower court as that would be an abuse of the process of the Court. Counsel cited several persuasive authorities of the High Court – ***Joseph Gichuhi and Anor. v. Agnes Mwenesi Siteka*** Nakuru HCCA 180 of 2014; ***Joseph Makarios v. Benardicato Esalambo and Anor.***, Kakamega HCCA 15 of 2013; ***John Bosco Ngeta Maundu v. William Wambua Kiwia and 3 Ors.***, Nairobi HC Misc. Application No. 1165 of 2013 and ***Palace Dry Cleaners and Anor. v. Kenya Power and Lighting***, Nairobi HCCC No. 837 of 2000 - whose common thread was the holding that the filing of multiple applications over the same subject matter seeking similar reliefs was an abuse of the court process.

7. There was contestation between the Counsel herein as to whether the lower court made an order for status quo pending the filing of submissions and ruling. Counsel for the respondent said there was no danger of execution because the court had ordered status quo to be maintained. Counsel for the applicant contested that position and urged that the failure of the court to grant an order of stay of execution had left the applicant exposed to execution. Unfortunately, the same applicant did not exhibit the proceedings of the lower court in its consideration of the stay of execution, and this court is not able to confirm the correct position as regards the interim order for status quo to be maintained.

DETERMINATION

Repeat Similar Applications

8. I agree with the general tenor of the court decisions that take the view that to file similar applications over the same subject matter seeking similar reliefs is an abuse of the court process. Indeed, where such applications have previously determined the matter the subsequent applications are barred by the principle of ***res judicata*** (see ***Mburu Kinyua v. Gichini Tuti*** (1978) KLR 69); where an application is dismissed for want of appearance, the applicant cannot be allowed to bring a second application unless he seeks reinstatement of the application for good cause (***Wanguhu v. Kania*** (1987) KLR 51) and where the earlier one is not concluded, a similar subsequent application is ***sub judice*** by virtue of section 6 of the Civil Procedure Act.

9. In the present case, however, the wording of provisions of Order 42 Rule 6 of the Civil Procedure Rules may have led to an innocent mistake on the part of the applicant that he could move the High Court where the lower court declined to grant an interim order of stay even before the lower court had determined the application for stay of execution pending appeal. Order 42 rule 6 is in the following terms:

“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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

10. I consider the provisions of the Rule in Order 42 Rule 6 (1) of the Civil Procedure Rules must be understood as follows:

1. There is no automatic stay of execution upon appeal and therefore no appeal or second appeal shall operate as a stay of execution or proceedings except as the **court appealed from** may order

2. **The court appealed from** may for sufficient cause order stay of execution of such decree or order.

3. **Even where an application for such stay shall have been granted or refused by the court appealed from, the appellate 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.**

4. There is a right of appeal for any person aggrieved by an order of stay made by **the court from whose decision the appeal is preferred** to the **appellate court** to have such order set aside.

11. In accordance with the hierarchical authority of laws, as part of the Civil Procedure Rules the provisions for the filing or repeat of application for stay of execution in the court to which the appeal is preferred, regardless of whether such an application has been granted or refused [and I daresay made] in the court appealed from, must be subject to the ordinary principles of civil litigation on **sub judice** and **res judicata**, which are statutorily underpinned under sections 6 and 7 of the Civil Procedure Act, respectively. Accordingly, the filing of the application herein by the appellant falls to be considered with reference to the principles of **res judicata** and **sub judice** as well as other considerations relating to abuse of process. The application, having been filed upon appeal, is similarly subject to common law principles on regarding the setting aside, alteration or variation of orders made by a trial court by the appellate court.

Interference with discretion of the trial court

12. It is trite that an appellate court will not interfere with the exercise of discretion by a trial court as held by the Court of Appeal for East Africa in **Mbogo v. Shah** (1968) EA 93, per Newbold, P. that:

“[A] Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is

*satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that **the judge was clearly wrong in the exercise of his discretion** and that as a result there has been misjustice.”*

13. As is clear from the provisions of Order 42 rule 6 (1) of the Civil Procedure Rules, there is no automatic right to a stay of execution. In accordance with the rules, the applicant must demonstrate substantial loss and offer security for the due performance of the decree as required by Order 42 rule 1 and 2 of the Civil Procedure Rules.

14. In refusing to grant an interim order pending hearing of the application stay of execution before it, the trial court exercised discretion conferred upon it by Order 42 rule 6 of the Civil Procedure Rules. As no reasons are disclosed for the refusal to grant an interim order, and the record of proceedings of the lower court are not produced before this court, this court is not able to say whether or not the court was wrong in refusing to grant the interim order. The court’s reasoning may only be disclosed in the ruling for which submissions were invited for the 19th October 2015 before the lower court. This Court does not therefore find, on the basis of the material before it, any scope for interference with the exercise of discretion by the trial court pursuant to the authority of *Mbogo v. Shah*, supra.

The Principle of sub judice

15. The appellant’s application herein also falls foul of the cardinal principle of *sub judice* rule under section 6 of the Civil Procedure Act, which requires the Court to stay the consideration of any suit or application where a previously suit or application is pending determination by a court of competent jurisdiction:

“6. Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

16. In the circumstances of this case, the application of *sub judice* rule must mean that this Court will defer to the lower court as that court considers the application for stay of execution filed pursuant to Order 42 rule 6 Civil Procedure Rules before that competent court prior in time to the application before this Court.

CONCLUSION

17. To prevent abuse of the court of process where parallel proceedings are had before two different courts with concurrent jurisdiction or before the same court at different times, section 6 of the Civil Procedure Act requires that the latter application be stayed to allow the hearing and determination of the earlier proceedings. The filing of an application before this court while a similar application is pending hearing and determination before a lower court of competent jurisdiction is, clearly, an abuse of court process. In addition, the appellate court has no jurisdiction to interfere with the exercise of discretion by a lower court except where the court is clearly wrong or has misdirected itself resulting in a miscarriage of justice. From the material before the court, it is not possible to determine that the trial court has exercised its discretion wrongly, as the grant of an order for stay of execution is not automatic upon the filing of an appeal to a higher court.

ORDERS

18. For the reasons set out above, the Applicant’s Notice of Motion dated 5th October 2015 is stayed by virtue of section 6 of the Civil Procedure Act pending hearing and determination of the application for stay of execution pending appeal dated the 4th September 2015 before the **Chief Magistrate’s Court**

Civil Case No. 939 of 2014. Cost in the Cause.

DATED AND DELIVERED THIS 5TH DAY OF NOVEMBER, 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

..... for the APPELLANT

Mr. Makau for the RESPONDENT

Ms. Doreen - Court Assistant.