



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 614 OF 2004

ZACHARIA MBORI.....1ST PLAINTIFF

BELDINA ACHOLA MBORI.....2ND PLAINTIFF

VERSUS

RAJENDRA RATILAL SANGHANI.....1ST DEFENDANT

PRADEEP KARAMSHI SHAH.....2ND DEFENDANT

PALVI GUDKA.....3RD DEFENDANT

NNK INVESTMENTS.....4TH DEFENDANT

RULING

INTRODUCTION

1. For the determination by this court, is the Notice of Motion application by the Defendants dated and filed on 11th December 2013. The application was brought pursuant to the provisions of Order 9 Rule 9 & 10, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, as well as Sections 1A, 1B and 3A of the Civil Procedure Act. The orders sought by the Applicants were *inter alia*;

1. Spent.
2. Spent.
3. **THAT this Honourable Court do order a stay of execution of the judgment and Order made by this Honourable Court on 27th March 2012 pending the hearing and determination of this Application.**
4. **THAT this Honourable Court do order a stay of execution of judgment and order made by this Honourable Court on 27th March 2012 pending the hearing and final determination of the Applicants' Appeal to the Court of Appeal.**
5. Spent.
6. **THAT the costs of this application be provided for.**

2. The application was predicated upon the grounds as set out on the face of the application:-

1. **THAT the Defendants had an arguable appeal with a high probability of success.**
2. **THAT if the said stay of execution was not granted, their appeal would be rendered nugatory and they would suffer irreparable loss and damage.**
3. **THAT unless this application was granted, the 1st, 2nd and 3rd Defendants could be committed to civil jail as the Plaintiffs had instituted execution proceedings seeking to commit them to civil jail.**
4. **THAT pursuant to negotiations entered between the Plaintiffs' Advocates and the firm of M/S Apopo & Associates, then representing the Defendants, the sum of Kshs 2,000,000/- was paid to the Plaintiffs to operate as a condition of stay pending Appeal as the parties negotiated.**
5. **THAT the Defendants were ready and willing to provide such reasonable security as this Honourable Court would order.**
6. **THAT the Defendants would suffer substantial loss unless the orders sought were granted.**
7. **THAT the application had been made without any unreasonable delay.**
8. **THAT this application ought to be granted in the interest of equity, fair play and justice.**

AFFIDVAIT EVIDENCE

3. The application was supported by the affidavit of Pradeep Karamshi Shah, the 2nd Defendant herein and a director of the 4th Defendant Company. It was sworn on 11th December 2013. He deposed that judgment was entered against the Defendants on 27th March 2012 in which they were ordered to pay the Plaintiffs a sum of Kshs 4,000,000/= together with interest thereon from the date of filing suit until payment in full and costs of the suit.
4. He stated that, being aggrieved and dissatisfied by the said judgment, they filed a Notice of Appeal on 6th April 2012 and applied for certified copies of the proceedings on the same day.
5. He averred that in an attempt to settle the matter out of court, the Defendants paid the Plaintiffs Kshs 2,000,000/= on the understanding that the Plaintiffs would stay any further execution processes pending the hearing and determination of the Appeal herein as they were apprehensive that if the entire amount was paid to the Plaintiffs, who were retired officers, they would be in no position to refund the Defendants the monies if their intended appeal was successful.
6. Further, he contended that the payment of the Kshs 2,000,000/= was predicated upon the orders of Musinga, J (as he then was) as a pre-condition for the granting of stay orders pending the hearing and determination of the Applicants' application for stay. It was also his averment that the Respondents intended to execute the judgment and orders of the Court as issued on 27th December 2012 and that if the orders they had sought were not granted, it would lead to irreparable loss and damage being occasioned to the Defendants and render their appeal nugatory. ,
7. The application was opposed. H. Chacha Odera, the Plaintiffs' advocates, swore a Replying Affidavit on behalf of the Plaintiffs herein on 13th January 2014. It was his contention that the application was fatally defective, devoid of merit and an abuse of the process of the Court.
8. Further, he averred that the Defendant's allegations that they paid the Plaintiffs a sum of Kshs 2,000,000/= as a condition of stay of further execution pending appeal were not true but that the said sum of money had been paid as a condition for discussing liquidation of the balance of the decree by installments as had been evidenced in the Plaintiff's advocates the letter dated 26th August 2013 annexed to his affidavit, exhibit marked "B".
9. He deposed that the Defendants had neither explained the inordinate delay in filing the instant application nor demonstrated the substantial loss they would suffer should the decree in these proceedings be executed. He was emphatic that the present application was another attempt by the Defendants to abuse the court process and to deny them the fruits of their judgment. He also stated that the Defendants had done nothing to expedite the filing of their intended appeal.

10. He added that the application was devoid of merit for the reason that only the 1st to 3rd Defendants were represented by the firm of M/S Rach & Co Advocates whereas the 4th Defendant was represented by the firm of M/S William & Case Associates and consequently Prayer No (2) of the application was fatally defective. He further stated that the application for stay of execution on behalf of the Defendants was filed by M/S Apopo & Associates and that since the same was filed, the same had never been regularised or a determination of the said application made.

11. On 4th March 2014, the aforesaid Pradeep Karamshi Shah filed a further affidavit sworn on 3rd March 2014. He denied that the letter dated 26th August 2013 annexed and marked as “B” in the Plaintiffs’ Replying Affidavit was received by the firm of M/S Apopo & Associates as it did not bear a received stamp and that the same was meant to mislead the court.

12. In reiterating the contents of the Supporting Affidavit sworn on 11th December 2013, he was emphatic that the orders of Musinga, J issued on 29th October 2012 that the sum of Kshs 2,000,000/= was to be paid into an interest earning account. However, he said that the same became impractical to open the said joint interest earning account whereupon the Plaintiffs requested the Defendants to pay the said sum in the 1st Plaintiff’s account. A copy of the said Order was annexed to the said Further Affidavit and marked Exhibit “PK-1”.

13. He also stated that he had been advised by Mr Apopo Advocate that his firm had been unable to procure the typed proceedings to enable them prepare the Record of Appeal.

14. It was his contention that the Defendants had extremely high chances of succeeding on appeal as had been shown in the draft Memorandum of Appeal and that if the whole decretal amount was paid to the Plaintiffs, the Defendants would suffer irreparable loss and damage and their intended appeal rendered nugatory.

LEGAL SUBMISSION BY THE 1ST, 2ND AND 3RD DEFENDANTS

15. On 4th March 2014, the 1st, 2nd and 3rd Defendants filed their submissions dated 3rd March 2014. They submitted that the payment of Kshs 2,000,000/= was paid directly into the 1st Plaintiff’s account but that what was not agreed upon was whether the said amount was to serve as security for a stay pending the hearing and determination of the appeal or whether the same was to be paid in part payment of the decretal sum. They urged the court to find that the said amount was paid as a security pending the hearing and determination of the appeal. It was their contention that they had expressed good faith in offering security for the orders sought.

16. That argued that they were deserving of the orders that had been sought in their application. They stated that the inordinate delay in filing the application was due to the unavailability, or lack thereof, of typed proceedings for the purposes of preparing the Record of Appeal and in view of the fact that they were under the impression that the said sum had been paid pending the hearing and determination of the appeal. They prayed that the unavailability of the typed proceedings not be visited upon them.

17. They reiterated that they stood to suffer irreparable loss for the reason that the Plaintiffs, who were retired Civil servants, a fact they contended had not been rebutted by the Plaintiffs, would not be able to refund them the said decretal if the appeal succeeded.

18. On the issue of irregularity of the 4th Defendant’s representation, the Defendants submitted that the same was disposed of as the prayer under Order 9 Rule 9(b) of the Civil Procedure Rules, 2010 had been allowed. They argued that if the 4th Defendant’s representation was irregular, the same could be regularised by filing consent as enunciated under the aforesaid Order, if need. They also averred that even if the same was irregular, it was not fatal to the application herein. They relied on the case of **James Kamau Njigua v The Church Commissioner for Kenya & Others [2014] eKLR** in this regard.

19. They urged the court to order for a stay of execution pending the hearing and determination of the Appeal on such terms as to security as this court would direct.

LEGAL SUBMISSIONS BY THE PLAINTIFFS

20. In their written submissions dated 10th April 2014 and filed on 11th April 2014, the Plaintiffs submitted that there was a similar application filed by the Defendants that remained undetermined and unregularised.

21. It was also submitted that the Defendants had failed to discharge the burden of demonstrating that their application passes the test under Order 42 Rule 6 of the Civil Procedure Rules for an application for stay which was to show that the application had been made without delay, that the applicant stood to suffer substantial loss and that the applicant was ready to furnish security.

22. It was their contention that the Defendants were guilty of inordinate delay as they filed the instant application, nine (9) months after the judgment herein was delivered. They were categorical that the Defendants had not proffered any reasonable and/or tangible explanation for the said delay. They also submitted that the Defendants had relied on the test used in determining an application for a stay of execution pending appeal under Rule 5 (2)(b) of the Court of Appeal Rules which test was not relevant for applications brought under the provisions Order 42 Rule 6 of the Civil Procedure Rules, 2010.

23. They averred that the Defendants' application demonstrated bad faith for the reasons that instead of explaining the inordinate delay, the said Defendants had argued that the 1st Plaintiff's advanced age was a basis for seeking a stay of execution pending appeal. It was also their argument that no appeal had been filed and that the Defendants had not demonstrated what action they had taken to pursue the proceedings to enable them prepare a Record of Appeal.

24. They placed reliance on the case of **HCCC No 875 of 2001 Trust Bank Ltd v Ajay Shah & 3 Others [2012] eKLR** in which Mabeya J held that all the three (3) conditions set out in Order 42 Rule 6(2)(a) and (b) were cumulative and had to be satisfied before could be granted.

25. As regards the question of substantial loss, the Plaintiffs submitted that the Defendants had failed to demonstrate the substantial loss that they stood to incur and suffer in the event the orders they had sought in their application were not granted. They submitted that the Defendants were required to prove that the Plaintiffs would be unable to compensate them for the decretal sum in the event the orders they had sought were not granted and the Appeal succeeded.

26. They argued that in the case of **Kenya Shell Limited v Benjamin Karuga Kibiru & Another (1982-1988) 1 KAR 1018**, the Court of Appeal had observed that it was not normal in money decrees for the appeal to be rendered nugatory if payment was made. It was their submission that the Plaintiffs had in an Affidavit filed in court on 29th October 2012 showed that the 1st Plaintiff was a retired executive with numerous investments in real estate and that they could repay the decretal amounts or resort to unencumbered properties in the unlikely event that an adverse order was made against them by the Court of Appeal.

27. It was their contention that they were entitled to enjoy the fruits of their judgment and that they would continue to suffer as the Defendants had consistently delayed the hearing of this matter.

28. In respect of the third test, being one of furnishing security, the Plaintiffs submitted that if the court deemed it fit to grant the orders sought, then it ought to order the Defendants to pay the sums they had received from the Plaintiffs together with interest thereon and deposit the balance of the decretal sum in a joint account to be held by their advocates and those of the Defendants. It was their submission that the same would be fair in view of the age of the Plaintiffs and the matter herein.

29. They averred that the Defendants paid a sum of Kshs 2,000,000/= in response to a Notice to Show Cause why they should not be committed to civil jail had been issued. They argued that if it was the

intention of the parties that the said payment was to be a condition of a stay of execution pending appeal, nothing would have been easier than for the parties to have recorded a consent order in that respect. They pointed out that the Defendant did not secure an affidavit from Mr Apopo denying that he had not received the letter dated 26th August 2013.

30. The Plaintiffs therefore submitted that the Defendants' application was devoid of merit and that having failed to meet the test in Order 42 Rule 6 of the Civil Procedure Rules, 2010, the same ought to be dismissed with costs. They referred the court to the case of **Dennis Ouma Simolo v AA Transporters Limited [2012] eKLR** wherein Kasango J dismissed an application where the applicant herein had not proffered a reason for the delay in filing his application and for not having set out the substantial loss he would suffer in the event a stay order was not granted.

LEGAL ANALYSIS

31. The court wishes to address the issue of representation of the 4th Defendant to establish its relevance in the determination of the application herein. It was the Plaintiffs' argument that the consent, executed by M/S Kibera & Associates Advocates and M/S Rach & Co Advocates, dated 11th December 2013 on 16th December 2013 purportedly showed that M/S Kibera & Associates Advocates were acting for all the Defendants whereas the firm of M/S William & Case Associates was acting for the 4th Defendant. The Plaintiffs submitted that the representation of the 4th Defendant by M/S Kibera & Associates Advocates was irregular as judgment herein had already been delivered.

32. Order 9 Rule 9 (b) of the Civil Procedure Rules, 2010 provides as follows:-

“ Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-

- a. **upon an application with notice to all the parties; or**
- b. **upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”**

- ag. In the absence of any consent or order by the court upon application by the 4th Defendant to change its advocates, it is correct as the Plaintiffs submitted that the 4th Defendant's representation in this matter was irregular. However, as the Defendants also submitted, this irregularity is not one that would have rendered their application defective as the 1st, 2nd and 3rd Defendants were properly represented by M/S Kibera & Co Advocates. The grounds in the face of the present application largely made reference to the said 1st, 2nd and 3rd Defendants with no reference to the 4th Defendant in particular.
- ah. The court can only then issue orders in favour of the 1st, 2nd and 3rd Defendants herein, if at all as the present application was filed on their behalf by the firm of M/S Kibera & Associates Advocates who were properly on record on their behalf. As the present application herein can therefore be sustained on this ground, the court will now address the substantive issues that have been placed before the court for determination.
- ai. It is not in dispute that requirements to be satisfied for an application under Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 are that an applicant must demonstrate that:-
- a. **Substantial loss may result to him unless the order was made;**
 - b. **The application was made without unreasonable delay; and**
 - c. **He shall furnish such security as the court would order for the due performance of such decree or order as may ultimately binding on him.**
- aj. An applying party must satisfy all of the three (3) ingredients, which are inseparable, before he can be granted a stay of execution pending appeal. The fact of the non- severability of the three (3) conditions aforesaid were reinforced in the cases of **Mukuma vs Abuoga [1988] KLR 645** and the case of **Trust Bank Limited vs Ajay Shah & 3 Others** (Supra) the latter, which was relied upon by the Plaintiff herein.

ak. The inability of satisfying all the three (3) ingredients was also considered in the case of **Kenya Shell Limited vs Kibiru & Another** (Supra) in which Platt Ag JA observed as follows:-

“The application for the stay made before the High Court failed because the first of the conditions set out in... was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to pay the money..”

38. The court has considered the Plaintiffs’ argument that although they are persons of means having properties in real estate, they could pay the 1st, 2nd and 3rd Defendants the decretal sum if they succeeded in their appeal. Realisation of property is a complex matter bearing in mind the provisions of the land law legislation. Hence, security of immovable property, though good, would most likely than not cause undue hardship to the Defendants in the event they were to succeed in their appeal with the Plaintiffs having been paid decretal sum in full.

39. In that regard, the court wishes to associate itself with the holding in the case of **Royal Reserve Management Company & Another vs Gerald Mahinda & Another eKLR [2008]** where Okwengu J (as she then was) affirmed that a sum of Kshs 1,000,000/= was not a small amount having noted that the Respondents therein had not indicated their means so as to justify their contention that they were in a position to refund the money and **Trustees Catholic Diocese of Murang’a & Another vs Rev. Samuel Ngugu & Another eKLR [2008]** where the court found that a sum of Kshs 2,500,000/= was rather a substantial amount for an individual.

40. In the absence of any other sufficient proof, the court finds that the sum of Kshs 2, 000,000/= plus interest, though not colossal by the Plaintiffs’ standards, the 1st, 2nd and 3rd Defendants were likely to suffer substantial loss in the event they were to succeed on appeal due to the technicalities of realising the decretal amount from proceeds of sale of property belonging to the Plaintiffs. Accordingly, the court finds that the 1st, 2nd and 3rd Defendants to have succeeded in proving the first condition under Order 42 Rules 6 of the Civil Procedure Rules, 2010.

41. On the issue of the timeous filing of the application herein, the court notes that judgment was entered in favour of the Plaintiffs herein against the Defendants on 27th March 2012. The Defendants stated that they applied for certified copies of the proceedings on 6th April 2012 and filed the Notice of Appeal on the same date. However, exhibit marked “PK 2” attached to the Plaintiffs’ Supporting Affidavit shows that the Notice of Appeal bears a stamp of 10th April 2012 while the letter applying for the certified copies of the proceedings applied was dated 26th April 2012.

42. A further perusal of the court file shows that the 1st, 2nd and 3rd Defendants filed the initial Notice of Motion application dated and filed on 19th October 2012. However, from the parties’ averments, no Record of Appeal has been filed to date. The court notes that the proceedings have never been typed.

43. While the 1st, 2nd and 3rd Defendants were under a duty to pursue the said proceeding and they did not demonstrate the efforts they made in obtaining the same, the court would be hesitant to hold them entirely liable for the reason that the typing of the said proceedings was not in their control. The court therefore finds the delay in filing a Record of Appeal, though delayed, was excusable.

44. The 1st, 2nd and 3rd Defendants filed the present application almost seven (7) months after the judgment herein was delivered. However, from the Plaintiffs’ advocates letter of 26th August 2013, there does appear to have been some discussions about the liquidation of the decretal sum. The court therefore finds that although there was delay in filing the 1st, 2nd and 3rd Defendants’ Notice of Motion application dated 19th October 2012, the same was not inordinate.

45. In respect of the third condition aforesaid, the court had had due regard to the fact that the 1st, 2nd and

3rd Defendants paid a sum of Kshs 2,000,000/= directly to the 1st Plaintiff's account leaving a balance of Kshs 2,000,000/=. The Defendants' payment of the sum of Kshs 2,000,000/= directly to the 1st Plaintiff's account was a departure from the consent order recorded by the parties before Musinga J (as he then was) as the said amount was to be deposited in a joint interest account in the names of the advocates as a condition precedent for a stay of execution pending and determination of the 1st, 2nd and 3rd Defendants' Notice of Motion application dated 19th October 2012.

46. The said 1st, 2nd and 3rd Defendants were willing to abide by the conditions of the court in the event it was to grant the stay orders. The Plaintiffs did also submit that in the event the court was to grant the orders sought by the said Defendants, then the said Defendants should be ordered to pay over the sums they received from the Plaintiffs together with interest and deposit the balance in a joint account as aforesaid. They did not, however, give the court the figures they were alluding to necessitating the court to go into the court record.

47. While the court noted that the Plaintiff's advocates had acknowledged receipt of a sum of Kshs 2,000,000/= vide their letter of 26th August 2013, which the 1st, 2nd and 3rd Defendants denied ever having been received by their advocates, the order by Musinga J (as he then was) issued on 29th October 2012 was clear that the sum of Kshs 2,000,000/= was security that was to be deposited in an interest earning account in the joint names of the advocates pending the hearing and determination of the 1st, 2nd and 3rd Defendants' application seeking a stay of execution and was never intended to have been paid directly to the 1st Plaintiff.

48. A superior court to which an application for stay of execution has been made must recognise and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It cannot also order that the full decretal sum be paid to the decree-holder. It is not sitting on appeal to decide whether or not an appeal is merited or not. That is clearly within the jurisdiction of the Court of Appeal to consider and determine. It would be best in those circumstances to preserve the *status quo* so as not to render an appeal nugatory.

49. However, in doing so, the superior court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment. The court is called upon to ensure that no party suffers prejudice. The Plaintiffs in this case have at least received part payment of the decretal sum which as at 9th May 2013 stood at Kshs 9,317,813/=. This was the figure the court noted from the latest Notice to Show Cause why execution should not issue in the court file. The bulk of this amount consisted of interest.

50. The court is not aware of the exact amount due and owing to the Plaintiffs as the time the 1st, 2nd and 3rd Defendants filed the present application as none of the parties indicated the same in their pleadings. However, as the amount to be paid as security is ordinarily a matter of discretion, this court finds that a sum of Kshs 5,000,000/= as security to be paid by the 1st, 2nd and 3rd Defendants would ideally be fair and just in the circumstances of the case herein.

51. The said sum of Kshs 5,000,000/= is merely slightly above fifty (50%) per cent of the decretal sum which as at 9th May 2013 stood at Kshs 9,317,813/=. Fifty (50 %) per cent of this said decretal sum would essentially have been Kshs 4,658,906.50. However, the court cannot ignore the fact that interest has continued to accrue and the decretal sum would definitely be higher than the sum of Kshs 4,658,906.50.

52. In view of the fact that the decretal sum is still accruing interest, it is only just and fair that such monies start continue accruing interest while the 1st, 2nd and 3rd Defendants exercise their constitutional right to appeal against the judgment of Kimaru J. This will safeguard both the parties' interests while they await the hearing and determination of the 1st, 2nd and 3rd Defendants' appeal.

53. The ruling by Musinga J (as he then was) was crystal clear that the stay of execution that he had issued was pending the hearing and determination of the application and not pending the hearing and determination of the appeal as the 1st, 2nd and 3rd Defendants had wanted this court to believe. Accordingly, having considered the pleadings, written submissions and case law relied upon by the parties and after taking the circumstances of this case, the court finds that this is a suitable case where it should exercise its discretion to grant a stay of execution pending appeal.

DISPOSITION

54. The upshot of this court's ruling is that Prayer No (4) of the 1st, 2nd and 3rd Defendants' Notice of Motion application dated 10th December 2012 and filed on 11th December 2013 was merited. The said application has been allowed on the following terms:-

- a. **THAT the 1st, 2nd and 3rd Defendants shall deposit into a joint interest earning account in its advocates' name and that of the Plaintiff the sum of Kshs 5,000,000/= within the next ninety (90) days from the date of this suit.**
- b. **THAT the 1st, 2nd and 3rd Defendants shall file its Record of Appeal within ninety (90) days from the date of this ruling. This period is to give them sufficient time to pursue the certified copies of proceedings.**
- c. **THAT in the event the 1st, 2nd and 3rd Defendants shall fail to comply with the conditions hereinabove, the stay of execution pending the filing and determination of the intended appeal in the Court of Appeal shall automatically lapse, unless for good cause, it shall be extended by this court.**
- d. **THAT the Deputy Registrar of the High Court of Kenya Commercial & Admiralty Division is hereby directed to facilitate the typing of the said certified copies of the proceedings herein to enable the 1st, 2nd and 3rd Defendants comply with Orders (a), (b) and (c) hereinabove.**

55. It is so ordered.

DATED and DELIVERED at NAIROBI this 16th day of July 2014

J. KAMAU

JUDGE