



REPUBLIC OF KENYA
IN THE E.L.C. COURT OF KENYA AT EMBU
CIVIL APPEAL NO. 43 OF 2016

PATRICIA GITIRI MUGUSHU.....APPELLANT/APPLICANT

VERSUS

DICKSON MURIUKI KARIGI.....RESPONDENT

RULING

1. On or about 18th August 2016, the Applicant filed Notice of Motion dated 17th August 2016 seeking a stay of execution of the ruling/order of the Chief Magistrate's Court made on 25th July 2016 in Embu CMCC No. 260 of 2008. The challenged order was a warrant of arrest and committal to civil jail of the Applicant in execution of the decree of the said court.
2. The decree of the Magistrate's court was issued on or about 10th February 2012 in favour of the Respondent following a full hearing of the suit.
3. It is common ground that the said suit was filed against the late husband of the Appellant who passed on before the suit could be concluded. Consequently, the Applicant was substituted as the Defendant in her capacity as the personal representative of the deceased, although it is not clear from the record if she was appointed as executrix pursuant to a will or administratrix pursuant to intestate succession.
4. The said application is brought under Order 42 Rule 6 of the Civil Procedure Rules amongst other provisions of the law. It is grounded upon the several grounds stated on the face of the Notice of Motion.
5. Among the grounds are that she is dissatisfied with the order of 25th July 2016 issuing the warrants of arrest in execution the decree; that she is of ill health and on medication; that her appeal has a high probability of success; and that she is likely to suffer substantial loss since she may not recover her money should the appeal succeed.
6. The said application is supported by an affidavit sworn by the Applicant on 17th August 2016 to which she has attached two exhibits, namely, the decree of the Magistrate's Court dated 10th February 2012 and the order of 25th July 2016 for issuance of the warrant of arrest.
7. The said application was opposed vigorously by the Respondent who filed a replying affidavit on 29th August 2016 and a further affidavit on 26th September 2016.
8. During the hearing of the application on 20th February 2017, counsel for the Applicant put great

emphasis on the fact that the Applicant was merely the administratrix of the estate of the deceased defendant. He, therefore, submitted that she ought not to be held personally liable for the debts and liabilities of the estate. His main submission was that the warrants of arrest were wrongfully issued against her personally instead of the estate of the deceased.

9. The Respondent who was acting in person strongly opposed the said application. He submitted that the decree of the Magistrate's Court in Embu CMCC No 260 of 2008 was granted on 10th February 2012 and the same remained unsatisfied five (5) years down the line even though the Applicant had not filed an appeal against the decree. He submitted that the warrant of arrest was issued because of the Applicant's failure to pay the decretal amount. She had the option to pay.

10. In further opposition to the said application, the Respondent submitted that medical care and facilities are available even to those people who are committed to civil jail and therefore the Applicant could continue with her medication in prison. The Respondent also refuted the suggestion that he was a pauper from whom the decretal amount could not be recovered in the event that the appeal succeeded. He exhibited a copy of a title deed for his property Title No. Gaturi/Nembure/9695 as rebuttal of the suggestion that he could be a man of straw.

11. In his reply, the Applicant's counsel conceded that no appeal has ever been lodged against the decree of 10th February 2012 but the Applicant is only challenging the warrant of arrest in execution of the decree. He also submitted that the Applicant is willing to abide by any terms the court may impose on the provision of security for the satisfaction of the decree.

12. The said application having been brought under the provisions of **Order 42 of the Civil Procedure Rules**, it is necessary to consider the requirements which an applicant for stay of execution has to meet in order to be entitled to such order of stay. **Order 42 (2)** provides that:

“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.”

13. The requirements for the grant of stay pending appeal are now well settled in Kenya since the decision of the Court of Appeal was rendered in the case of **Kenya Shell Ltd Vs Kibiru & Another [1986] KLR 410**. In that case, the appellant had sought stay of execution of a monetary decree issued by the High Court in favour of the Respondent. In dismissing the said application, the Court of Appeal observed as follows:

“It is usually a good rule to see if Order XL1 Rule 4 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 cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence, it is difficult to see why the Respondents should be kept out of their money.”

14. The Court of Appeal also held in the said case that while considering applications for stay of execution the court should balance the two competing interests of the parties, that is, that a successful litigant should not be deprived of the fruits of his judgement, and that execution of a decree should not render a proposed appeal nugatory.

15. Has the applicant in this matter demonstrated the element of substantial loss unless stay of execution is granted? I am not persuaded that from the material on record the Applicant has demonstrated such loss. The fact that she is the administratrix of the estate of the deceased defendant and not the original

defendant is neither here nor there. It does not aid in demonstrating or substantiating the “substantial loss” contemplated under Order 42 of the Civil Procedure Rules.

16. Under section **83 of the Law of Succession Act (Cap 160)** some of the duties of a personal representative include:

a) (not relevant)

b) to get in all the free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death.

c) (not relevant)

d) to ascertain and pay out the estate of the deceased, all his debts.

17. Under section 3 of the Law of Succession Act, “personal representative” is defined to mean “the executor or administrator of a deceased person.” An administrator is further defined to mean a “person to whom a grant of letters of administration has been made under the Act.” According to *Blacks Law Dictionary (9th Edition)* administration of an estate means, “*the management and settlement of the estate of an intestate decedent, or of a testator who has no executor, by a person legally appointed and supervised by the court.*” It further provides that:

“Administration of an estate involves realizing the movable assets and paying out of them any debts and other claims against the estate. It also involves the division and distribution of what remains.”

18. *W.M. Musyoka* in his book entitled “*A Casebook on the Law of Succession*” *LawAfrica (2010)* takes the same view of the duties and responsibilities of an administrator of the estate of a deceased person, see chapter 15 from pages 537 -543. It is further clarified in the said chapter that any expenses properly incurred in the course of or which are necessary for the due administration of the estate are charged to the estate. The administrator does not have to incur any personal expense or burden in his capacity as administrator.

19. It is my opinion, therefore, that what the decree of the Magistrate’s Court required of the Applicant to do was perfectly within the duties and responsibilities of a personal representative of the estate of a deceased person. The Applicant was not required to satisfy the decree from her own pocket but from the assets of the estate of her deceased husband. It has not been claimed by her that the assets of the estate are insufficient to satisfy the decree at once or even by instalments. No application to date has been made for payment of the decretal amount by instalments. In fact, no appeal has ever been preferred against the said decree.

20. In the circumstances of this case, it is not tenable for the Applicant to allege that she is apprehensive that the decretal amount may be irrecoverable from the Respondent should her appeal succeed. I say so because there is no appeal against the decree for payment of the money which was found to be due to the Respondent in Embu CMCC No. 260 of 2008. In that case, the question of recovery would not arise.

21. It is also very doubtful if a stay of execution of a decree is available to a litigant who has not appealed against that decree. It would not serve any useful purpose to grant such stay when the main decree has not been appealed against. Justice G.V. Odunga in his book “*Digest on Civil Case Law and Procedure*” *LawAfrica (2006)* in para 956A states as follows:

“A party cannot be allowed to appeal from execution process when he failed to appeal from the judgement which gave rise to the proceedings which he intends to appeal from”

The case attributed to that proposition is an unreported case of ***Sophia Lenya Vs Kenya Armed Forces C. Association, per Warsame J (as he then was) in Kisumu High Court Misc Appeal No. 1 of 2004.***

22. In the case of *Raymond M. Omboga Vs Augustine Pya Maranga, Kisii HCCA No 15 of 2010, Makhandia J (as he then was)* made the following observation in a matter whose facts were very different from the current one:

“The court cannot see how it can order the stay of a decree that is not the subject of the appeal...”

23. The ultimate effect of granting a stay of execution process would be to stay execution of the primary decree which has not been challenged on appeal. It would be a way of obtaining stay of a decree through the back door when such decree is not subject to challenge by way of appeal.

24. It is noted that no evidence was tendered on the medical condition of the Appellant nor was any evidence tendered on her being on medication. Assuming in the Applicant’s favour that she is on medication that by itself would not establish substantial loss. She may still carry her medicine along and should she require additional medical care, it is a matter of judicial notice that medical care is available within prison facilities. Any specialized care may still be obtained in medical facilities outside the prison facility.

25. The upshot of the foregoing is that the Applicant has failed to satisfy the first requirement for the grant of stay of execution under ***Order 42 Rule 6 of the Civil Procedure Rules*** on substantial loss. In that case, it is not necessary to consider the issue of security for the due performance of the decree because both requirements must be satisfied for one to succeed on such application.

26. It is therefore my opinion, and I so hold, that the application dated 17th August, 2016 has no merit and the same is hereby dismissed with costs to the Respondent.

27. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 7th day of MARCH 2017

In the presence of

Ms Njeru for the Appellant

and Mr Dickson Muriuki the respondent in person.

Court clerk Njue

Y.M. ANGIMA

JUDGE

07.03.17