Patel v Shah (Civil Application E174 of 2025) [2025] KECA 1259 (KLR) (11 July 2025) (Ruling)

Neutral citation: [2025] KECA 1259 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E174 OF 2025

K M'INOTI, M NGUGI & LA ACHODE, JJA

JULY 11, 2025

BETWEEN

DR. JANARDAN D. PATEL ..... APPLICANT

AND

BINDI SHAH ..... RESPONDENT

(Application for stay of execution/conservatory orders pending the hearing and determination of an appeal from the ruling and order of the High Court of Kenya at Nairobi (Cherere, J.) dated 6{{^th}} March 2025 in HCCC No. 492 of 2003)

RULING

1. Before the Court is a notice of motion dated 18th March 2025 taken out by the applicant, Dr. Janardan D. Patel, in which he seeks stay of execution of, or conservatory orders against, the ruling and order of the High Court of Kenya at Nairobi (Cherere, J.) dated 6th March 2025, pending the hearing and determination of an intended appeal.

2. The notice of appeal on record is dated 10th March 2025 and indicates that the applicant intends to appeal against the ruling of the Hon. Justice Cherere dated 6th March 2025. The relevant prayer in the application is worded as follows:

> " 3. That pending the hearing and determination of the appeal this Honourable Court be pleased to issue conservatory orders and or stay of execution of the ruling and orders of the High Court of Kenya at Nairobi delivered on 6th of March 2025 in Nairobi High Court Civil Suit No. 492 of 2003."

3. It is plainly obvious to us that the prayer for stay of execution is misconceived in the circumstances of this application in so far as the High Court, by the impugned ruling, dismissed the applicant's application, after it found that it had no jurisdiction to entertain the same. To that extent, and as has been stated time and again, this Court cannot stay an order of the High Court that has merely dismissed

a suit or an application. (See *Western College of Arts and Applied Sciences v E. P. Oranga & 3 Others* [1976] eKLR; *George ole Sangui v Kedong Ranch Ltd* [2015] eKLR; *Exclusive Estates Ltd v Kenya Posts and Telecommunications Corporation & Another* [2005] 1 EA 53; and *F & S. Scientific Ltd. v Kenya Revenue Authority & Another* (CA No. 260 of 2012).

4. Accordingly, we shall only entertain the application as it relates to the prayer for conservatory orders.

5. The relevant background to the application is that on 4th March 2019, the respondent, Bindi Shah, obtained in the High Court judgment against the applicant for Kshs. 21, 535,459.00. On 17th October 2019, the court granted the applicant conditional stay of execution pending appeal. The two conditions required the applicant, first, to deposit within 60 days Kshs. 5,000,000.00 in an interest-earning account in the joint names of the advocates for the parties, and secondly, to secure the balance of the decretal amount by depositing in court a title deed or certificate of lease for a property with a value equal to or more that the balance of the decretal amount.

6. The applicant did not comply with the conditions, but instead applied for variation of the same and for stay of execution. The High Court dismissed that application vide a ruling dated 29th October 2020. Undeterred, the applicant moved to this Court where, on 23rd April 2021, he obtained an order of stay of execution, again, subject to complying, within 30 days, with conditions very similar to those that the High Court had earlier on imposed.

7. This time round, the applicant complied with the order partially: he deposited the requisite amount within the stipulated period, but failed to deposit the title. After the applicant's failure to comply with the two conditions, the respondent successfully applied before the Deputy Register of the High Court for the applicant to show cause why he should not be committed to civil jail for failure to satisfy the decree. The result was that warrants for the applicant's arrest were issued on 31st January 2025.

8. On 7th February 2025, the applicant once again applied in the High Court for an order of stay of execution and for extension of time to comply with the conditions set by this Court. By the ruling impugned in the intended appeal, the High Court held that it had no jurisdiction to vary the conditions set by this Court and that if the applicant was aggrieved by the orders of this Court, his remedy lay in recourse to this Court. Further, the court found that even if it had jurisdiction in the matter, it would have dismissed the application for lack of merit.

9. The applicant was aggrieved and lodged the application now before the Court. In support of the application, Mr. Museve, learned counsel, relied on the applicant's supporting affidavit sworn on 18th March 2025 and written submissions dated 26th March 2025. Counsel submitted that the applicant had already lodged a notice of appeal and was therefore properly before the Court. He contended that the intended appeal was arguable based on the applicant's undated draft memorandum of appeal, in which he faults the High Court for holding that it did not have jurisdiction in the matter; for failure to appreciate the law and evaluate the pleadings and evidence; for punishing the applicant for errors committed by his advocates; for failure to consider the prejudice that the applicant would suffer as a result of committal to jail; and for denying the applicant a fair hearing.

10. The applicant further submitted that the intended appeal will be rendered nugatory if the remedy sought is not granted because he will be committed to jail, which cannot be undone. In support of the application, the applicant cited the decisions of this Court in *Article 19 Global Campaign for Free Expression v Waswa* [2024] KECA 139 (KLR) and *Kingoina v Kingoina & 3 Others* [2024] KECA 129 (KLR) regarding the principles that guide the Court in an application for stay of execution pending appeal.

11. The respondent opposed the application *vide* submissions dated 23rd May 2025. Mr. Kamau, learned counsel, submitted that the application did not lie in view of the negative nature of the orders of the High Court that the applicant was seeking to stay. In support of the proposition, he relied on the ruling of this Court in *Exclusive Estates Ltd v Kenya Posts and Telecommunications Corporation & another* (*supra*). Counsel also contended that the applicant was not deserving of an equitable remedy in view of his failure to settle the decree and to honour previous conditions imposed by both the High Court and this Court. For those reasons, the applicant urged us to dismiss the application with costs.

12. We have carefully considered this application. Conservatory orders are a creation of the *Constitution* of Kenya, 2010 and are available as a remedy in proceedings for enforcement of fundamental rights and freedoms under Article 23(3) of the *Constitution*. (See *Cabinet Secretary, Ministry of Health v Jospeh Aura & 12 Others*, *CA No. E984 of 2024*).

Addressing itself to the distinction between conservatory orders, injunctions and orders of stay of execution, the Supreme Court expressed itself as follows in *Peter Gatirau Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR:

> " The domain of interlocutory orders is somewhat ruffled, being characterised by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of "stay orders" is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light. "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private- party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes." (Emphasis added).

13. This application and the litigation from which it emanated are civil claims between two private citizens with hardly any alleged violation of fundamental rights and freedoms in the High Court that would activate the remedy of conservatory orders under Article 23(3) of the *Constitution*. Rule 5(2) of the Court of Appeal Rules offers the applicant sufficient remedies without straining the clear and unambiguous provisions of Article 23(3).

14. But even if we were to find that conservatory orders were available to the applicant, we would not grant a remedy in his favour in the circumstances of this application, for two reasons.

15. The first is that the applicant has not satisfied us that he has a bona fide intended appeal. At the heart of the applicant's intended appeal is the question whether the High Court can review or vary a decision of this Court. It is clear to us beyond contestation that by dint of the hierarchy of our courts as ordained by the *Constitution*, the High Court has no jurisdiction to review or vary orders of the Court of Appeal. A party who is not able to meet the timelines set by this Court or by the Court of Appeal Rules has a clear remedy under rule 4 of the *Court of Appeal Rules*. There is no occasion for recourse to the High Court to vary an order of this Court.

16. Secondly, we are equally satisfied that by his own conduct, the applicant does not merit the remedy sought. The High Court and this Court have separately granted him orders of stay of execution on

conditions which he has not fulfilled. He is now making a third stab at the same remedy, having failed twice to honour the conditions upon which that remedy was granted to him.

17. For the foregoing reasons we find no merit in this application and the same is hereby dismissed with costs to the respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF JULY 2025.

K. M'INOTI

JUDGE OF APPEAL

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MUMBI NGUGI

JUDGE OF APPEAL

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K. A. ACHODE

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR.