



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWILU, OTIENO-ODEK & KANTAI, J.J.A)

CIVIL APPLICATION NO. NAI. 141 OF 2015 (UR) 115 OF 2015)

BETWEEN

DR. MOSES NJUE GACHOKA T/A KINGS MEDICAL COLLEGE...APPLICANT

AND

DR. FAITH MULI RESPONDENT

(An application for stay of the execution of the ruling and decree of the High Court of Kenya at Nairobi pending the hearing and determination of an intended appeal (Sergon, J.) dated 15th May 2015 in H.C.C.C No. 634 of 2007)

RULING OF THE COURT

1. On 15th May, 2015, the High Court (Sergon, J.) delivered a ruling at Nairobi in HCCC No. 634 of 2007 granting a conditional stay of execution of the judgment and decree of the court. Before the High Court, the applicant sought stay of execution of the decree delivered on 13th March, 2015 wherein judgment for Kshs.3 million was entered in favour of the respondent against the applicant. In granting the conditional stay, the learned judge ordered the applicant to deposit Kshs.1,000,000/- within 30 days and in default the conditional stay to lapse. It is against this order for conditional stay of execution that the applicant intends to appeal to this Court.
2. By Notice of Motion dated 22nd May, 2015, the applicant has moved this Court pursuant to **Rule 5 (2b)** of the Rules of this Court seeking stay of execution of the ruling delivered on 15th May, 2015. In the alternative, the applicant seeks an order that he be allowed to deposit Kshs.500,000/= as security for satisfaction of the decree as opposed to Kshs.1 million as ordered by the High Court. The application is supported by the applicant's own affidavit in which he avers that the learned judge erred in ordering him to deposit Kshs.1 million whereas he had offered to deposit Kshs.500,000/-; that the intended appeal has a high probability of success and if the orders sought are not issued, the intended appeal shall be rendered nugatory; that there is imminent danger execution shall issue; that the applicant shall be prejudiced and gravely suffer if stay is not granted.
3. The respondent in her replying affidavit opposes the application stating that the ruling by the High Court was clear that the applicant should deposit Kshs.1 million in court; that the applicant has failed to deposit the said sum as ordered; that there is no arguable appeal in this matter; that the

- applicant has filed at the High Court a similar application seeking orders for stay of execution; that the applicant is simultaneously engaging this Court and the High Court with similar applications and is gambling with different courts; that the applicant had previously applied for stay of execution before the High Court and conditional stay was granted wherein he was to deposit Kshs.1 million and he now wants to appeal against the order for conditional stay; that the present application is misplaced and lacks any support.
4. At the hearing of this matter, learned counsel Mr. R. J. Ogwe holding brief for learned counsel T.T. Nganga appeared for the applicant while learned counsel Mr. K. K. Bwomote appeared for the respondent. Counsel for the applicant reiterated the contents of the Notice of Motion and its supporting affidavit. It was submitted that the draft memorandum of appeal attached to the supporting affidavit enunciates arguable points, *to wit*, that the learned judge erred both in law and fact in failing to find that the applicant had met the threshold for granting stay of execution; that the judge failed to appreciate that the applicant had shown a good gesture by offering to deposit Kshs.500,000/= and erred by ordering deposit of that Kshs.1 million; the judge erred in law by arriving at a wrong decision in finding that the balance of convenience did not tilt in favour of the applicant. The applicant urged this Court to allow the application and issue stay orders or in the alternative order that the sum of Kshs.500,000/= be deposited as security for the decretal sum.
 6. Counsel for the respondent in opposing the application relied on the replying affidavit emphasizing that the respondent should not be prevented from enjoying the fruits of her judgment; that the applicant had failed to deposit in court the sum of Kshs.1 million as ordered; that the applicant by engaging two superior courts simultaneously is intent on delaying the due process of law.
 7. We have considered the application, the grounds in support thereof, the replying affidavits, submissions by counsel and the law. For this application to succeed, two principles must be satisfied, first that the intended appeal is arguable and second, that unless stay is granted, the appeal or the intended appeal, if successful, would be rendered nugatory - see **Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) [1988] KLR 838; J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. [1982 – 88] 1 KAR 1088 and Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – Civil Application No. 98 of 2002 (unreported).**
 8. In the case of **Stanley Kang’ethe Kinyanjui -v- Tony Keter & 5 others, Civil Application No. NAI 31/2012**, this Court stated, *inter alia*, “that in dealing with ***Rule 5 (2) (b)***, the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge’s discretion to this Court.” The first issue for our consideration is whether the intended appeal is arguable. We note that the intended appeal is against a ruling granting a conditional stay of execution of the judgment and decree of the High Court. The conditional stay was to the effect that the applicant should deposit in court the sum of Kshs.1 million as security for the judgment sum. Is an arguable appeal disclosed when the ruling appealed against is a conditional stay of execution? It is the applicant’s contention that an arguable appeal is disclosed as per the draft memorandum of appeal. The present application and the intended appeal are not against the judgment of the High Court that entered judgment for Kshs.3 million against the applicant. Rather, the intended appeal is against the ruling and order of conditional stay of execution. The grant of a conditional stay is an exercise of discretionary power by the learned judge. The applicant in his submission has not aptly demonstrated to us an arguable appeal on how the learned judge erred in the exercise of his discretionary power in granting a conditional stay. Inability to satisfy the judgment sum or deposit part of the judgment sum as security does not *per se* raise an arguable appeal.
 9. In the supporting affidavit, the applicant states that no matter what efforts he makes, he will not be able to raise the Kshs.1 million deposit and non-compliance with the order will expose him to the

process of execution which will render the intended appeal nugatory. The ruling by the learned judge granted a conditional stay requiring deposit in court of the sum of Kshs.1 million. Deposit in court means that the sum is not to be released to the decree holder until the intended appeal is heard and determined. By depositing in court, the deposited amount is preserved and we are not satisfied that if a judgment debtor deposits the decretal amount or part thereof in court, an intended appeal is rendered nugatory.

10. Further, the conditional stay granted by the High Court was to the effect that if no deposit was made within 30 days from 15th May, 2015, the application for stay would automatically be deemed to have been dismissed. Both learned counsel conceded that no deposit had been made to date. The significance of this is that the applicant's application for stay before the High Court stands dismissed there not having been a review of that order; the issue before us is therefore whether there is anything to stay through the present application. The order that now exists in the High Court is a negative order dismissing the applicant's application for stay. That being the case, there is no positive order made on 15th May, 2015 the execution of which this Court can stay. In the case of **Western College of Arts and Applied Sciences (Weco) vs. Oranga (1976) KLR 63**, where the predecessor to this Court considered a similar application, Law V.P stated as follows:

“But what is there to be executed under the judgment the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In the instant case, the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for stay, to ensue or to restrain by injunction.”

And on his part, Mustafa J.A. who was a member of that bench stated:

“The temporary injunction asked for by the applicant is extraneous to a stay of execution as it does not relate to what the High Court ordered to be done or not to be done and this Court has no jurisdiction to entertain it.”

The above is the situation we find ourselves in.

11. In totality, the applicant has not satisfied us that the intended appeal against a conditional stay order is arguable and that if stay orders are not granted, the appeal shall be rendered nugatory. The present application seeks this Court to stay a negative order and we have stated time and again that the jurisdiction of this Court under **Rule 5 (2) (b)** cannot be exercised to stay a negative order. The upshot is that the Notice of Motion application dated 22nd May, 2015 has no merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 25th day of September, 2015

P.M. MWILU

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR