



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2243 OF 2014

JACKSON ANGWENYI ABUGA.....CLAIMANT

VERSUS

MANMO CO-OPERATIVE SAVINGS & CREDIT SOCIETY LTD.....RESPONDENT

RULING

The respondent, Manmo Co-operative Savings & Credit Society Ltd filed application dated 16th November, 2020 under the provisions of Order 42 Rule 6 of the Civil Procedure Rules and seeking for orders that;

pending the hearing and determination of Nairobi Court of Appeal Civil Appeal No.301 of 2019 – Mamno Sacco Ltd versus Jackson Angwenyi Abuga there be stay of execution of the warrants of attachment of moveable property issued by this court on 3/11/2020.

The application is supported by the affidavit of Hezron Mose and on the grounds that the claimant has commenced execution against the respondent and has appointed M/S High Class Auctioneers and such process is through the attachment of the respondent's property including desks, chairs, cabinets and computers.

The execution is illegal as the claimant passed away on 8th May, 2020 and no application has been filed to substitute him with his legal representatives, administrators or executors.

The respondent has filed the instant application at the earliest opportunity and without delay.

The respondent has filed an appeal against the judgement of the court and which has high chances of success and if the orders sought are not granted the same shall be rendered nugatory as evidence in Nairobi Court of Appeal No.301 of 2019.

In his affidavit, Mr Mose avers that he is the chairperson of the respondent and conversant with the suit and in support of the application seeking stay of execution pending the hearing and determination appeal filed by the respondent in **Nairobi Court of Appeal Civil Appeal No.301 of 2019 – Mamno Sacco Ltd versus Jackson Angwenyi Abuga**. In the interests of justice the instant application be allowed.

In reply, the claimant filed Replying Affidavit of Elijah Bitange Mageto Advocate and who avers that he has been in the conduct of this matter on behalf of the claimant and by judgement delivered on 26th April, 2019 the order awarded the claimant Ksh.1,240,578.

The claimant died on 8th May, 2020 and at the time auctioneers had obtained warrants of attachment but could not proceed with execution due to COVID Regulations barring attachment and lockdown.

Advocate Mageto also avers that he is in the process of filing *ad litem* as he has received all documents necessary and upon such order shall apply for substitution.

The respondent's wants to take advantage of the death of the claimant to fail to pay the judgement amount and the conditions precedent to the grant of an order of stay have not been satisfied. Application should be dismissed with costs.

Parties agreed and addressed the application by way of written submissions.

The respondent submitted that stay of execution of the warrants of attachment of moveable property issued by the court on 3rd November, 2020 should be issued since they have filed **Nairobi Court of Appeal Civil Appeal No.301 of 2019 – Mamno Sacco Ltd versus Jackson Angwenyi Abuga** and which appeal should be allowed to proceed for hearing and determination. The claimant has since died and has not

been substituted pursuant to Order 24 Rule 3(1) of the Civil Procedure Rules. No letters of administration have been obtained and this is admitted by Advocate for the claimant in the Replying Affidavit.

Stay pending appeal should be allowed on terms which are fair and reasonable and this application has been filed without delay and to secure the subject of the judgement, the orders sought should issue.

The claimant submitted that under Order 42 Rule 6 of the Civil Procedure Rules stay of execution shall only issue where an applicant has satisfied the conditions that there shall be substantial loss and there is security for the due performance of the judgement. The respondent has not urged the court with regard to any substantial loss to be incurred where stay is not granted. In the event the filed appeal is not successful, there shall be no loss suffered by the respondent if the judgement sum is paid to the claimant.

The mere filing of an appeal is not proof of substantial loss. The execution process has been put in motion and such arise from the orders of the court and judgement herein and should not be stopped on the sole grounds that there is an appeal which has been filed.

A successful litigant is entitled to the fruits of his judgement and as such should be protected by the court. no security has been offered in the event the appeal is not successful and in this regard where stay of execution is allowed, for the due performance of the judgement such security should be made. Half the decretal sum should be paid to the estate of the deceased claimant.

Determination

The respondent has relied on the provisions of Order 42 Rule 6 of the Civil Procedure Rules to urge its application seeking stay of execution pending the hearing and determination of **Nairobi Court of Appeal Civil Appeal No.301 of 2019 – Mammo Sacco Ltd versus Jackson Angwenyi Abuga** which was filed following judgement herein on 26th April, 2019.

Order 42 Rule 6(1) of the Civil Procedure Rules provides that;

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.

Sub-rule 6(2) on the other hand requires as follows;

(2) 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 1st 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 1st Applicant.

There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to which includes;

- i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
- ii. The application is brought without undue delay and
- iii. 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.

In the case of **Charles Kariuki Njuri v Francis Kimaru Rwara (suing as Administrator of Estate of Rwara Kimaru alias Benson Rwara Kimaru (Deceased) [2020] eKLR** the court held that;

The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.

What then shall be the substantial loss resulting to the respondent if stay of execution is not allowed? And has the application been filed without delay? what security for the due performance of the decree has been offered?

The respondent's sole reason for moving the court seeking stay of execution is due to the execution proceedings following the warrants of attachment of moveable property issued on 3rd November, 2020 to M/S High Class Auctioneers and that the claimant has since died and there is no substitution and or representatives or administrators appointed over his estate.

However, the gist of the application herein is Order 42 Rule 6 and not Order 24 Rule 3 as submitted.

An applicant seeking orders pursuant to Order 42 Rule 6 must satisfy the conditions set out therein. Even where the claimant's advocate has admitted to the demise of the claimant, section 24(4) of the Employment Act, 2007 make provisions which secure the benefits due to a deceased employee.

On the judgement of the court, there are valid orders and directions for the payment of an award amounting to ksh.1,240,578. Even where there is an appeal filed, the execution process is valid and the court finds no matter established with regard to what loss the respondent shall suffer where the stay of execution orders are not issued.

The other requirement is that an application seeking for stay of execution should be filed without delay. judgement issued on 26th April, 2019. The instant application is filed on 16th November, 2020 a period of over one (1) year since. There is inordinate delay. such cannot be justified for the death of the claimant. He ought to have enjoyed the fruits of his judgement before death.

The appeal in **Nairobi Court of Appeal Civil Appeal No.301 of 2019 – Mamno Sacco Ltd versus Jackson Angwenyi Abuga** was only filed on 5th July, 2019 and nothing was done to secure it before this court until and after the 5th May, 2020 when the claimant died.

Further to the above, Order 42 Rule 6 requires an applicant to offer such security for the due performance of such decree or order as may ultimately be binding on him where the appeal is not successful. No such security has been offered herein.

On the analysis above, taking into account that the claimant Advocate has confirmed the demise of the claimant, there being no substitution, the orders for stay of execution lacking in merit save there exists **Nairobi Court of Appeal Civil Appeal No.301 of 2019 – Mamno Sacco Ltd versus Jackson Angwenyi Abuga** and which should be allowed to proceed on its merits, conditional stay of execution is imperative.

Accordingly, these shall be stay of execution herein on condition the respondent deposits the total decretal sum in court within thirty (30) days from the date hereof and failure to which the orders of stay shall lapse. Each party shall bear own costs.

DELIVERED IN OPEN COURT AT NAIROBI THIS 11TH DAY OF FEBRUARY, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and