



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

ELRC NO.157 OF 2018

(Before D.K.N.Marete)

STEPHEN MAINA GITHAIGA.....CLAIMANT

VERSUS

A.C.K DIOCESE OF MT.KENYA

WEST TRUSTEES REGISTERED1ST RESPONDENT

REV.BISHOP JOSEPH MWANGI KAGUNDA.....2ND RESPONDENT

RULING

This is an application dated 30th October, 2020 and comes out thus;

1. *That this Application be certified as urgent, be heard on a priority basis and service thereof on the Respondents be dispenses with.*
2. *That this Honourable court do order a stay of execution of the Judgment and decree made by this Honourable court on the 4th February, 2020, pending the hearing and final determination of the Applicant's Civil Appeal No.86 of 2020.*
3. *That the Honourable court to order a stay of execution of the judgment and the consequent decree made by the Honourable trial court on the 4th February, 2020 pending the hearing and final determination of this application.*
4. *That costs of this Application be in the cause.*

It is grounded as follows;

- a) *The Respondents obtained judgment against the Claimant/Applicant herein and are in the process of obtaining a Ruling on the 2nd Respondent's Bill of costs and hence an imminent danger of executing the decree as to costs thereof.*
- b) *That the Appellant/Applicant being aggrieved by the judgment has lodged his Notice of appeal before this Honourable Court and an application for extension of time to file the memorandum and record of appeal in the Court of appeal (Civil Application No.101 of 2020).*
- c) *That if execution occurs and/or further proceedings conducted in the matter, the Applicant's appeal as well as this application will be rendered nugatory and the Applicant will suffer irreparable loss and damage.*
- d) *There was clearly an error on the face of the record in entering judgment, as is, against the Applicant as has been set out in the draft memorandum of appeal in the Civil Application 101 of 2020.*
- e) *The application has been brought without undue delay.*
- f) *The applicant has an arguable appeal pending with high probability of success.*

The Respondent, in a Replying Affidavit sworn on 16th March, 2021 avers that the application vexatious, non-meritous and an abuse of the court process.

The Claimant/Applicant's case is set out in the application and its Supporting Affidavit sworn on 30th October, 2020.

This is further amplified by a Supplementary Affidavit sworn on 19th March, 2021, ostensibly to clear the scene after receipt of the response. Here, the applicant avers that her counsel's law firm is properly on record vide a consent dated 26th October, 2019, executed by the outgoing and current counsels. This was filed on the same date.

It is the Claimant's further case that the delay in bringing this application is occasioned by the daliance of his earlier counsel, B.G.Mwangi to get up the appeal which came to his knowledge far much later. It is trite law that a litigant cannot be punished for the mistakes of counsel and therefore seeks indulgence and benefit of the law from this court.

Other reasons for delay is the raising of instruction fees to the newly appointed attorney. This was occasioned by his joblessness and the impossibility of getting any paying assignment brought about by the vastness of Covid-19. This also resulted in close of courts and consequential slow down.

Further, the applicant in his Supplementary Affidavit worn on 19th March, 2021 puts his case as follows;

- That he has filed an Application No.101 of 2020 at the Court of Appeal seeking leave to file a Memorandum and Record of Appeal out of time.
- He has filed the Notice of Appeal within the stipulated time but his outgoing counsel failed to put it on record in the stipulated time.
- That he intends to pursue an expeditious litigation of his appeal once it is okayed by court.
- That his application for leave is properly before the Court of Appeal therefore legitimizing his intended Memorandum of Appeal now in draft.

The 2nd Respondent/Decree holder's case faults the application on the following grounds.

- a) *The counsel herein is not properly on record as judgment herein was since delivered and on record was the firm of B.G Mwangi & Co.Advocates and no leave sought by counsel to come on record and hence the current motion is a waste of court's time.*
- b) *The application for stay herein offends order 42 rule 6 of the civil procedure rules in that this motion has been filed after a duration of over 1 year and no plausible reasons have given for the unreasonable delay.*
- c) *That there is nothing to stay in the orders of his Honourable court on the 4th February 2020 as the order given is in the nature of a negative order and is incapable of execution.*

It is his further case that there is no substantive appeal on record to warrant an issue of the orders sought. Again, the applicants draft appeal annexed is unsigned, undated and does not bear a case number thereby casting doubt on the keenness of the applicant on the appeal.

In the penultimate, the motion becomes an abuse of the process of court in that the Notice of Appointment of advocate at the court of appeal is irregular. This comes out thus;

6. *That the current motion is otherwise an abuse of the court process as among the documents filed as part of the current application being, a notice of appointment of advocates at the court of appeal dated 27th October 2020 and an index to the notice of motion dated 27th October 2020 have just been attached and have not been marked as annexures in the supporting affidavit by the applicant and is therefore not clear whether they form part of the motion or not.*

The Claimant/Applicant in his written submissions dated 6th April, 2021 submits a case of substantial loss on his part in the event of non-grant of the orders sought. The cause at the Court of Appeal and Nyeri Civil Application No.101 of 2021 shall be rendered nugatory. He illustrates this by relying on the authority of **James Wangalwa and another vs Agnes Nallaka Chesto (2012) eKLR** while citing the case of **Mukuma vs Abuoga** as;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

The Claimant/Applicant further comes in and submits a case of explained delay and prays that this court exercises its discretion and not punish him on grounds of such explained delay.

As to an offer of security, a quest of Order 42 rule 6, the applicant submits that this has not been raised as a defence and further prays that this court exercise her discretion to bring this in his favour, bearing in mind the circumstances of his life and case.

The Applicant submits that he has an arguable appeal.

“..it is our contention that substantial loss may result to the applicant if the orders of stay are not granted. During the trial, the applicant demonstrated and gave oral evidence to the effect that he is a man of straw which no other means of livelihood having lost his job and had hence moved to court on grounds of unfair termination of employment. Being unemployed as at now, we need no other proof to conclude that the applicant would not be in a position to pay the 2nd Respondent’s costs”.

Further, the Court of Appeal has held that there are 2 conditions which the applicant must satisfy before grant of stay of execution pending appeal in **Civil Application No.206 of 1996 Abok J. Odera vs Kenya Posts & Telecommunication Corporation**. These are;

1. *That the intended appeal is not frivolous, that it has an arguable ground to canvas during the intended appeal;*
2. *The intended appeal of successful would be rendered nugatory if stay of the order is not granted.*

The Respondent/decreed holder in his written submissions dated 13th April, 2021 reiterates his case and submits that there is nothing to stay in the circumstances. This is because the court merely and only dismissed the suit against the 2nd Respondent. This is expressed thus;

In the case of Simon Warui Mwangi & another versus Grace Kuguru Mwangi & 2 others (annexed herewith) Justice E.C Cheronu and in citing other decisions, shed light on what negative orders entailed land went on to further dismiss the application brought before him for stay on such grounds; he stated,

“In a judgment delivered on 29th May, 2020, this court struck out with costs on grounds that the court had not been properly invoked. This court and the superior courts have rendered themselves that for an order of stay to lie, there must be a positive requirement therein which would or could be affected or tampered with by the stay. The Court of Appeal for Eastern Africa in the case of western college of Arts and applied sciences Vs Oranga and others (1976-80) I.K.L.R held 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 Wilson vs Church, the High Court had ordered the trustees of a church to make payment out of that fund. In the instant case, the High Court has not ordered any parties to do anything or to restrain from doing anything or to pay any sum.

“There is nothing arising out of the High Court Judgment for this Court, in and application for stay. It is so ordered”.

The Respondents further submits that in the recent case of **Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 others (2016) eKLR** the Court of Appeal expounded on stay of execution and stated thus;

“In Kanwal Sarjit Singh Dhiman Shah (2008)eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows, “ the 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only. (See western college of Arts & Applied Sciences vs Oranga & others (1976) KLR 63 at page 66 paragraph C”

Lastly, she submits that there is no pending appeal to warrant urgency of stay in an application to file an appeal out of time and that there is no guarantee that it will be granted.

In closing, the Respondent submits that the judgment and orders of court are in their nature negative and therefore there is nothing to stay.

This application comes out in favour of the Applicant. The Applicant has ably explained that the delay in filing of his memorandum of appeal was occasioned by counsel, not himself. Daliance by his former counsel led to this unfortunate state of affairs.

Further, his aspirations towards an appeal were thwarted by mere poverty. He was not able to raise instruction fees for counsel to expeditiously proceed on appeal. He blames unemployment and Novel Covid 19 strictures for this.

The application is brought to court to obviate execution in so far as taxed costs is concerned. It is the Applicant’s case that such execution would negate his intention to appeal. The Respondent argues and submits that the orders of court being negative in nature do not warrant a situation of stay.

This court finds for the application. This is because, like is the case for the Applicant, non-issue of stay orders would derogates his interest and render his intended appeal nugatory. The Respondent would move on to execute for his costs and leave him hanging and breathless. Her argument on negative orders and unsuitability of stay orders is therefore hollow. It cannot stand.

All circumstances and inclinations of the parties respective cases tilts the application in favour of the Applicant.

I am therefore inclined to allow the application with orders that each party bears the costs of their application.

DATED AND DELIVERED AT NYERI THIS 30TH DAY OF JUNE, 2021.

D.K.Njagi Marete

JUDGE

Appearances

1. Mrs.Machira instructed by Machira & Muriuki Advocates for the Claimant/Applicant.
2. No appearance for the 1st Respondent
3. Miss Wambui instructed by H.K.Ndirangu Advocates for the 2nd Respondent.