



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO E 7 OF 2021

VIPINGO RIDGE LIMITED.....APPELLANT

VERSUS

SWALEHE NGONGE MPITTA.....RESPONDENT

RULING

1. The application before me is dated 6th August 2021. It seeks stay of execution of the judgment in Kilifi SPM-ELRC No. 105 of 2020 pending the hearing and disposal of the current appeal. The application is opposed on the grounds contained in the response to the application dated 18th August 2021.

2. On 20th September 2021 when the matter came up for mention for directions, there was concurrence between the parties to canvass the application through written submissions. The submissions were to be filed by 27th September 2021. On his part, although the Respondent was amenable to proceeding by way of written submissions, he through his advocates on record indicated that he will rely on the grounds of opposition only. He was not going to file submissions.

3. The thrust of the opposition to the application, if I understand it well, is that since the Applicant has not first moved the trial court for stay of execution pending appeal as is required under Order 42 rule 6 of the Civil Procedure Rules (Order 42 rule 6 of the CPR), the current application is premature with the consequence that the court is deprived of the requisite jurisdiction to entertain it. Further, the Respondent takes the view that to file this motion in disregard of the foregoing requirement of law deprives the Respondent the opportunity to exercise his right of appeal to this court in respect of whatever orders the trial court would have made on the application.

4. But the Respondent also raises other grounds in opposing the current motion. First, he is of the view that since the decree on appeal is a money decree, no substantial loss will arise if execution proceeds during the pendency of the appeal. This type of loss, as has sometimes been indicated, is capable of quantification and compensation.

5. Further, the Respondent avers that the Applicant has not offered security for the performance of the decree in the event it loses the appeal. Because of this failure, the court should decline to order stay of execution.

6. The Employment and Labour Relations Court (Procedure) Rules, 2016 do not directly provide for an aggrieved party in a cause to seek stay of the decision pending appeal. However, rule 13 of the rules requires that all issues related to execution and or enforcement of the court's decisions be addressed in accordance with the rules made under the Civil Procedure Act. These, in my view include stay of enforcement of the court's decisions. Therefore, the current application in so far as it invokes the provisions of Order 42 rule 6 of the CPR is properly premised (see Rika J in *Benedict Ojou Juma & 10 others v A. J. Pereira & Sons Limited [2016] eKLR*).

7. The Respondent argues that the application as presented is premature, the Applicant having not exhausted the procedure under Order 42 (6) of the CPR. The rule requires that such application be canvassed before the trial court first.

8. It is on record that the Applicant filed but withdrew an application for stay of execution pending appeal before the trial court. This was after the trial court declined to grant the Applicant interim stay of execution of its decree pending the canvassing of the motion inter-partes. From the record, the trial court only certified the application as urgent and ordered that it be served on the Respondent for 19th August 2021. The Applicant felt that this action by the trial court exposed it to the danger of execution in the intervening period. Consequently, the Applicant elected to withdraw the said motion and file the current application in the appeal.

9. In the Respondent's view, such action in effect meant that the Applicant had applied for stay of execution pending appeal to the appellate court without first applying to the trial court. This action deprives the court of jurisdiction to entertain the application.

10. I have carefully considered the Respondent's position vis a vis the provisions of Order 42 rule 6 of the CPR. The relevant provision reads as follows: -

“ 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.”

11. A plain reading of the provision requires that before an Applicant seeking stay pending appeal moves the appellate court for stay orders, he/she must first have applied for the orders before the trial court. And there must be evidence that the trial court pronounced itself on the application whether it granted or declined to grant it.

12. It appears to me therefore that it would be irregular for such applicant to move the appellate court without first approaching the trial court on the matter and the trial court pronouncing itself on it one way or the other. Indeed, this is the position expressed in ***Pius Mbithi & another v Daniel Mutiria & another [2017] eKLR*** referred to by the counsel for the Respondent in the current application.

13. This rule is however silent on whether the application for stay of execution must only be presented in writing. Of significance is that Order 42 (6) (5) empowers an applicant to informally apply for stay of execution pending appeal so long as the application is presented immediately upon delivery of judgment.

14. In this case, although the Applicant withdrew the formal application for stay pending appeal before the trial court, the record shows that the said Applicant had, on 8th July 2021 informally applied for and was granted 30 days stay of execution and leave to appeal. Further, before the decision to withdraw the motion before the trial court, the Applicant actually applied for temporary stay orders but they were declined. In my view and having regard to the import of the provisions above on the right to move the court for stay informally, these applications satisfied the requirements of Order 42 rule 6 of the CPR that an application for stay be first lodged before the trial court and the court pronounces itself on it. I will therefore decline to dismiss the current application on the basis of the aforesaid objection.

15. What I must then consider is whether the Applicant meets the conditions for stay of execution pending appeal as stipulated under Order 46 rule 6 of the CPR. The rule stipulates as follows: -

“No order for stay of execution shall be made under sub-rule (1) unless—

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.”

16. A cardinal requirement for grant of stay of execution before appeal is that the Applicant demonstrates the possibility of suffering substantial loss in the event that the orders sought are not granted. However, the term substantial loss has no fixed meaning. As was observed in ***Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation) (2004) 2 E.A.***, the term does not represent any particular mathematical formula. It can only be understood as denoting any form of loss, great or small, that is of real worth or value.

17. The term must not therefore be understood as referring only to that loss that is disproportionately high. In my view, it denotes any loss however big or small that may not be recoverable.

18. Consequently, in money decrees, one of the determinants of the risk of substantial loss is the financial position of the parties to a pending appeal. Where a Claimant for instance seeks to execute a decree that is the subject of a pending appeal and his/her means to make good the amount in the event of the appeal going against him are unknown or in doubt, the court should take this into account in deciding whether to stay enforcement of the decree until the appeal is heard and determined. Indeed, this was considered in ***Century Oil Trading Company Limited vs. Kenya Shell Limited Nairobi [2008] eKLR***, when the court stated:

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal.”

19. At paragraph 16 of the affidavit in support of the application for stay of execution, the Applicant expresses the fear that if execution is allowed to proceed and the current appeal succeeds the chance of recovery of the decretal sum is not guaranteed exposing the applicant to the danger of real loss. With these averments, it would have been reasonable for the Respondent to file an affidavit of means to demonstrate his ability to refund the cash. This is the position that was taken in Civil Application No. 238 of 2005; ***National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike*** in which the Court of Appeal expressed itself as follows: -

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant

expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

20. In the absence of evidence on the means by the Respondent to refund the decretal sum in the event of the appeal succeeding, the court is inclined to hold that there is the risk of the Applicant suffering substantial loss should its appeal succeed.

21. On whether the application was filed timeously, it is clear that the motion to this court was presented on 6th August 2021. This was before the lapse of one month after judgment was delivered. I therefore find that the application was filed without undue delay.

22. The court is alive to the duty to ensure that a decree holder enjoys the fruits of his/her judgment without undue hindrance. However, the court is also alive to the obligation to ensure that an appeal that has been filed is not rendered an academic exercise should the appellant succeed after the decree has been enforced and the hope for recovery of the amounts paid has been dashed. These two interests must be balanced. Taking this judicial requirement into consideration, I will order that the decretal sum be deposited in a joint interest earning account in the names of the lawyers on record for the parties within 21 days of this ruling. The parties to agree on the financial institution to house the escrow account. In default of compliance, the Respondent be at liberty to execute.

23. The Respondent is awarded costs of the application.

Dated, signed and delivered on the 6th day of October, 2021

B. O. M. MANANI

JUDGE

In the presence of:

N/A for the Claimant

Miss Katuma holding brief for Mwangunya for the Respondent

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B O M MANANI

JUDGE