REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1614 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

PETER MBUTHIA GITAU.....CLAIMANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

Before me for determination is an application for stay of execution filed by the respondent on 14th October 2019 under certificate of urgency. The application is supported by the grounds on the face of the application and in the supporting affidavit of WILSON GACONI, an officer of the applicant working in the Human Resource Division. In a nutshell, the grounds in support of the application are that the applicant is aggrieved by the judgment of this court delivered on 26th July 2019, that the oral stay of 30 days granted at the time of delivery of judgment has lapsed and that the applicant had commenced the process of appeal by filing a notice of appeal on 13th August 2019. That the applicant applied for certified copies of proceedings and judgment by letter dated 7th August 2019.

The applicant further states that it is exposed to imminent execution as the claimant has already sent a demand notice for payment of the decretal sum. The applicant states it will suffer prejudice should execution happen as it would suffer substantial loss as well as loss of reputation which may hamper its statutory mandate of revenue collection. Further that the appeal would be rendered nugatory as there are high chances of the appeal succeeding as is evident from the grounds of appeal in the draft notice of appeal filed with the application herein.

The claimant filed a replying affidavit on 18th October 2019 alleging that the appeal is incurably defective and is intended to delay execution of the decree as the respondent had 30 days stay within which period it failed to file formal application for stay of execution. That when Counsel for the claimant sent the applicant a draft decree for approval on 21st August 2019 the applicant did not respond prompting counsel for the claimant to forward the same to court in engrossment, signing and signature.

The claimant further deposes that the applicant did not respond to the demand letter sent on 30th August 2019 notifying the applicant of intention to execute should payment not be made with 7 days. That it is only after commencing execution proceedings by way of issuance of notice to show cause which was fixed for hearing on 19th November 2019 that the applicant filed this application to scuttle the execution proceedings.

On the notice of appeal, the claimant deposes it is defective for having been served out of time without leave of the court. The claimant deposes that the appeal is a non-starter as it does not disclose triable issues, does not prove substantial loss and has been made after inordinate delay and without offering security. The claimant deposes that he is in a position to refund the decretal sum should the appeal succeed and has set out proof of his ability as follows –

i. Motor vehicle registration number KBL 476K valued at Kshs.600,000/=.

ii. Motor vehicle registration number KCG 096V valued at Kshs.850,000/=.

iii. Motor vehicle registration number KCH 412B valued at Kshs.850,000/=.

iv. Proper L.R No GATAMAIYU/KAGAA/1574 valued at Kshs.2,000,000/=.

v. Proper L.R No GATAMAIYU/KAGAA/1573 valued at Kshs.1,500,000/=.

vi. Proper L.R No GATAMAIYU/KAGAA/1526 valued at Kshs.1,500,000/=.

He deposes that the value of the said assets is sufficient to cover the decretal sum. That he is a Kenyan citizen living and working in Kenya and has no intention to leave the jurisdiction of this court. He prays that the application be dismissed.

In the further affidavit of WILSON GACONI filed on 28th October 2019, he deposes that the notice of appeal was lodged on 8th August 2019 within time and it is the court registry that did not have it signed until 13th August 2019. It denies delaying the execution of the decree while reiterating the averments in the supporting affidavit filed with the application.

Parties disposed of the application by way of written submissions.

Determination

I have considered the application together with the grounds and affidavits in support thereof. I have also considered the replying affidavit filed in opposition to the application and the submissions filed by the parties.

The Application before this court dated 14th October 2019 and filed on 15th October 2019 seeks the following orders:

1. That service at first instance be dispensed with and this application be certified as urgent.

2. That there be a stay of execution of the decree pursuant to the judgment delivered on 26th July 2019 by Hon. Lady Justice Linnet Ndolo as read by Hon. Lady Justice Maureen Onyango pending the hearing and determination of this application.

3. That there be a stay of execution of the decree pursuant to the judgment delivered on 26th July 2019 by Hon. Lady Justice Linnet Ndolo as read by Hon. Lady Justice Maureen Onyango pending hearing and determination of the Intended Appeal.

4. That the costs of this application be provided for.

The principles for grant of stay are set out in Order 42 Rule 6 of the Civil Procedure Rules as follows

[Order 42, rule 6.] Stay in case of appeal.

1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

2. No order for stay of execution shall be made under subrule (1) unless—

a. 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.

3. Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

4. For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

5. An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

6. Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

In addition to the principles set out in Order 42 Rule 6 of the Civil Procedure Rules, the Court of Appeal has set principles for stay of execution in several decisions. The principles have been synthesised as follows; that the appeal or intended appeal must be arguable and not frivolous; and that the applicant must prove that the appeal would be rendered nugatory should stay not be granted. Refer to the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Others (2014) eKLR**.

Further in the case of **Nelson Andai Havi v Law Society of Kenya and 3 Others (2018) eKLR**, the Court of Appeal opined thus –

"The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

i. the appeal or intended appeal is arguable and not frivolous; and that

ii. unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory."

In the present application it is not for this court to determine whether the appeal is arguable as this is a preserve of the appellate court. The issue of security for the performance of the decree which goes hand in hand with the issue whether or not the appeal would be rendered nugatory is however relevant. In the case of **Winfred Nyamira Maina v Peterson Onyiego Githana (HCCC No. 576 of 2012)** Gikonyo J. held that –

"The substantial loss under Order 42 Rule 6 of the Civil Procedure Rules especially where money decree is involved lie in the inability of the Respondent to pay back the decretal sum should the appeal succeed. The legal burden of proving this inability lies with the Applicant and it does not shift. But it is not enough for the Applicant to merely state that the Applicant cannot refund the sum paid. There must cogent evidence which show the inability or financial limitation on the part of the Respondent to refund the decretal sum. And, it is only when such prima facie evidence is laid before the court by the Applicant that the evidential burden shifts to the Respondent."

Further in the case of **Kenya Shell Limited v Kiburu (1986) LKR 410, the Court of Appeal** stated as follows –

"It is not sufficient by merely stating that the sum of Shs.20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment. The applicant has not given to court sufficient materials to enable it to exercise its discretion in granting the order of stay."

In this application the applicant has not offered to deposit security of the performance of the decree. I however take judicial notice that the applicant is a public body which is by statute charged with revenue collection and the sum of Kshs.1,416,000 would be easily paid to the claimant should the appeal fail.

However, the same holds for the claimant who has demonstrated that he is not a man of straw and that he would be able to refund the decretal sum should the appeal succeed. I therefore find no proof of substantial loss that would be suffered by the applicant should its appeal succeed.

The other issue for determination that has been raised in the pleadings and submissions is whether there was inordinate delay by the applicant in filing this application. The judgment herein was delivered on 26th July 2019 and the applicant was granted 30 days stay. The stay lapsed on 25th August 2019 but it was not until 15th October 2019, almost 2 months later, that the applicant filed the instant application. The applicant has not sufficiently explained the delay which in total amounts to almost 3 months from the date of delivery of judgment on 26th July 2019. The only explanation given by the applicant at paragraph 11 of the further affidavit of WILSON GACONI is that there has not been any undue delay on filing the Application for Stay as the Respondent, being a state corporation needed to gather and disseminate further instructions for appeal and the application was therefore filed timeously.

The applicant herein has been chided enough times by the courts for giving this lame excuse for delay.

In **Kenya Revenue Authority v Habimana Sued Hemed &. Another Civil Appeal No. 34 of 2008,** the Court of Appeal held that –

"We hold the view that the Kenya Revenue Authority is not an organ of the Government as contemplated under the Government Proceedings Act. There are three arms of Government, and they are clearly defined and recognized universally over the ages. We do not need to redefine them here. Kenya Revenue Authority collects taxes for the Government, and they do a good job of it. It is nonetheless an autonomous, corporate, statutory body specifically with power to sue and be sued."

The Honourable Judges of the Court of Appeal went further to hold that –

"We cite with approval the words of Mbogholi Msagha J in Gurdoba Enterprises Limited vs Kenya Revenue Authority (Civil Case No. 676 of 1998), where he opined that;

"Kenya Revenue Authority ...must submit itself to the rigors of litigation and stop operating under the shadow of the Government when it comes to legal proceedings."

Ojwang J (as he then was) faced with a similar situation in

Menginya Salim Murgani v Kenya Revenue Authority, HCCC No. 1139 Of 2002) *was of similar persuasion when he stated in reference to the appellant:*

> "The body parliament intended was a responsible and accountable one, empowered to discharge its legal obligations without resorting to reserved privilege when obligations fall upon it".

I find that there was inordinate delay in filing this application. It is not lost to his court that in the judgment herein against which the applicant intends to appeal, delay was one of the reasons the court granted compensation to the claimant, which the applicant has cited as one of the grounds of appeal. In the judgment, Ndolo J. stated as follows at paragraph 36 and 36 of the judgment in this case –

> **"26. During the trial, the Court sought to know from the Respondent's Assistant Manager, Human Resources Division, Frankline Kiogora Gitonga, the reason for the delay in dealing with the Claimant's case and the simple answer was that the case was complex. The Respondent did not bother to give further explanation on the delay, which was in clear violation of its own Code of Conduct, whose Section 8.4.7 set 6 months as the upper time limit for determination of cases of suspension.**
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> **36. I therefore award the Claimant twelve (12) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's long service with the Respondent and the Respondent's callous and irresponsible conduct in handling his case."**

On the issue whether the notice of appeal on record is valid, the claimant argues that the notice of appeal does not state that the applicant intends to appeal against either the judgment and or orders of this court issued on 26th July 2019. That the respondent cannot seek a stay of orders and or judgment which in any event it is not appealing and or has no intention to appeal against.

The applicant on the other hand urges that it is evident from the record that the Notice of Appeal and a letter requesting for certified typed copies of the proceedings were filed on 7th August 2019 and 9th August 2019 respectively which is within 14 days of the Judgment which was rendered on 26th July 2019. Further that the Deputy Registrar of this Court did not sign and seal the Notice of Appeal until the 13th of August 2019 despite the documents having being received on 7th August 2019. That the Notice of Appeal lodged in this Court is therefore properly filed and instituted as it was filed and served within the statutory 14 days.

The applicant submitted that the Notice of Appeal served as adequate notice that the Applicant was dissatisfied with the Judgment of the Court and intended to appeal.

That the Notice of Appeal, is not incurably defective as the Court of Appeal Rules under Rule 4 allows for extension of time limited by the Rules for doing any act authorized or required by the Rules. Therefore, any defect that the Respondent has raised can be cured under the Rules.

The applicant relied on the case of **Philip Keipto Chemwolo & Another v Augustine Kubende (1986) eKLR**, where the court held that –

> "I think a distinguished equity Judge has said:
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> > "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits. "
>
> I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline. In this case, the appellants offered to pay the costs. The respondent will not agree."

The applicant argues that the claimant has not adequately demonstrated that this Application is defective and neither has he moved the Court under the Civil Procedure Rules or under Rule 84 of the Court of Appeal Rules to strike out the Notice.

I have looked at the record and note that the notice of appeal was received in the registry on 7th August 2019 and signed by the Deputy Registrar on 13th August 2019, the very date it was served upon the claimant's counsel. I therefore find no defect on the same as it was filed and served within timelines as provided in the rules. The other reason raised by the claimant being defect in relation to the prayers sought therein is a matter for the appellate court to determine.

Conclusion

Having addressed all the issues raised in the application, affidavits and submissions of parties, it is my considered opinion that the orders sought by the applicant herein are not deserved due to delay in filing the application for stay of execution which has not been adequately explained and the applicant's failure to establish that it would suffer irreparable harm or that the appeal would be rendered nugatory, this being an appeal against a monetary decree, which as I have held above, the claimant has demonstrated ability to refund should the appeal succeed. In reaching this conclusion I have taken into account the fact that the claimant ha a valid decree, the fruits of which he is entitled to enjoy.

The result is that the application is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF FEBRUARY 2020

MAUREEN ONYANGO

JUDGE