



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
PETITION NO. 18 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

ONDICHO MESHACKRAKAMBA

PETITIONER

VERSUS

KULDIP SINGH

1ST RESPONDENT

PATRICK MUGO

2ND RESPONDENT

DAVID NYACHOTI

3RD RESPONDENT

JOSEPH AMOLO

4TH RESPONDENT

ST. EDWARD'S SCHOOL LIMITED

5TH RESPONDENT

RULING

Judgment herein was delivered on 29th November 2019 in the presence of the parties. Ms. Rijeholding brief for Mr. Muthuri for the respondent applied for stay of execution for 30 days which was not opposed by the claimant/decreed holder and was granted. The 30 days expired without the respondents either settling the decretal sum or seeking extension of stay orders.

After expiry of the 30 days stay of execution granted to the respondents, the claimant/decreed holder instructed JOEL MWANZIA V T/A BETABASEAUCTIONEERS to execute the decree. The Auctioneer obtained warrants of attachment and proclaimed against the 1st and 2nd respondents/judgement debtors on 24th and 27th January 2020.

In the applications dated 21st and 23rd January 2020, the respondents/applicants seek the following orders

Application dated 21st January 2020

1. Spent.
2. That there be a temporary stay of execution herein pending hearing of prayers number 3 and 4 herein.
3. That there be a stay of execution herein pending hearing and determination of intended Appeal.
4. That this Court do extend time within which to file Notice of Appeal and Appeal itself.
5. That the costs of this application be provided for.

Application dated 23rd January 2020

1. Spent.

2. That pending hearing of the application dated 21st January, 2020, the Court do grant temporary stay of execution in terms of prayer numbers 2 thereof.

3. That the costs of this application be in the cause.

In the grounds and affidavit in support of the application, the 1st respondent states that at the time judgment was delivered, he was out of the country and the School was closed so he was not able to instruct his advocates to appeal, although he was duly notified of the outcome of the judgment. That they have deposited the decretal sum in court and secured the decree.

The respondents/judgment debtors pray that the court grants the orders sought.

The claimant/decree holder filed a replying affidavit sworn on 31st January 2020 in which he deposes that the application is a sham intended to deny him the fruits of his judgment, that it is within his knowledge that at the time judgment was delivered the 1st respondent was not out of the country, that it is further within his knowledge that the 1st respondent shut down and sold the 5th respondent (the School) in 2019. It is therefore not true that at the time of judgment the School was in recess as pleaded by the 1st respondent, as the School is no longer in operation. That the execution can therefore not disrupt the operations of the 5th respondent as pleaded.

The claimant pleads that the respondent squandered the stay of 30 days granted by the court, that defence Counsel confirmed having notified all the respondents about the judgment. That he engaged the respondents who agreed to pay the decretal sum as admitted in the 2nd respondent's affidavit.

That the issue of appeal came up only after execution process commenced.

The claimant/decree holder deposes that on the date he accompanied the Auctioneer to proclaim on 22nd January 2020, they were intimidated by security guards at the 1st respondent's residence and criminally handled, arrested and driven to parklands Police Station but were released after the 1st respondent/judgment debtor who had caused their arrest failed to show up. That it is misleading for the defence to allege harassment by the decree holder.

The claimant/decree holder deposes that he will be prejudiced should orders sought in the application be granted as the only intention of the respondents is to delay execution.

Joel Mwanzia V, the Auctioneer also filed a replying affidavit sworn on 3rd February 2020 where he deposes that he received warrants of execution from this court on 21st January 2020 but was unable to proclaim on 22nd January 2020 after the decree holder and himself were mistreated, arrested by two policemen and taken to Parklands Police Station, corroborating the averments of the claimant/decree holder.

He deposes that they were kept at Parklands Police Station from 4 pm to 6.30 pm when the OCS released them following the failure of the 1st respondent to show up.

He deposes that he managed to proclaim on 24th January 2020. That on this day he first reported to Parklands Police Station and to the local Chief who accompanied him and the decree holder to 1st respondent's residence. That he also proclaimed against the 2nd respondent's/judgment debtor's goods on 27th January 2020.

In the written submissions by Counsel for the respondents/applicants, he submits that this court ordered stay of execution conditional upon deposit of decretal sum which the respondents complied with. That Section 7 of the Appellate Jurisdictions Act gives this court power to extend time for filing notice of appeal.

Determination

I have considered the two applications and the affidavits both in support and in opposition thereto. The only issue for determination is whether the applicant has justified grounds for delay in filing notice of appeal to warrant extension of time for filing thereof and stay of execution.

Section 7 of the Appellate Jurisdictions Act provides that—

7. Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

Order 42, Rule 6 of Civil Procedure Rules provides 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 sub rule (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 sub rule

(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.

The Court of Appeal summarised the conditions for extension of time for filing appeal in the case of **Paul Musili Wambua v Attorney General & 2 Others [2015] eKLR** and stated the following;

“... it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general, the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

In the instant application, the 1st applicant admits being notified of the judgment. He did not prove that he was out of the country at the time of delivery of the judgment or that the School (the 5th respondent) which he alleges was closed at the time, was in existence, the decree holder having stated that it was closed and sold off and is therefore non-existent. He has not explained why he could not instruct Counsel even if he was out of the country in this day and age when he was capable of doing so in any part of the world. He further does not state when he came back to the country, if at all he was out, as he was in the country at the time of proclamation.

The 1st respondent admits in his affidavit that he was informed by the Decree Holder that he was in the process of execution, confirming the Decree Holder's averments that he engaged the respondents before he moved to execution.

The 1st respondent/judgment debtor has not denied harassing the Auctioneer and the Decree Holder and causing them to be arrested and taken to Parklands Police Station, then failing to turn up there.

Stay of execution is an equitable remedy and whoever seeks an equitable remedy must come to equity with clean hands. I do not find the applicants deserving of the orders sought for the reasons stated above. **The result is that the applications dated 21st and 23rd January 2020 are dismissed with costs which I assess at Kshs.5,000.**

The decretal sum deposited in court to be released to the Decree Holder forthwith.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF AUGUST 2020

MAUREEN ONYANGO

JUDGE

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 March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE