



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 26 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

JALIAS AYOTABI AWITL.....CLAIMANT

VERSUS

J.R.S GROUP SECURITY LIMITED.....RESPONDENT

RULING

The application before me for determination is dated 21st April 2017 and seeks the following orders –

1. That this application be certified urgent and be heard *ex-parte* in the first instance.
2. That this court be pleased to grant leave to the firm of Odhiambo Ouma and Company Advocates to assume the conduct of this matter for and on behalf of the Respondent/ Applicant,
3. That this Court be pleased to review its orders and directions issued pursuant to the application filed by the Respondent in person on 12th April 2017 accordingly,
4. That pending the Hearing and determination of this application *inter partes*, there be an order of stay of execution of the Decree of this Court together with all consequential orders,
5. That this Court be pleased to grant an order for stay of execution of the decree of this Court pending the hearing and determination of an appeal by the respondent to the Court of Appeal against the entire Judgment of this Court,
6. That the costs of this application be provided for.

The application is supported by the grounds on the face thereof and the affidavit of YASSER ABDUL KHAN, the General Manager of the respondent sworn on 20th April 2017.

In sum the grounds in support of the application are that the applicant who is the respondent herein was aggrieved by the judgment of this court delivered on 27th October 2016 and instructed counsel to file an appeal. He has attached copies of the communication between the applicant and his advocate. In a letter dated 30th January 2017, M. M. Omondi and Company Advocates wrote to the respondent asking for a deposit of Kshs.30,000 together with instructions to appeal to enable him move the court by filing an application for stay to avoid embarrassment of execution. By letter dated 9th February 2017 the respondent wrote to the said advocates forwarding a cheque of Kshs.30,000 “to facilitate to process of appeal in this matter.” No action was taken after that until 6th April 2017 when ESHIKON AUCTIONEERS proclaimed against the moveable property of the respondent. By letter dated 20th April 2017 the firm of Odhaimbo Ouma and Company Advocates sent a letter to the Deputy Registrar seeking certified proceedings and judgment for the purpose of appeal.

A notice of appeal dated 7th November 2016 was lodged in court on the same date.

It is deposed in the affidavit that the respondent only learnt that the application for stay was not lodged by M. M. Omondi and Company Advocates, its erstwhile counsel when the auctioneers proclaimed the applicant’s property. That it then lodged an application dated 12th April 2017 that was lacking in detail and the trial Judge had insufficient facts placed before her when she gave orders on the said application declining to grant interim stay of execution. The application dated 12th April 2017 was not heard and determined inter partes. The said

application was lodged by the applicant in person without seeking leave to act in person.

It is the respondent's submission that the appeal has high chances of success, that the respondent demonstrated its determination to file appeal by filing notice of appeal in time, that should execution proceed the appeal will be rendered nugatory and the respondent will suffer enormous loss to its operations, that mistake of counsel should not be a hurdle to the applicant's employment of its constitutional right of appeal, and that the applicant is ready and willing to abide by any conditions imposed by the court.

The claimant filed grounds of opposition as follows –

1. That the applicant's application is misconceived, bad in law and the filing of the same amounts to abuse of the courts due process.
2. That the matter was heard inter partes with each party giving evidence which this honourable court analyzed the same and arrived at the judgement after evaluation on merits
3. That the applicants application has been brought in bad faith only meant to delay the settlement of this matter when it is within the applicants knowledge that eventually they have nothing to change but to pay the decretal amount.
4. That the applicants appeal has no chance of success on the following reasons:-
 - a) Notice of appeal was filed when the time given has expired the notice was filed on 12th April 2017 and Judgment was read on 27th October 2016
 - b) No new issues has been brought by the applicant to have a chance of success.
 - c) The applicant has delayed beyond statutory period given of 14 days to appeal five months latter you cannot think of filing appeal.
5. That the applicant's application should be dismissed with costs to the claimant.

The application was disposed of by way of written submissions.

Determination

The issues for determination are whether the applicant has complied with the requirements for grant of stay of execution and if it is entitled to the prayers sought. There is also the preliminary issue whether MS ODHIAMBO OUMA AND COMPANY ADVOCATES should be granted leave to come on record which I will deal with first.

Order 9 Rule 9 and 10 of the Civil Procedure Rules provides a follows –

Order 9, Rule 9. Change to be effected by order of court or consent of parties

When there is a change of advocate, or when a party decides to act in

person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

Order 9, Rule 10. Procedure.

An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.

In the present application, there is no notice to the advocates previously on record and further there is no consent by previous counsel for the respondent to change counsel. This is sufficient reason for this court to strike out the proceedings.

There is also the issue of the application dated 12th April 2017, which has not been prosecuted or withdrawn. Technically therefore, the applicant has two applications seeking similar orders on record.

Thirdly, when declining to certify the application dated 12th April 2017 as urgent, I gave reason therefore as follows –

“I have considered the application dated 12th April 2017. The applicant/judgment debtor seeks stay of execution pending appeal.

There is a notice of appeal dated 7th November 2016 on record. However there is no evidence that the applicant has applied for certified copies of proceedings and judgment for purposes of appeal. There is no indication of the grounds upon which the applicant intends to appeal.

The applicant was granted stay of execution of 30 days on 27th October 2016 but did not file a formal application for stay upon expiry of the 30 days stay on 27th November 2016. The applicant was granted a further stay of execution by the Deputy Registrar upon taxation on 10th February 2017 but again allowed the stay to lapse without filing a formal application.

I am not satisfied that the orders sought are warranted as the applicant came to court only when threatened by execution after the lapse of the stay granted by the Deputy Registrar.

For these reasons I decline to certify the application as urgent or to grant temporary orders of stay of execution.”

Turning to the merits of the present application, it is trite law that when determining an application for stay of execution pending appeal, the court must be minded that a successful litigant ought not be denied the fruits of his judgment where such judgment is regular like in the present case. In the case of **MACHIRA T/A MACHIRA & CO ADVOCATES -V- EAST AFRICAN STANDARD (NO. 2)** the court held that:-

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

In the instant case the applicant has stated that its appeal will be rendered nugatory should the application not be granted. The applicant has however not addressed the issue of the claimant’s ability to refund the money which is a relevant factor in determining whether or not the appeal would be rendered nugatory and/or whether or not the applicant will suffer substantial loss. Order 42 Rule 6(2) provides that –

(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 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.

In addressing the subject of stay of execution, Hulsburgs Laws of England, 4th Edition, Vol 37, pages 330 – 332 states as follows –

“The stay of proceedings is a serious, grave and fundamental interference in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceedings beyond reasonable doubt should not be allowed to continue.”

I find that the applicant’s counsel is not properly on record and has not approached the court properly to be granted leave to come on record. I further find that the applicant has not addressed the claimant’s ability to repay the decretal sum should the appeal succeed. The applicant has thus not discharged the burden of proving that the intended appeal would be rendered nugatory should I not grant stay of execution.

The result is that the application is dismissed with costs.

DATED AND SIGNED AT NAIROBI ON THIS 26TH DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 6TH DAY OF DECEMBER 2018

MATHEWS NDERI NDUMA

JUDGE