



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC MISC APP NO. 138 OF 2017

RICHARD MUTHUSI PLAINTIFF

-VERSUS-

PATRICK GITUMA NGOMO 1ST DEFENDANT

DANROS (KENYA) LIMITED 2ND DEFENDANT

RULING

1. By a motion dated **03/07/2017**, the Applicant seeks the following orders:-

1. THAT the Application be certified as urgent and be heard ex-parte in the first instance.

2. THAT the Honourable court be pleased to stay execution pending the hearing and determination of the Application.

3. THAT the Honourable court be pleased to stay execution pending hearing and determination of the intended appeal.

4. THAT the Honourable court be pleased to grant the Defendant/Applicants leave to Appeal out of time against the Judgement of the Honourable Senior Resident Magistrate Patrick Wambugu Mwangi delivered on 22nd May, 2017 in Kilungu Senior Resident Magistrate's court case **No. SRMCC No. 96 of 2016**.

5. THAT the costs of the application be provided for.

2. Same is supported by the following grounds:-

1. The Defendant/Applicants and their insurer learnt recently, upon perusing the court, file that Judgement was entered against them on the 22nd May 2017 whereof the Defendants/Applicants were held 90% liable and general damages was assessed at Kshs. 1,000,000/= and Special damages of Kshs. 3,650/=.

2. The Judgement in this matter was delivered on 22nd May, 2017 and stay of execution period for 30 days was granted to the Defendants/Applicants however during the pendency of stay of execution period the firm of Muriithi & Ndonge Advocates which was on record on behalf of the Defendants/Applicants was dissolved on 30th May, 2017.

3. That the dissolved firm never informed the Defendants/Applicants of the dissolution and the terms of the judgement that was delivered on 22nd May, 2017 until the stay of execution period expired.

4. That upon being informed of the dissolution of the previous firm on record the Defendants/Applicants and their insurer instructed the firm of Hannah Muriithi & Company Advocates to take over the matter and give a current status of the file.

6. That upon perusal of the file the Defendants/Applicants herein and their insurer CIC Insurance Group Limited were dissatisfied with the judgement and agreed to appeal against the judgement of the trial court.

6. That CIC Insurance Group Limited thereafter instructed the new firm Hannah Muriithi & Company Advocates to come on record in place of the dissolved firm Muriithi & Ndonge Advocates and to immediately proceed to file an application to seek orders for stay of execution and enlargement of time to file an appeal out of time and for stay of execution pending hearing of the application for stay of execution and hearing of the appeal itself.

7. The time frame for filing an appeal lapsed way back and there is need for the Honourable court to enlarge time to allow the Defendants/Applicants to file an appeal out of time and also for the court to order for stay of execution pending hearing and determination of this application as well as hearing of the appeal.

8. The Defendants/Applicants' appeal which has very high chances of succeeding will be rendered nugatory unless the honourable court grants the Applicant orders for stay of execution pending hearing and determination of this application as well as the intended appeal.

9. The Defendants/Applicants stand to suffer substantial and irreparable harm if orders for stay of execution and enlargement of time are not issued urgently, as they may never recover the decretal sum.

10. The failure to file the Memorandum of Appeal within the prescribed time was not intentional but an inadvertent error the same having been caused by the non-communication of the trial court judgement and dissolution of firm which was on record for defendant during trial to the litigants.

11. The Defendants/Applicants have an arguable and meritorious Appeal with a good likelihood of success.

12. The Defendants/Applicants are bound to suffer irreparable prejudice, loss and damage unless this Honourable Court grants the Orders sought herein.

13. The Plaintiff/Respondent shall suffer no prejudice if the application is allowed.

14. It is in the interests of justice that the prayers sought herein are granted.

3. The Application is supported by affidavit of Patrick Gitumu Ngomo sworn on **30/07/2017**.

4. The Respondent opposes same via Affidavit of Richard Muthusi, sworn on **10/07/2017**. On 10/07/2017 the parties agreed to canvass same notice of motion via written submissions.

5. The Applicant has filed and served the same and so is the Respondent.

APPLICANTS' SUBMISSIONS

6. The applicant submissions are that, the real issues for determination as may be sieved from rival positions taken by the parties are as here below:-

- **Is the present application an abuse of the court's process"**
- **Does the present application merit the condition for grant of the orders of stay of execution"**
- **Does the present application merit the condition for grant of orders for enlargement of time to appeal"**
- **Which party should bear costs of the present application"**
- **Is the present application an abuse of the court's process"**

7. The issue of abuse of court process is a serious one, and once raised by a party, it behooves the court to make a determination thereon at the earliest opportune time.

8. In the case **OF CHAIRMAN CO-OPERATIVE TRIBUNAL & 8 OTHERS EX-PARTE MANAGEMENT COMMITTEE KONZA RANCHING & FARMING CO-OPERATIVE SOCIETY LTD (2014) EKLR**, the Honourable Justice Odunga referred to the words of his brother Judge the Honourable Justice Kimaru in the precedent setting case of **STEPHEN SOMEK TAKWENYI & ANOTHER –VS- DAVID MBUTHIA GITHARE & 2 OTHERS NAIROBI (MILIMANI) HCC NO. 363 OF 2009**, where it was stated thus on the present issue:-

“..... The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilized legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused.

An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it.”

9. From the above quotation, an issue concerning abuse of court process is not one to be taken lightly. That the court stated that, the circumstances depicting abuse of court process were varied..... that abuse of court can be depicted from the very steps taken by parties and sometimes on the extrinsic evidence only.

10. The applicants from the facts of the case submit that they have not abused the court process but have exercised his constitutional right to challenge the decision of a trial court before an appellant court. There is no demonstration to the court in any way that the present application is an abuse of the court's

process.

DOES THE PRESENT APPLICATION MERIT THE CONDITION FOR GRANT OF THE ORDERS SOUGHT"

11. The Civil Procedure Rules grants the courts unfettered discretion to enlarge time. **Order 50 Rule 6 of the CPR** provides that grants the courts powers to enlarge time where a limited time has been fixed for doing any act or taking proceedings under these rules or by summary notice or by order of the court. Furthermore the legal basis for grant of stay pending appeal is **Order 42 Rule 6 of the Civil Procedure Rules, 2010**. Basically, the Defendant/Applicant is required to demonstrate that:-

Substantial loss may result unless the order is made. The application has been mad without unreasonable delay. Such security as the court orders for the due performance of the decree has been given before the applicant.

SUBSTANTIAL LOSS

12. The trial court held the Defendants 90% liable and made an award of Kshs.1, 000,000/= together with special damages of Kshs.3, 650/= in favour of the Plaintiff/Respondent.

13. The injuries sustained by the Plaintiff are not serious injuries and thus the quantum of damages that was awarded was excessive and erroneous estimate of the damages.

14. Thus the execution of the judgment herein shall cause substantial loss to the Defendants since the judgment does not reflect the evidence on court record. Plaintiff/Respondent has not demonstrated to this court his means to allow the court assess his financial capabilities, therefore he may not be in a position to refund the said decretal sum if the Defendants/Applicant's appeal succeeds.

UNREASONABLE DELAY IN MAKING THE PRESENT APPLICATION

15. The present application was filed on the 3rd July 2017. The judgment which the Defendants/Respondents have appealed against was delivered on the 23rd May 2017. The court on delivering the said judgment granted the Defendants/Applicants a stay of execution of 30 days.

16. Thereafter the firm of Muriithi and Ndonge Advocates (now dissolved) that was on record during the trial court was dissolved on 30th May, 2017. Thereafter the Applicant's insurance company instructed he firm Hannah Muriithi & Company Advocates to act on behalf of the Applicants and that is when the said firm perused the court file and filed this application. There was no unreasonable delay on the part of the Defendants/Applicants.

17. That as at the time of filing the present application the stay of execution of 30 days had lapsed but the delay is not inordinate and sufficient reasons have been given and explained.

SECURITY

18. It is deposed in supporting Affidavit that applicants are ready and willing to offer such security as the court may deem fit, proper and just in the circumstances, including ***depositing the decretal sum in a joint interest earning account by the corresponding firm of advocates pending the outcome of the present appeal.***

19. This will secure the interests of both parties without and bias. The Defendants/Applicants have satisfied the threshold required for an application to be allowed.

20. The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in **CHRIS MUNGA N. BICHAGE –VS- RICHARD NYAGAKA TONGI & 2 OTHERS eKLR** where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus:-

“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

21. The court is invited to look at and uphold the decision in **MOHAMMED SALIM T/A CHOICE BUTCHERY –VS- NASSERPURIA MEMON JAMAT (2013) eKLR**, where the court upheld the decision of **M/S PORTREITZ MATERNITY –VS- JAMES KARANGA KABIA CIVIL APPEAL NO. 63 OF 1997** and stated that:-

“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right”

22. In the present application, the Defendants/Applicants have unequivocally stated that they are ready and willing to offer security on whatever terms as may be imposed by the court in order to protect the interests of the Plaintiff/Respondent. On the same breath, it is equally befitting for the Defendants/Applicants to be accorded similar protection or security by granting to them orders of stay pending the hearing of the appeal so that should its appeal succeed, it will be able to recover its money. Henceforth the rights of both parties shall be protected.

THE INTENDED APPEAL IS ARGUABLE

23. The thrust of the Applicant's appeal which is captured in its draft memorandum of appeal is that Honourable Learned Magistrate erred in law and in fact by awarding a manifestly high award of general damages of **Kshs.1,000,000/=** which was incommensurate to the proven injuries sustained by the Respondent.

24. The Applicants argues that the findings of the trial court were not commensurate to the evidence which was tendered for the court's evaluation. The court's award on quantum of damages was excessive and an erroneous estimate of the damages that ought to be awarded to the Plaintiff taking into account the injuries he sustained as the same were not serious injuries.

WHETHER THE PRESENT APPLICATION HAS MERIT PRAYER FOR ORDERS OF ENLARGEMENT OF TIME TO APPEAL.

25. The judgment subject of this suit was delivered on 23rd May 2017 and the court thereafter granted the parties 30 days stay of execution. Thereafter the firm of **Muriithi & Ndonye Advocates (now dissolved)** that was on record during the trial court was dissolved on 30th May, 2017.

26. Thereafter the Applicant's insurance company instructed the firm Hannah Muriithi & Company Advocates to act on behalf of the Applicants and that when the said firm perused the court file and filed this application.

27. There was no unreasonable delay on the part of the Defendants/Applicants. The Applicants have satisfied the threshold required for such an application to be allowed. The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in **CHRIS MUNGA N. BICHAGE –VS- RICHARD NYAGAKA TONGI & 2 OTHERS (2013) eKLR**, where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus:-

“ The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated”

28. The court is invited to look at and uphold the decision in **MOHAMMED SALIM t/a CHOICE BUTCHERY –VS- NASSERPURIA MEMON JAMAT (2013) Eklr**, where the court upheld the decision of **M/S PORTREITZ MATERNITY –VS- JAMES KARANGA KABIA CIVIL APPEAL NO.3 OF 1997** and stated that:-

“That right of appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right”

RESPONDENT SUBMISSIONS

29. The respondent submits that, the court is tasked to determine:-

- ***Whether or not the orders of stay of execution orders should issue;***
- ***Whether leave to lodge appeal out of time should be allowed.***

30. Firstly, the respondent contends that, the applicants have not met the pre-requisites of Order 42 rule 6 of the Civil Procedure Rules, 2010. In a nutshell, they have not:-

31. Demonstrated that substantial loss would be occasioned if stay is not granted.

32. Demonstrated the Application for stay of execution has been brought forth without unreasonable delay; and Provided any security for costs.

33. The respondent argues that, all the conditions must be met. It is not enough to merely observe some and ignore the rest.

34. On the limb of Substantial Loss and Security, the respondent submits that, the applicants must clearly state what loss, if any, they stand to suffer. On keenly perusing the applicant's application, it is not indicated or explained what loss (if any) will be suffered should the orders for stay fail to be granted. The same is based on a mere assumption as against the respondent.

35. In submissions above, the respondent is guided by the ruling of Court of Appeal at Nairobi in **METEINE OLE KILELU & 10 OTHERS –VS- MOSES K. NAILOLE, CIVIL APPEAL NO. 340 OF 2008**, wherein the court opined that where the decree appealed against is a monetary decree, the applicant has to show that either once the execution is done, after refusal of the application, the applicant may never get back that money even if his appeal succeeds or that the decretal sum is so large *vis a vis* his status, or business that the execution would in itself ruin his business or threaten his very existence.

36. As such, the effect of the applicants' failure to either state, what loss, if any, in the Supporting Affidavit or to demonstrate the same, justifies that a vital limb in Order 42 rule 6 has not been complied with. On those grounds, the application should not succeed as both limbs must be proved to the satisfaction of this honourable court. This resulted to dismissal of the application for stay.

37. Further the respondent is guided by the case **of KENYA SHELL LTD VS KIBIRU & ANOTHER, CIVIL APPEAL NO. 97 OF 1986, NAIROBI** wherein it was stated that:-

“The application for stay made before the High Court failed because the 1st of the conditions was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made since the Respondents would be unable to pay the money.”

38. It is respondent contention that,, the Applicant has not stated what loss he stands to suffer or offered any security for the due performance of the decree.

39. Further he relies On the case of **NGANGA KABAE VS KAHUNYO KIMANI H.C.C.A NO. 182 OF 1999, NAIROBI ALNASHIR VISRAM J.** stated that it was improper for the lower court to grant stay orders without security.

40. The respondent advocate argues that, the respondent herein is a successful litigant entitled to enjoy the fruits of a successful litigation but is being restricted while in pursuit for the same.

41. The Applicant merely seeks to deny the Respondent his right to enjoy the fruits of the judgement delivered in his favour.

42. Failure to prove loss is enough reason, by its own, to warrant dismissal the Applicants' application. The applicants need to embrace the fact that litigation must come to an end in one way or another.

43. The applicant's present application and intended appeal are only an attempt to further have this matter pending in court thus prevent the plaintiff/respondent, a successful litigant, from enjoying the fruits of litigation.

44. Further, **Order 42 rule 6 of the Civil Procedure Rules, 2010** prescribes that:-

45. An applicant must satisfy court that the intended appeal is arguable thus not frivolous; and

46. An applicant must satisfy court that unless the order for stay is granted, the intended appeal, if successful, would be rendered nugatory.

ARGUABLE APPEAL

47. The applicant has neither demonstrated to this Honourable court that there exists arguable appeal with high chances of success nor satisfied the pre-requisite conditions set out in Order 42 Rule 6 of the Civil Procedure Rules, 2010 to enable grant of stay of execution of decree pending the hearing and determination of the intended appeal.

48. The respondent opines that in the circumstances that this honourable court is inclined to grant stay of execution, to let the same be conditional on depositing into court security for costs in the sum of the entire decretal amount or alternatively, depositing half of the decretal sum into a joint interest earning account in the name of both the applicant's and respondent's advocate.

49. It is the respondent's argument that the applicants' application and the intended appeal lack merit. Both are misleading, brought in bad faith and ought to be dismissed with costs.

50. The intended appeal has no chance of success and it would be vain and unjust to grant orders of stay of execution. As afore-submitted the same is only meant to further have this matter in court and prevent the respondent from accessing the fruits of a successful litigation. Respondent pleads this honourable court to exercise its discretion reasonably and judiciously as it deliberates on the issue.

51. He further urges that in the circumstances that this honourable court is inclined to grant stay of execution, to let the same be conditional on depositing into court security for costs in the sum of the entire decretal amount or alternatively, depositing half of the decretal sum into a joint interest earning account in the name of both the applicant's and respondent's advocate.

52. In view of the above, it is respondent's humble submission that the application is an abuse of the court process, thus this Honourable Court ought to dismiss the application with costs to the respondent.

53. After going through the Application and the Affidavit and Submissions filed, I find the issues are:-

- **Whether the stay pending appeal is merited"**
- **Whether the extension of time application is merited"**
- **What is the *just orders to make in the circumstances*"**

54. On the application for stay pending appeal, the is set out in the provisions of **Order 46 Rule 6 (2) Civil Procedure Rules**. Under the said provisions, the court is supposed to be guided by the Principles set therein in determining whether to grant or not the Orders for stay of execution of the decree pending appeal.

55. The principles guiding the grant of stay of execution pending appeal are well settled.

56. Under Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant should satisfy the Court that:-

- **Substantial loss may result to him unless the order is made;**
- **That the Application has been made without unreasonable delay; and**
- **The Applicant has given such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him.**

57. The court notes herein that the award impugned in the appeal is of Kshs. 1 million. It is stated to be manifestly high on the face of the injuries sustained by the claimant.

58. However none of the parties disclosed the injuries sustained by the neither decree holder nor annex

proceedings to demonstrate how the same award was arrived at.

59. Further it is submitted that the Respondent may not be able to refund the amounts awarded in event the same is paid and appeal succeeds. In the case **HCCA NO.716 OF 2003 JOHNSON MWIRUUTI MBURU –VS- SAMUEL MACHAIA NGURE JUSTICE NYAMU** held that a respondent's possible inability to pay the decretal amount was sufficient to justify grant of stay of execution pending appeal on the condition that the decretal amount be secured.

60. The Respondent does not respond on the aspect of ability to refund the amount in event the appeal succeeds.

61. However the Respondent proposes ½ decretal amount be deposited in interest earning account.

62. On the issue of merit of application to extend time, it was held in **NICHOLAS KIPTOO ARAP KORIR SALAT VS. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 7 OTHERS [2014] eKLR:-**

“..... It is clear that the discretion to extend time is indeed unfettered.

It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. “We derive the following as the underlying principles that a court should consider in exercising such discretion:-Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

63. Under Section 79G of the Civil Procedure Act, which section provides that:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having requisite for the preparation and delivery to the appellant of a copy of the decree or order: provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time”

64. The court is persuaded to rely on the above case and cited provisions of the law on the issue of delay in filing appeal out of time.

65. The Applicant explains the circumstances including the dissolution of instructed law firm and delay in communications to their client. The said explanation is not rebutted by the Respondent. The court finds that there are sufficient reasons for not filing the appeal in time.

66. The court will thus make the following orders:-

1. Appeal shall be filed and served within 14 days from the dates of the Ruling herein.
2. The stay is granted on condition that Kshs. 300,000/= is paid to the claimant within 30 days from date herein and in default application stand dismissed.
3. Costs to the Respondent in any event.

SIGNED, DATED AND DELIVERED THIS 4TH DAY OF OCTOBER, 2017.

C. KARIUKI

JUDGE

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