



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 17 OF 2017

(FORMERLY NYERI ELC NO. 35 OF 2017)

CAROLINE WAMBUI NJOKI.....PLAINTIFF/APPLICANT

VERSUS

DANSON KINYANJUI.....DEFENDANT/RESPONDENT

RULING

Brief facts

1. This application dated 7th May 2021 is brought under **Section 99 of the Civil Procedure Act, Order 3A, 45(1) & (2) and 51 of the Civil Procedure Rules** seeking for orders of stay of execution of the judgment delivered on 9th April 2021 pending the hearing and the appeal herein.
2. In opposition to the application, the respondent filed a replying affidavit dated 21st May 2021 and filed in court on 25th May 2021.

The Applicant's case

3. The applicant states that judgment was delivered on 9th April 2021 and being dissatisfied with the same she filed a Notice of Appeal on 30th April 2021 with a view of challenging the entire judgement.
4. The applicant is apprehensive that the respondent will execute the judgment if stay orders are not granted by this court as there is already case for eviction pending in court against her CMCC No. 154 of 2018. She states that she stands to suffer substantial loss and she stands to be evicted from her home where she resides with her child who was born and raised there.
5. The applicant further adds that she has made her application timeously and that her appeal has overwhelming chances of success.

The Respondent's Case

6. The respondent contends that the applicant's case was dismissed by the court and thus there are no orders or decree to be stayed. Further, the respondent states that the applicant cannot make an application to stay payment of costs in this application.
7. The respondent further states that CMCC No. 154 of 2018 is a different case which ought not to be brought up in these proceedings.

8. The respondent adds that it is prejudicial to allow the application as he pays the charges subsisting on the suit property for the past 8 years with no contribution from the applicant.

9. Parties agreed to dispose of the application by way of written submissions. It is only the respondent who filed his submissions.

The Respondent's Submissions

10. The respondent submits that the application is flawed, misconceived, incompetent and has been brought under the wrong provisions of the law.

11. It is the respondent's case that an order for dismissal cannot be stayed and relies on the case of **Donald Oyatsi vs Disciplinary & Ethics Committee & 3 Others [2021] eKLR** to buttress his point. The respondent further relies on the case of **Anthony Kiplangat Ngeno & Another vs Jonathan Ole Tankoi & 3 Others Civil Appeal 41 of 2015** and submits that an order of stay cannot issue against costs. As such, the respondent states that the applicant has failed to satisfy the conditions for granting stay of execution. Thus, the respondent prays that the application be dismissed with costs.

Issues for determination

12. The main issue for determination is whether the applicant has met the prerequisite for grant of stay of execution pending appeal.

The Law

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

13. The principles upon which the court may stay the execution of orders appealed from are well settled. **Order 42 Rule 6 of the Civil Procedure Rules** stipulates:-

1. "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 orders set aside.

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 1st 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.

14. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:

1. Substantial loss may result to him unless the order is made;

2. That the application has been made without unreasonable delay; and

3. 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.

15. These principles were enunciated in **Butt vs Rent Restriction Tribunal [1979]** the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-

- 1. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.**
- 2. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.**
- 3. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**
- 4. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.**

Substantial loss

16. Under this head, an applicant must clearly state what loss, if any, the/she stands to suffer. This principle was enunciated in the case of **Shell Ltd vs Kibiru and Another [1986] KLR 410 Platt JA** set out two different circumstances when substantial loss could arise as follows:-

“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages....It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in this 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 repay the decretal sum plus costs in two courts....”

The learned judge continued to observe that:-

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.

Earlier on, Hancox JA in his ruling observed that:-

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would...render the appeal nugatory.

This is shown by the following passage of Cotton LJ in Wilson vs Church (No.2) (1879) 12 ChD 454 at page 458 where he said:-

“I wish to state my opinion that when a party is appealing, exercising his undoubtedly right of appeal, this court ought to see the appeal, if successful, is not rendered nugatory. “

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal

nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

The application has been made without unreasonable delay.

17. Judgment was delivered on 9th April 2021 and the applicant has brought the present application on 7th May 2021. I find that the application has been filed timeously thus fulfilling one of the conditions under Order 42 Rule 6.

Security of costs.

18. The applicant ought to satisfy the condition of security. In the persuasive case of **Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd [2019] eKLR** the court observed:-

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....

Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

19. Similarly in **Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others [2014] eKLR** the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

20. From the above persuasive decisions, it is clear that the issue of security is discretionary and it is upon the court to determine the same. Notably, the applicant has demonstrated good faith by stating that she is ready to abide by the terms set by the court in granting stay although she has not offered any security of costs.

21. It is noted that this case was dismissed on 9th April, 2021 and as such the orders in the judgement are negative and not capable of being stayed. The applicant has introduced another case instituted against her seeking for orders for eviction CMCC No. 154 of 2017 and seems to be asking this case to also grant stay orders in regard to the case before Chief Magistrate. In this regard, the applicant is mixing up issues in two separate actions. This court has no power to grant any orders as regards the eviction case for it is not a matter before it.

22. I have considered the issues raised by the applicant that she is likely to be evicted from the suit premises together with her child who was born and raised there. Having lost the case and the orders herein being negative, it is my view that there is no decree

capable of being executed in this case save from the order for payment of costs have already been incurred and the application for stay pending appeal is not related to payment of costs. I am of the considered view that the applicant has failed to demonstrate that she will suffer any substantial loss in the event that the orders are not granted.

23. Consequently, I find no merit in this application.

24. It is hereby dismissed with costs to the respondent.

25. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 7TH DAY OF OCTOBER 2021.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO LINK THIS 7TH DAY OF OCTOBER 2021



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