



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO. E06 OF 2021**

**DAVID KIHORO WAITHERU.....APPELLANT/APPLICANT**

**VERSUS**

**JOHN MURUNGI AYUB.....RESPONDENT**

**RULING**

**Brief facts**

1. The application for determination dated 23<sup>rd</sup> April 2021 is brought under **Sections 1A, 1B and 3A of the Civil Procedure Act and Orders 22 Rule 22, 42 Rule 6 and 51 Rule 1 of the Civil Procedure Rules** seeking for orders for stay of execution of decree in Nyeri CMCC No. 314 of 2018 pending the hearing and determination of this appeal.
2. In opposition of the said application, the respondent filed a Replying Affidavit dated 17<sup>th</sup> May 2021.

**The Applicant's Case**

3. It is the applicant's case that on 8<sup>th</sup> February 2021, the magistrate delivered a ruling in CMCC No. 314 of 2018 whereby he dismissed the applicant's notice of motion dated 8<sup>th</sup> December 2020 seeking to set aside an ex-parte judgment in the said suit.
4. The applicant contends that he stands to suffer substantial loss if stay is not granted as the respondent will proceed to execute the decree.
5. The applicant states that he has lodged this appeal as the ruling of the lower court was not supported by evidence of the parties. As such, he contends that his appeal has a high chance of success and it will be rendered nugatory if the application is not allowed. Further, the applicant states that the application has been made in good faith and without any unreasonable delay.

**The Respondent's Case**

6. It is the respondent's case that the application is frivolous, vexatious, an abuse of the court process and does not conform to the mandatory provisions of the law. Further, that the application is premature as no decree capable of being executed exists in the matter.
7. The respondent contends that the appeal cannot be rendered nugatory as the suit is a monetary claim. Furthermore, the appeal has no chance of success as the appellant was afforded a chance to defend the suit which he failed to do. The respondent states that he was a passenger aboard of motor vehicle registration number GKB 794C which was knocked down by the appellant's motor vehicle registration number KBU 279W.

8. The respondent states that it has not been demonstrated that he is a pauper who is incapable of refunding the decretal sum and avers that he is a man of means and capable of refunding the monies if paid to him. In any event, the respondent contends that the damages awarded by the court are not excessive or inordinately high to justify interference of this court.

9. The respondent argues that the applicant's intention is to deny him the fruits of his litigation and urges the court to dismiss the application with costs.

10. The applicant in his Supplementary Affidavit reiterated the contents of his application and added that he should not be punished unheard and should be given an opportunity in court to ventilate his case.

11. Parties hereby agreed to dispose of the application by way of written submissions.

### **The Applicant's Submissions**

12. The applicant submits that stay of proceedings pending appeal is a right available to litigants that touches on the rights of fair trial and access to justice. The right to be heard is one of the components of fair trial enshrined in the Constitution and cannot be limited as provided under **Article 25 of the Constitution**. The applicant further submits that judgment was entered ex-parte as he was not given an opportunity to defend himself. As such, his appeal is arguable and he prays that the orders sought are granted to avoid the appeal being rendered nugatory.

13. The applicant makes reference to the case of **Kenya Wildlife Service vs James Mutembei [2019] eKLR**, which outlines the factors to consider when granting stay of proceedings. The applicant further refers to the case of **Butt vs Rent Restriction Tribunal Civil App No. NAI 6 of 1979** to enunciate the principles to consider for stay of execution. Furthermore, the applicant submits that the purpose of grant of stay is to preserve the subject matter and relies on the case of **R.W.W. vs E.K.W [2019] eKLR** which was quoted with approval in the case of **H.G.E vs S.M. [2020]eKLR**.

14. The applicant submits that he has satisfied the conditions set out for granting stay of proceedings pending appeal for he has made his application without undue delay. He believes that the respondent will not suffer any prejudice in the event that stay of execution is granted. He further submits that stay of proceedings ought to be granted where the orders challenged on appeal will have a direct effect in the proceedings. He contends that if the application is not allowed, the orders and all the proceedings will be rendered nugatory. Moreover, he states that he intends to prove on appeal that it's insured who was a second defendant in the primary suit and was in breach of the provisions in the policy schedule forming part of the contract and therefore it would be unfair if stay of proceedings is not granted.

15. The applicant relies on the case of **Kenya Commercial Bank Limited vs Nicholas Ombija [2009] eKLR** and submits that he has an arguable appeal that ought to be argued fully in court to its conclusion. He points out that his appeal has high chances of success because he was not afforded an opportunity to be heard as judgment was entered in default and he was not served with summons to enter appearance. The applicant further submits that the orders will be rendered nugatory if his appeal succeeds since the respondent will not be able to refund the decretal amount if paid to him.

16. The applicant believes that the respondent will not suffer any prejudice if stay is granted. Moreover, the respondent has not demonstrated how he stands to suffer prejudice if the said orders are granted considering the applicant was not a party to the primary suit. As such, the applicant prays that the court exercises its discretion and grant stay of proceedings pending the hearing of the appeal.

### **The Respondent's Submissions**

17. The respondent submits that the suit emanated from an accident which occurred on 23<sup>rd</sup> December 2018 whereby the respondent's counsel received a letter from the insurance company UAP Insurance requesting the respondent not to serve the applicant with the summons and not to pursue interlocutory judgment. The respondent's counsel responded to the said letter stating that they would not adhere to what the insurance company was proposing and proceeded to file suit CMCC No. 314 of 2018 and served the applicant with the summons who failed to enter appearance to which the matter proceeded vide formal proof and final judgment was pronounced. The applicant filed an application in the magistrates court dated 8/12/2020 seeking for orders for stay of proceedings, stay of execution, setting aside the judgment and leave to file a defence. The said application was dismissed by the said

court and the respondent being aggrieved with the decision lodged this appeal.

18. The respondent states that the UAP Insurance is not a party to the suit and therefore the affidavit sworn by Frankline N. Nyaga is untenable. He has not stated under whose authority he is swearing the affidavit yet he swears to facts that he is not conversant with. The respondent refers to the case of **Mombasa HCCA No. 175 of 2002 Stephen Bernard Oduor vs Afro Freight Forwarders** and states that being an official of an insurance company does not grant the deponent to speak of issues not within his personal knowledge like the loss that may be suffered. Furthermore, the applicant has come to this court with unclean hands as he has not explained what he did with the documents and notices served upon him. As such, the respondent submits that the application is an abuse of the court process and relies on the cases of **Machakos HCCA No. 189 of 2011 Nancy Musili vs Joyce Mbete Katisi** and **Nairobi HCCC No. 164 of 2015 Abdulla Abshir & 38 Others vs Yasmin Farah Mohamed.**

19. The respondent submits that the applicant has not demonstrated what prejudice he will suffer. The respondent makes reference to **Order 42 Rule 6(2) of the Civil Procedure Rules** and the cases of **Meru HCCA No. 140 of 2018 Phines Kaberia alias Kaberia M'Ithika vs Joseph Gachoki Gakuya** and **Kericho HCCA No. 27 of 2009 Rose Chepkorir vs Mwinyi Mohammed Riva** to support his argument. The respondent further submits that the applicant has come with unclean hands because he has failed to follow the law as the affidavits have been sworn by an alien who is not being truthful. He relies on the case of **Simon Thuo Mwangi vs Unga Feeds Civil Appeal No. 181 of 2003** cited with authority in **Esther Waimaitha Njihia & Others vs Safaricom Ltd (2004) eKLR** to support his contention.

20. The respondent contends that although the applicant is seeking that the court exercises its discretion to allow his application, discretion ought to be substantiated and established. The respondent makes reference to the cases of **Machakos Civil Appeal No. 58 of 2018 Paul Nderitu Mwangi & Another vs Jacinter Mbete Mutisya & Others** and **Stephen Wanjohi vs Central Glass Industries Limited Nairobi HCCC No. 6726 of 1991.**

21. The respondent relies on the case of **Chris Munga N. Bichange vs Richard Nyagaka Tongi & 2 Others** and submits that the applicant has no arguable appeal. The applicant admitted to been served with summons to enter appearance. He does not complain that he was not served with the other notices and therefore there is nothing to argue on appeal. Moreover, the applicant has a duty to fulfil the legal requirements for the court to grant him the orders he is seeking. The facts sworn in support of the application cannot be proved by an alien, nor do mere statements amount to proof. To support this contention the respondent relies on the case of **HomaBay Civil Appeal No. 7 of 2014 Evans Nyakwana vs Cleophas Bwana Ongaro.**

22. The respondent contends that there exists no orders capable of being executed in regard to the ruling of the magistrate. He makes reference to the case of **Eldoret Civil Appeal No. 41 of 2019 Ektela Ekailodio & 11 Others vs Christopher Kurutyon & Others.** before the Court of Appeal.

#### **Issues for determination**

23. The applicant seeks for orders for stay of execution of the decree emanating from the judgment in CMCC No. 314 of 2018. However, in his submissions it is evident that the applicant argues that proceedings be stayed. The applicant seems to have mixed up stay of proceedings with stay of execution. However, the application is clear that the applicant prays for stay of execution pending appeal. It is important to state that there are no proceedings pending in CMCC No. 314 of 2018 because judgement has already been delivered in favour of the respondent when the applicant filed an application to set aside judgement which was dismissed.

24. Stay of execution pending appeal is enshrined under Order 42 Rule 6 of the Civil Procedure Rules and stay of proceedings. The case of **Kenya Power & Lighting Company Limited vs Esther Wanjiru Wokabi [2014] eKLR** is instructive on this point. The court observed that:-

**“Having analyzed the provisions of Order 42 Rule 6 of the Rules it is clear to me that the said provisions only apply to applications of stay of execution of a decree or order issued by a court pending hearing of an appeal but the same do not apply to applications for stay of proceedings such as the application now before me. It is apparent from the face of the application and from the submissions made by the parties that counsel for both parties were operating on the mistaken belief that the conditions prescribed in Order 42 Rule 6(2) were also applicable to applications for stay of proceedings which is not the case.**

**Having made that finding, it is obvious that Order 42 Rule 6(2) cannot come to the aid of the applicant. The court must be guided by other considerations in making its decision whether or not to grant stay of proceedings as sought herein but then, what are those considerations.”**

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

### **The Law**

26. In the case of **David Morton Silversten vs Atsango Chesoni Civil Application No. Nai 189 of 2001 [2002] 1 KLR 867; [2002] 1EA 296 the Court of Appeal citing Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd & Another Civil Application No. NAI 50 of 2001** held that it is not the law that a stay of proceedings cannot be granted but each case depends on its own facts. In **Niazons (Kenya) Ltd vs China Road & Bridge Corporation (Kenya) Ltd Nairobi (Milimani) HCCC No. 126 of 1999 Onyango-Otieno J** (as he then was) held that:-

**“Where the appeal may have serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay should be granted.”**

27. **Order 42 Rule 6 of the Civil Procedure Rules** provides that for an applicant to succeed in an application for stay of execution, he/she should demonstrate that :-

1. Substantial loss may result to him/her 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.

### **Substantial loss**

28. *Under this head, an applicant must clearly state what loss, if any, they stand 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.”**

29. From the foregoing, it is clear that the onus of proving substantial loss rests upon and must be discharged by the applicant. It is not enough to state that loss will be suffered, but the applicant ought to show that loss will be suffered. In this case, the applicant merely states that he shall suffer substantial loss but does not explain how such loss is likely to occur. The applicant having failed to discharge the burden of proof, cannot expect this court to grant the orders sought.

#### **Whether the application was filed expeditiously**

30. The ruling in the instant matter was delivered on 8<sup>th</sup> February 2021 and the present application was filed on 29<sup>th</sup> April 2021. This is about 21 days out of the statutory timelines. In my considered view, the delay is not inordinate.

#### **Security of costs.**

31. The applicant ought to satisfy the condition of security. In the persuasive decision 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.”**

32. Evidently, it is clear that the issue of security is discretionary and it is upon the court to determine the same. Though the parties herein did not raise the requirement to provide security, I am of the considered view that security is necessary as a commitment by the applicant to fast track the appeal and prevent prolonged delay in the execution of the judgment. In the event that the appeal is not successful security will serve the purpose of preventing loss on part of the respondent. For the court to make orders or directions on security, it will depend on whether the applicant has demonstrated that he will suffer substantial loss in the event that stay is not granted.

33. Having found that the applicant has not established the requirement to demonstrate substantial loss, I find that this reduces his chances of success under Order 42 Rule 6.

34. I have taken into consideration that service of the summons to enter appearance and that of other orders and notices was not

denied by the applicant. As such, it cannot be said that this appeal has high chances of success as argued by the applicant.

35. It is also noted that the ruling before the magistrate delivered on 08/02/2021 was negative and has nothing positive to call for orders for stay of execution.

36. The foregoing analysis lead me to the conclusion that the applicant has failed to establish the conditions set out under Order 42 Rule 6.

37. I find no merit in this application and hereby dismiss it with costs to the respondent.

38. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 4<sup>TH</sup> DAY OF NOVEMBER 2021.**

**F. MUCHEMI**

**JUDGE**

**RULING DELIVERED THROUGH VIDEO LINK THIS 4TH DAY OF NOVEMBER 2021**



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