



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL NO. 157A OF 2020

JOHN KINUTHIA NJOROGE.....APPELLANT

VERSUS

MARJORIE MURIGU SAIDI....RESPONDENT

RULING

This ruling relates to the applicant's application dated 13th May, 2021 seeking the following orders;

1. Spent

2. Spent

3. THAT this Honourable Court be pleased to review and/or vary the Orders of 11th March, 2021 requiring the deposit of the entire Decretal Sum of Kenya Shillings One Million Eight Hundred and Thirteen Thousand Five Hundred and Seventeen (Kshs. 1,6813,517) in a joint interest earning account in the name of the parties Advocates on record within Sixty (60) days and in place be pleased to allow for an alternative security in the nature of a Personal Guarantee to satisfy the Decree pending the hearing and determination of the Appeal.

4. THAT cost of this application be in the cause.

The application is supported by an affidavit sworn on 13th May, 2021 and is premised on the ground that following an application for stay of execution pending the hearing and determination of the intended appeal and the subsequent orders, the applicant although grateful, now seeks to have the orders reviewed and/varied.

That being a man of straw coupled with the harsh business environment brought about by the Covid 19 Pandemic, he has not been able to deposit the security as ordered by the court and is alternatively seeking to offer a personal guarantee as security. Further that, this court has the power to exercise its discretion and review and or vary its orders requiring the deposit of the entire amount and substitute it in the interest of justice.

It is the applicant's case that due to the tough economic times, his business has not made any profit for the last one year and has attached a bank statement for the period between 2nd September, 2020 to 30 May, 2021 from Family Bank and Marked as JKN1 to support this assertion. The application further contends that he does not have any known fixed assets or movable asset registered in his name which he can alternatively use as security. He acknowledges that security is a pre requisite to granting stay of execution, however, he urges the court to exercise its discretion in a justifiable way while considering his peculiar circumstances.

The applicant has urged this court to consider the purpose of stay of execution order pending appeal as was established in the case of **RWW vs. EKW (2019) eKLR** cited by Musyoka J. in **HE V SM (2020) eKLR** where the Court held that the purpose of an application for stay of execution pending an appeal is preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. Further in **PETER KIRIA & EYE GROUP NEWSPAPER & ANOTHER (2017) eKLR** where **Gikonyo J.** held that insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeal where the underlying transactions typically tend to lead to colossal decretal amounts.

In opposition to the application, the respondent swore an affidavit on 14th September, 2021 in which he argued that the applicant having failed to adhere to court orders of 13th May, 2021 is already in contempt of court. The respondent's objects to the substitution of the deposit of the decretal sum with a personal guarantee as such a substitution will amount to an injustice. According to the respondent granting the orders prayed would not only be bad in law and against the set down rules of procedure, but will be an injustice to him as it will deny him security during the pendency of the appeal. Reference has been made to the case of **MWAURA KARUGA T/A LIMIT ENTERPRISES VS KENYA BUS SERVICES LTD & 4 OTHERS (2015) eKLR** where the court held that security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant.

The bank statement produced as evidence of the applicant's financial status has been refuted as prima facie or substantive evidence on the ground that being a businessman, the applicant is bound to have multiple accounts. The respondent prays that this court dismisses the applicant's application and allow her to enjoy the fruits of her judgment awarded 16 years after the cause of action arose. The respondent further submission is that in determining what security should be deposited courts are guided to make an order that will protect both parties in a suit. The respondent has relied on the case of **VISRAM RAVJI HALI VS THORTON & TUPIN (1963) LTD CIVIL APPLICATION NO. NAI 15 OF 1990** where the Court of appeal stated that orders for security should ensure that it is adequate and the plaintiff is able to realize the fruits of his litigation.

The applicant has submitted that the applicant has not offered any sufficient grounds to substitute the security ordered by this court and has further relied to the case of **ALICE GATHIGIA KARUKU VS MAISHA FLOOR MILS (2013) eKLR** where the court stated that before the said substitution can be granted, sufficient reasons for the substitution ought to be presented by the applicant. The respondent has asked the court to affirm the orders dated 11th March, 2021 and in the alternative a title to property which amounts to tangible security be deposited with court.

Analysis and Determination:

The applicant has failed to comply with the conditional order for stay of execution that was made by this Court on 11th March, 2021 and now seeks to have the same set aside, and or varied. Mbogholi J. (as he then was) directed the applicant to deposit the entire decretal sum of Kshs. 1,813,517 in a joint interest earning account in the names of the parties advocates on record within Sixty (60) days failure to which the order of execution shall automatically lapse.

Furnishing of security is one of the pre requisite conditions for granting of orders of stay. The Court of Appeal, in **VISHRAM RAVJI HALAI VS. THORNTON & TURPIN (1963) LTD [1990] eKLR**, held that whereas the power of the Court of Appeal to grant a stay pending appeal is unfettered, the jurisdiction of the High Court to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions, namely; establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.

Further in expounding the importance of stay, the court in **ARUN C SHARMA VS. ASHANA RAIKUNDALIA T/A RAIKUNDALIA & CO. ADVOCATES & 2 OTHERS [2014] eKLR**, stated that:-

“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 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.”

The applicant has urged this court to review the order of 11th March, 2021 because he is unable to raise the security that was ordered due to the company's dire financial position occasioned by the current harsh economic realities. In the order sought to be reviewed, the court had given the applicant 60 days from the date of the order to deposit the required security, in default of which, the order of stay was to automatically lapse. I have noted that the applicant had made a similar application before the trial court which on 21st July 2020 granted stay of execution on the ground that the applicant deposited Kshs. 1,877,034 within 30 days, which was not complied with.

The applicant has produced a bank statement for the period between 2nd September 2020 and 30th May, 2021, as proof of his financial status, the respondent has disputed the same as not conclusive evidence. I note that the bank statement only shows the transactions in the applicant's personal account, there is no indication of which business the applicant was involved in and or the income he generated before and after the Covid 19 pandemic. The applicant has proposed a personal guarantee as security, however, as held in the **ARUN C SHARMA Case**, security should guarantee due performance of the decree. There is no evidence to convince this court how the applicant's personal guarantee would guarantee this. Additionally, it is worth noting that the lower court case was filed in 2004, which means that the respondent has had to wait for 16 years to enjoy the fruits of her judgment.

In my view, the applicant has not given any proper reason to justify the review and or varying of the order of 11th March, 2021. The respondent has however asked this court to allow the applicant deposit a title of a property whose value amounts to Kshs. 1,813,517. I accordingly, affirm the orders of 11th March, 2021 and order that in the alternative the Respondent do deposit a title deed of a property valued at Kshs. 1,813,517 or more in court within 30 days from the date of this ruling failure to which stay of execution shall automatically lapse.

Such a title deed should be either in his name or that of a guarantor. Costs to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2021

.....

S. CHITEMBWE

JUDGE



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