REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL NO. 120 OF 2021

HOPE RONO t/a ROSELYN TOURS & TRAVELS....APPELLANT

VERSUS

VIVIAN CHEROP KOECH.....1ST RESPONDENT

MARGARET JEMUTAI KANGOGO.....2ND RESPONDENT

EMILY JEROP SILAH.....3RD RESPONDENT

(Appeal originating from the Ruling in CM CC No.1119 of 2016 at Eldoret by Hon. C. Menya)

RULING

The application

1. Before me for determination is the Appellant's/Applicant's Notice of Motion Application dated 12th October, 2021 seeking the following orders;

1. Spent.

2. That there be stay of execution of the Ruling delivered by Honourable C. Menya on the 17th September, 2021; pending the hearing and determination of this application inter-parties.

3. That there be orders of stay of execution of the said Ruling pending, the hearing and determination of the Appeal herewith.

4. That the costs of this application be provided for.

2. The application is premised on the grounds on the face thereof and the supporting Affidavit of Hope J. Rono sworn on 12th October, 2021 and which raises several issues *inter alia:* that the trial court delivered a Ruling on the 17th September 2021, requiring the release of three quarters of the decretal sum to the Defendants with fourteen days. The Applicant being dissatisfied with the judgment of the trial court instructed her Advocate on record to file a memorandum of appeal and sought for orders of stay in the trial court but the same were declined. Consequently, the Applicant's application was set down for inter-party hearing on 4th November, 2021.

3. The Applicant contends that there being no orders of stay the Respondents have since served her with a letter dated 8th October, 2021 threatening execution within seven days; alongside a decree dated 5th October, 2021.

4. The Applicant is apprehensive that if stay is not granted the appeal will be rendered nugatory.

5. The Applicant further contends that no prejudice will be suffered by the Respondents if orders of stay are grant.

6. It is the Applicant's contention that she has an arguable appeal with very high chances of success.

7. Finally, the Applicant deposed that she is ready and willing to abide by reasonable conditions as the court will order and urged court to grant orders of stay as prayed.

8. The application was opposed by the Respondent vide a Replying Affidavit sworn by Vivian Cherop Koech on 21st October, 2021 in which she deposed that the application is devoid of merits, bad in law, untenable in law, frivolous, scandalous and abuse of the court process as the same does not disclose any reasonable legal/factual ground for grant of the prayers sought.

9. The Respondents contend that this instant application is sub judice as a similar application is pending before the trial court in Eldoret Civil Suit No. 1119 of 2016 dated 27th September, 2021 and that the same is scheduled for hearing on 4th November, 2021. The Respondents further contend that this court can only be vested with jurisdiction to hear and determine this instant application if the trial court has already rendered itself on the same and as such the filing of this instant application is an act of jumping gun by the Appellant.

10. It is the Respondents contention that he who comes to equity must come with clean hands. That the Appellants having failed to comply with the trial court's order made on 17th October, 2021 requiring her to pay up to three quarters of the decretal sums within 14 days shows that she is approaching this court with unclean hands.

11. The Respondents further contend that the Applicant has not furnished this court with security to warrant the issuance for grant of orders of stay pending appeal.

12. According to the Respondents the Applicant does not have an arguable appeal and is only out delay the Respondents from enjoying the fruits of their judgment.

13. It is further the Respondents contention that the Applicant has not shown that the Respondents will not be capable of refunding the decretal sums in the event the appeal succeeds.

14. The Respondents urged court to dismiss this instant application.

The application was canvassed by way of written submissions. Both parties filed their written submissions.

ANALYSIS AND DETERMINATION

15. I have carefully considered the application, the affidavits and the submissions filed as well as the authorities relied upon by both parties.

Before I delve into the issues raised in this instant application. I will first address the issue of whether this instant application is *sub-judice*. Counsel for the Respondent has submitted that this instant application is *sub-judice* as there is a pending application seeking orders of stay at the trial court.

16. In the case of, **Patrick Kalava Kulamba & Another vs. Philip Kamosu and Roda Ndanu Philip (Suing as the Legal Representative of the Estate of Jackline Ndinda Philip (Deceased) [2016] eKLR** it was held by **Meoli, J** that:

"12. For the purposes of this case, the operational words are as underlined above. Thus, whether an application for stay pending appeal has been allowed or rejected in the lower court, the High Court "shall be at liberty…to consider" an application for stay made to it and to make any order it deems fit. The High Court in that capacity exercises what can be

termed "original jurisdiction". And from my reading of the rule, the jurisdiction is not dependent on whether or not a similar application had been made in the lower court, or the fate thereof…

[17. So long as an appeal from the substantive decision of the lower court has been lodged, an application under Order 42 Rule 6 (1) of the Civil Procedure Rules can be entertained afresh in the High Court. I believe that was part of the distinction that the Court of Appeal was making in the Githunguri Case concerning the court's original jurisdiction, vis-à-vis the appellate jurisdiction and the innovation behind Rule 5 (2) b (as it is now). The foregoing has a bearing on the interpretation of Order 42 Rule 6 (6) of the Civil Procedure Rules and in particular the highlighted phrased therein.

18. Similarly, the jurisdiction of the High Court in this case was invoked when the substantive appeal (itself a fresh pleading separate from the suit in the lower court) was filed. It is true that the application for stay of execution was allowed with conditions in the lower court. The wording in Order 42 Rule 6 (1) however does not preclude the Applicant from approaching this court as it has done.

19. I would venture to add that the wording of Order 42 Rule 6 (1) of the Civil Procedure Rules effectively grants the same jurisdiction to this court as an appellate court as Rule 5 (2) (b) does to the Court of Appeal: to entertain an application for stay whether or not the same has already been heard by the lower court and dismissed. The only salient difference is that in the case of the High Court the rule makes it clear that it matters not whether the earlier application for stay in the lower court has been allowed or rejected in the lower court. That is my reading of Order 42 Rule 6 (1).

20. It suffices, in my opinion, in this case, in view of the nature of the application before me, that there is an existing substantive appeal against the judgment of the lower court. To insist in this case that the Applicant must first file a separate appeal on the ruling of the lower court, apart from the judgment would in my view not only lead to confusing duplication of proceedings in respect of the same matter but also cause delay. The provisions however must be applied under the guiding principles of Article 15 9 (2) d) of the Constitution.

21. In the circumstances of this case, I consider that driving the Applicant from the seat of justice when there exists a substantive appeal, and in disregard of the full import of Order 42 Rule (6) (1) would amount to raising a technicality, namely, the filing of an appeal on a supplemental matter that actually touches on the appeal where a substantive appeal already exists, above purpose and substance. There may arise in certain cases allegations of abuse of procedure but that must be established."

16. From the foregoing it is therefore clear that whether an application for stay was granted or refused to be granted by the trial court, this court is at liberty to consider such an application and to make such orders thereon as it deems just. It is my finding that this instant application is therefore not offend the principle of *sub-judice*.

17. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(1) and (2) of the Civil Procedure Rules which provides as follows:

"(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 order set aside.

(2) No order for stay of execution shall be made under subrule (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."

18. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the Applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. (See **Civil Appeal No.107 of 2015, Masisi Mwita..Vs…Damaris Wanjiku Njeri (2016) eKLR)**

Whether the Applicant will suffer substantial loss.

19. As to whether the applicant shall suffer substantial loss, in the case of **Kenya Shell Limited –vs- Benjamin Karuga Kibiru & Ruth Wairimu Karuga (1986) KLR (410)** the Court of Appeal pronounced itself to the effect 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 corner stone of both jurisdictions for granting a 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".

20. The Applicant has a burden to show the substantial loss she is likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Appellant to her Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Applicant herein has not tendered any evidence to show what substantial loss she is likely to suffer if orders of stay are not granted.

Whether this application has been made without unreasonable delay.

21. The Ruling herein was delivered on 17th September 2021. The Applicant filed his Memorandum of Appeal on 20th September, 2021 and filed the application herein for stay on 13th October 2021. I am satisfied that this application has been filed timeously.

Security for Costs.

22. As to the issue of security for due performance of the decree, the Applicant ought to satisfy the condition of security. (See the case of **Focin Motorcycle C. Ltd vs Ann Wambui Wangui [2018] eKLR**)

23. The Applicant indeed deposed that she is ready to furnish such security as the court may direct. She however does not provide any form of security and therefore fails to satisfy this condition.

24. From the foregoing it is my considered view that the Applicant's Notice of Motion Application dated 12th October, 2021 is not meritorious. Accordingly, I hereby dismiss it with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 20TH DAY OF DECEMBER 2021

E. O. OGOLA

JUDGE