



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 63 OF 2021

MISA M. A AUCTIONEERS.....INTERESTED PARTY/APPELLANT

PETER JEFWA LEONARD.....APPELLANT/ PLAINTIFF

VERSUS

CHRISTOPHER NJERU KARIUKI.....RESPONDENT

CORAM: Hon. Justice S. M. Githinji

Wambua Kilonzo & Co. Advocates for the Appellant/Applicant.

Machuka & Company Advocates for the Respondent.

RULING

The Appellant/Applicant herein filed a Notice of Motion Application under Certificate of Urgency dated 14th October, 2021 seeking the following orders: -

1. Spent.

2. Spent.

3. THAT there be stay of execution of the ruling delivered against the applicants/appellants on 25/6/21 in CMCC No. 371 of 2018 MALINDI pending the hearing and determination of the appeal.

4. Any other orders which this court may find just to grant.

The Application is supported by the grounds on the face of the application and a supporting affidavit sworn by **GEOFFREY KILONZO**, sworn on the 14th day of October, 2021. He averred that judgment was delivered as against the Respondent in the trial court in **CMCC No. 371 of 2018 MALINDI**. That in exercise of the court's decree and Judgment, the Plaintiff instructed the Appellant to execute the warrants of attachment and sale which was done but later the trial court set aside the execution process and ordered the auctioneer to pay for the lost income of the attached m/v. He also averred that the execution process was set aside for reason that the Respondent deposited the decretal amount but the Respondent failed to inform the Plaintiff of the payment and as such the auctioneers remained in possession of the m/v. That the Respondent is executing against the auctioneers for lost income for the period in which the m/v was attached.

He deposed that the ruling was to the effect that the Interested Party do pay the Respondent a sum of Kshs. 378,000/- which amount was arbitrary brought to the court without being subjected to any proof. That the auctioneer was not afforded an opportunity to defend itself and was therefore condemned unheard contrary to the laws of natural justice. Further that the Interested party the applicants/appellants being aggrieved by the ruling in *CMCC No. 371 of 2018 MALINDI* has filed an appeal which is challenging the validity of making a ruling against the auctioneer when it was not a party to the suit. He also deposed that it was improper to enjoin the auctioneer and that the Respondent should have filed an independent suit for indemnity.

He deposed that if the orders sought are not granted, the auctioneer will have been shut out of the temple of justice. That the decretal sum is substantial and if the same is paid out to the Respondent, the applicant shall suffer substantial loss in that the applicant will not be able to recover the said amount from the Respondent. That the application was made without unreasonable delay; and that security for costs can be given by the applicants if so required by court.

RESPONSE

The Respondent on the other hand filed a Replying Affidavit sworn on the 4th day of November, 2021 by **Christopher Njeru Kariuki**. In his Replying Affidavit he averred that granting the reliefs sort by the Applicant will only amount to denying him the fruits of a validly obtained ruling and that the Applicant has not laid a basis to warrant this court to exercise its discretion in the Applicant's favor.

He also averred that granting orders of stay of execution is not a right to a party but is only available to a deserving party; the applicant has totally failed to lay basis to the satisfaction of the court. He asserted that the intended appeal has no chance of success and is frivolous and vexatious. That the lower court correctly applied the law and interpreted all the guiding principles when making it's decision and therefore the respondent stands to suffer irreparable loss and damage if orders sought are granted.

He deposed that the auctioneer was enjoined in the present cause pursuant to leave duly applied for and granted in accordance to provisions of Section 34 of the Civil Procedure.

Submissions

Appellant's Submissions

The Appellant pointed out the law governing applications on stay pending appeal under *Order 42 Rule 6 of the Civil Procedure Rules*. That a party must satisfy the following conditions; substantial loss may result to the applicant unless the order is made, that the application has been filed without unreasonable delay and that security as may be ordered by the court has been provided for the due performance of the decree. He relied on the authority of *JMK v MWM & Another (2015) eKLR* where the court in allowing the appeal and setting aside the lower court's judgment condemning the Appellant unheard, observed that the Appellant should have been accorded an opportunity to be heard before he was condemned. He submitted that the Appellant in the case had not been a party in the suit in the trial court and yet the trial court issued adverse orders against him.

He submitted that the elements of procedural fairness in the administrative law context was provided by the supreme court in *Baker Vs Canada (Minister of Citizenship & Immigration) 2 S. C. R. 817*. It was his submission that a process by which the trial court makes findings and proceeds to make recommendations before affording a hearing to persons affected thereby, cannot by any stretch of imagination be termed as "fair hearing" in order to meet the provisions of *Article 50 of the Constitution*.

He as well submitted that the court condemned the auctioneer to pay the sum of Kshs. 378,000/- being equivalent of lost income. That the Respondent did not tender any evidence to the effect that he suffered any loss whatsoever or that the loss is equated to the said amount. He relied on Section 107 (1) (2) of the Evidence Act as well as Section 112 of the Evidence Act.

He also submitted on what ought to be considered in determining whether to grant or refuse stay of execution pending appeal as per the case of *Butt Vs Rent Restriction Tribunal (1979)*.

Respondent's Submissions

On whether the 1st Appellant was properly enjoined in the suit, the Respondent relied on the authorities of *Kepue Ole Ngweta &*

Another Vs Sarah Njoki Munge (2015) Eklr where the court held that *Section 34 of the Civil Procedure Act* provides that issues of execution discharge or satisfaction of a decree be filed in the court that made the decree, and therefore bars a party from filing a separate suit. Similar findings were held in the case of *Nazir Jinnah Vs Asmahan Peterson & 2 Others (2013) eKLR* as well as that of *Charles Ngare Karaya Vs Florence Muthoni & Another (2018) Eklr*.

On the law on enjoining an interested party to a suit, he relied on *Order 1 Rule 10(2) of the Civil Procedure Rules*.

Finally, the Respondent submitted that the Applicant has failed to satisfy the conditions stated under *Order 42 Rule 6* for stay of execution pending appeal. That the applicant has failed to satisfy or prove the substantial loss he is going to suffer if stay orders are not granted, the Applicants application and prayers sought are made out of bad faith with an ill intention of denying the Respondent from enjoying the fruits of a validly obtained ruling.

That the Applicant is deliberately silent on the issue of security because of his unwillingness to furnish the same. He relied on the authority of *Congress Rental South Africa Vs Kenyatta International Conventional Center & 2 Others Misc App No. 453 Of 2017*.

Analysis and Determination

I have considered the Appellant's application for stay of execution pending appeal as well as the Respondent's response thereto and the respective advocates' submissions on the matter which I intend to refer to as crucial in determining the Application.

The operative law in this instance, as correctly pointed out by both Counsel, is *Order 42 Rule 6 of the Civil Procedure Rules* which provides as follows:

(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 order 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 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.

In an application such as this, sufficient cause must be shown by the Applicant. There must also be a threat of substantial loss if the order is not granted and the application must have been brought without unreasonable delay. Additionally, there must be provision of such security as may be directed by the Court. Even with the foregoing, the grant of stay remains a discretionary order that must be weighed against the right of a successful litigant to enjoy the fruits of his/her judgment. This is in line with the authorities of *Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR* and *Gatobu M'Ibutu Karotho v Christopher Murithi [2008] eKLR*.

It is not contested that the Application was brought without undue delay, therefore this requirement has been satisfied.

On substantial loss, the applicant stated that the purpose of the jurisdiction to stay execution of judgment pending appeal is to prevent substantial loss being suffered by the party appealing while protecting the rights of the decree holder. That in this case, if the order being sought is not granted and the Respondents proceed to execute the decree, the applicant's goods will be attached and sold by way of public auction to raise the decretal amount. Therefore, if the appeal succeeds, the Appellant will not be able to recover the said goods or amount, hence the Appellant will suffer substantial loss as the decretal sum is huge.

The Respondent on the other hand is vehement that the instant Application is calculated to frustrate the Respondent's right to enjoy the fruits of his judgment. It is contended that the Appellant has not demonstrated what substantial loss would be occasioned should the stay not be granted. Citing *NRB CA Civil Appeal No. 55 of 2012, Godfrey Julius Ndumba Mbogori & Another v Nairobi City County (2018) eKLR*.

This Court has been tasked to balance the competing interests of the Appellant/Applicant as against that of the Respondent and at the same time allow the Respondent to enjoy the fruits of the Ruling on the other hand. In doing so, given the circumstances, I do find the notice of motion dated **14th October, 2021** merited, and is hereby allowed on condition that the appellant/ applicant releases part of the decretal sum of Kshs. 150,000/= to the Respondent within forty-five (45) days from the date hereof. The costs of this application to abide the outcome of the appeal.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 9TH DAY OF MARCH, 2022.

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S.M. GITHINJI

JUDGE

In the presence of: -

1. Mr Kilonzo for the Applicant
2. Mr Martini for the Respondent (absent)



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