



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 1 OF 2013**

**GIANFRANCO MANENTHI.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**ANTONIETTA FARINATO.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**AFRICA MERCHANT ASSURANCE COMPANY LTD...DEFENDANTS/APPELLANTS**

**RULING**

The applicant Africa Merchant Assurance Ltd has filed a notice of motion pursuant to Order 4 Rule 6, Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders

a) That this honourable court be pleased to issue an order of stay of execution pending the hearing of and determination of the appeal in the Court of Appeal. That costs of this application be provided for.

The genesis of the application is that the applicant is aggrieved by the judgement of this court dated 19<sup>th</sup> December, 2018 and the subsequent decree of Kshs.12,028,200, in favour of the Plaintiff/Respondent. The applicant in support of the motion annexed an affidavit deposed by Kennedy Kiprop, who works as a Claims Manager with the defendant. He avers inter alia that there is a valid judgement which he is aggrieved of and has since filed a notice of appeal. That the Plaintiff/Respondent has taken out warrants of attachment for the Applicant's property in execution of the decree. That if stay is not granted the Applicant will suffer irreparable loss.

The plaintiff/respondent filed grounds of opposition dated 15<sup>th</sup> March, 2019. The Respondent claims that the applicant is guilty of laches rendering his application untenable. At the hearing of the application Mr. Gicharu represented the respondent while Mr. Mokaya represented the applicant.

The principles upon which the court exercises discretion under Order 42 rule 6 of the Civil Procedure Rules are firmly settled. The discretion under Order 42 rule 6 is on its terms unfettered but the aggrieved party must satisfy the court on a well set of conditions precedent to be made before such exercise of discretion in his or her favour.

The application under this Order 42 rule 6 is to be viewed in reference to the following factors:

- 1) That the application has been filed without undue delay.**
- 2) That the applicant had demonstrated that substantial loss may result unless stay orders are granted.**
- 3) That the applicant is ready to give security for due performance of the decree or order as may ultimately be binding on him at the end of the determination of the appeal.**

I have considered the notice of motion, affidavit in support and grounds of opposition. I therefore find it necessary to apply the facts of the case to each of the conditions stipulated in Order 42 rule 6 to establish whether the applicant has a meritorious application.

First, is the condition without unreasonable delay. The legislative intent under Order 42 is to bind the parties to prosecute their claims without undue delay. A court of equity frowns at stale claimant who steps on their rights and only to approach the court after a long period of time. From the record Judgement was delivered on 19<sup>th</sup> December, 2018. It is now about three months. The applicant has not sought stay of execution. The applicant has not even deposed his affidavit filed in support why the application was not filed timeously. Among the factors this court must consider is the length of time and the reasons for the delay and whether any prejudice has been occasioned to the respondent due to the inaction.

The rationale behind this condition is to guide the court not to order stay of execution only meant to delay the trial process or enforcement of a decree. The right to be heard on appeal should not be seen to defeat the ends of justice.

This was affirmed in the case of **Global Tours & Travel Limited Nairobi. He Winding up Cause No. 43 of 2000** where the court held:

***“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from it a matter of judicial discretion to be exercised in the interest of justice. The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order stay the court should essentially weigh the pros and cons of granting of not granting the order.”***

The foregoing observation the applicant has not explained in their affidavit acquiescence on any part which might have fairly caused the delay.

I agree with the respondent counsel that the application is guilty of laches. Further apart from factor on undue delay the court must consider the aspect on substantial loss. It is trite that the fact of an appeal pending shall not operate as a stay of execution. Under Order 42 rule 6 of the Civil Procedure Rules the applicant must demonstrate that without stay of execution he will suffer irreparable harm or what is commonly referred to as substantial loss which he cannot be compensated by way of damages.

In the case of **Federal Commission of Taxation v Myer Emporium Ltd 1986 160 CLR 220** the court held:

***“It well established by authority that the discretion which it confers to order stay of proceedings is only exercised where special circumstances exist which justify departure from the ordinary rule that a successful litigant is entitled to the fruits of his litigation pending the determination of any appeal.”***

Discussing the very point on substantial loss Platt, JA in the case of **Kenya Shell Ltd v Benjamin Keruga Kibiru and others 1982-85 1 KAR 1018** observed:

***“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented.”***

In the case **Pan African Insurance Co. Ltd vs International Air Transport Association High Court No. 86 of 2006** held as follows on substantial loss:

***“The deponent should go a step further to lay the basis upon which court can make a finding that the applicant should would suffer a substantial loss as alleged. The applicant should go beyond vague and general assertion of substantial loss in the event a stay order is not granted.”***

In the instant application there is no claim for substantial loss. The applicant sought only stay of execution orders as to his legal rights to pursue an appeal. It is my considered view that from the affidavit evidence the applicant has not made out a case on this condition deserving of being granted stay of execution.

Thirdly, 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 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 degree in order to enjoy the fruits of his judgment in case the appeal fails.

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 judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal. In **Arun C Sharma -V- Ashana Raikundalia T/A Rairundalia & Co. Advocates** Justice Gikonyo the Court 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.”***

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. In this regard, I stand to be guided by the case of **Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR**, where it was stated that: \_

***“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that***

***he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”***

I'm alive to the fact that grant of stay being a discretionary order the court is expected to balance out the interests of the successful litigant and the applicants' unfettered right to file an appeal to fully ventilate their grievances. This means that the court has discretion to consider other factors such as good cause and in the interest of justice why stay should be granted. Whether the appeal has merit or not is not a matter for the jurisdiction of this court.

Having made the above findings, exercise my discretion in favour of the appellant and make the following orders.

- 1. The applicant's notice of motion for stay of execution pending appeal is hereby allowed.***
- 2. In so far as it relates to security for the performance of the decree the applicant is hereby conditioned to deposit the entire principal amount of the judgment being Kshs.12,028, 200/= within 40 days from today's date in the joint earning interest account of both advocates in a preferred financial institution of their choice.***
- 3. That in default of depositing of security within the time stipulated in this Order of stay of execution automatically lapses.***
- 4. The appellant to compile, file and serve a record of appeal upon the respondent within 45 days from the date hereof.***
- 5. The costs of this application do abide the outcome of the appeal.***

Dated, signed and delivered at Malindi this 14<sup>th</sup> day of May, 2019.

**REUBEN NYAKUNDI**

**JUDGE**

**Representation:**

Mr. Gicharu for Plaintiff/Applicant - present

Mr. Mokaya for the Defendant/Respondent - absent