



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. E028 OF 2020

SIMON P. M. GATANGI.....APPELLANT

VERSUS

JOEL GIKUNDI KUNGUTIA.....RESPONDENT

RULING

1. Before the Court is an application by the Appellant dated 18th January 2021 seeking the following orders: -

i. Spent

ii. THAT pending inter partes hearing of this application, an order of stay of execution be and is hereby granted staying execution of the judgment and orders/decrees issued on 10th November 2020 in Tigania PMCC No. 101 of 2017.

iii. THAT an order of stay of execution of the judgment and orders issued on 10th November 2020 be and is hereby granted pending the hearing and determination of the Appeal in Meru HCCA No. 28 of 2020.

iv. THAT this Honourable Court does make any other or further orders to safeguard the interests of the Applicant.

v. THAT the costs of this application be provided for.

Appellants'/Applicants' Case

2. The Application is supported by the grounds on the application and by the Applicant's supporting affidavit sworn on 18th January 2021. He avers that he is the current factory unit manager of Ngere Tea Factory Company Limited; That the Respondent filed a defamatory (*the Applicant must have meant defamation*) suit in Tigania Law Courts being Tigania PMCC No. 101 Joel Gikundi v Simon P.M Gatangi and Michimikuru Tea Factory Company Limited; That after the suit was heard, Judgment was delivered on 10th November 2020 wherein he was ordered to pay the Respondent Ksh 900,000/= in general damages plus costs and interests; That being aggrieved by this Judgment, he filed a Memorandum of Appeal against the same and soon thereafter, he applied for copies of typed proceedings and Judgment; That owing to the COVID 19 pandemic, it took him time to file the Memorandum of Appeal because the High Court in Meru had been closed; That his appeal has high chances of success; That he is willing to have the sum of Ksh 900,000/= deposited in a joint interest earning account in the names of the Advocates of the Appellant and the Respondent as security for the due performance of the decree pending the hearing and determination of the appeal; That unless stay of execution is granted, he will suffer substantial loss and damage while the Respondent will not be prejudiced in any way.

The Respondents' Case

3. The Application is opposed and vide the Respondent's replying affidavit sworn on 11th February 2021. He avers that the Applicant's appeal has no chances of success because the Appellant agreed and pleaded to pay general damages in the sum of Ksh 400,000/= as per his submissions filed in Court on 13th March 2020 as per page 8 of the Judgment; That even if he executes the decree and sum of Ksh 900,000/= as awarded by the lower Court and the Appeal succeeds, he is capable of refunding the same as he is an employee of Tigania East Constituency under the Parliamentary Service Commission and he has a title deed over Parcel No. MERU/AKAAIGA/11272 measuring 0.408 Ha; That he is opposed to the sum of Ksh 900,000/= being deposited in any joint account with anybody but he instead would rather have it deposited in court account; That the Applicant shall not suffer loss and damages if his application is rejected and general damages of Ksh 900,000/= is paid to him or deposited in court pending hearing and determination of the appeal.

Issues for Determination

4. The only issue arising for determination on this application is on whether or not this Court should grant an order for stay of execution of the Judgment and/or Decree of the lower Court issued on 10th November 2020 by Hon. P. M. Wechuli SRM in Tigania CMCC NO. 101 of 2017 pending hearing and determination of this appeal.

Determination

5. The principles that guide Courts in determining an application for stay are well established under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010. The same provides as follows: -

‘No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

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.

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.’

6. The aforementioned 3 conditions apply conjunctively and must all be present for there to be a valid reason to grant stay.

Arguable Appeal

7. Although not expressly mentioned in the rules, this Court finds that for it to entertain an application for stay, there must be an arguable appeal as to entertain such application in the absence of an arguable appeal would be tantamount to abuse of Court process. The intended appeal seeks to appeal the Judgment of the Court delivered on 10th November 2020. This nature of appeal is indeed allowed. This Court has had a chance to look at the memorandum of appeal filed by the Applicant. It seeks to challenge the finding of the Court which held that the tort of defamation had been committed. It also seeks to challenge the award of damages. These point are indeed arguable. An arguable appeal is not one that must necessarily succeed. See the case of *Omar Shurie v. Marian Rashe Yafar (Civil Application No. 107 of 2020)*.

Substantial Loss

8. On substantial loss, it is argued by the Applicants that should the Respondent be allowed to execute against him for the sum of Ksh 900,000/= he is likely to suffer substantial loss. He does not describe the nature of substantial loss that he is likely to suffer with specificity. On the other hand, the Respondent avers that should the Appeal succeed, he is capable of repaying the entire decretal amount since he is an employee of the Parliamentary Service Commission and that he has property namely Parcel No. MERU/AKAAIGA/11272 measuring 0.408 Ha. In essence, the Respondent is arguing that no substantial loss is likely to be suffered by the Applicant should the decretal amount be paid to him. On this point, this Court is more inclined to find against the Applicant as he has failed to demonstrate the nature of substantial loss that he is likely to suffer. One of the leading authorities in the issue of substantial loss is the case of *Kenya Shell Limited v Kiburu Another Civil Application No. NAI 97 of 1986 (1986) KLR 416* where Platt, AG JA held as follows: -

“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”.

9. As no substantial loss has been demonstrated, this Court will be more inclined to deny stay. However, before making a final finding, this Court will consider the other two grounds under Order 42 Rule 6 on undue delay and security.

Undue Delay

10. On whether or not there has been undue delay, this Court observes that following delivery of Judgment on 10th November 2020, the Applicants filed the instant application slightly over two (2) months later, on 18th January 2021. This cannot be said to be unreasonable delay noting that the said period fell during the vacation from 21st December 2020 to 13th January 2021. This Court finds that this application has been made in a timely fashion and the Applicant is not guilty of indolence and/or delay.

Security

11. On security, the Applicants has indicated his willingness to offer security for the payment of the decretal sum and he is ready to have this

deposited in a joint interest earning account. The Respondent on the other hand has pleaded at paragraph 5 of his replying affidavit that he is opposed to an order requiring the Appellant to deposit the decretal sum in a joint interest earning account but would rather have it deposited in Court. It is ironical that the Respondent is opposed to having the money deposited in a joint interest earning account but would rather have it deposited in the court account as the former would make the money accumulate and earn him more. Since both parties seem amenable to an order for deposit of security and the only point of divergence is on the account where such security is to be deposited, this Court finds that an order for stay on condition of deposit of such security would be most efficacious.

Conclusion

12. In the end, bearing in mind that there is an arguable appeal pending in this Court, and although no substantial loss has been demonstrated, the Applicant has indicated his willingness to deposit security for payment of the decretal amount, this Court shall grant conditional stay. This order for stay will allow the consideration of the appeal while the decretal sum is secured for the eventually successful party.

ORDERS

13. Accordingly, for the reasons set above, this Court makes the following orders: -

i. An order for stay of execution of the Judgment/Decree issued on 10th November 2020 by Hon. P. M. Wechuli in Tigania PMCC No. 101 of 2017, pending the hearing and determination of the Appeal herein is hereby issued.

ii. The Applicant shall deposit the entire decretal sum of Ksh.900,000.00 in Court within fourteen (14) days from today's date.

iii. In default of the deposit as per order ii) above, the orders for stay shall lapse and be of no effect.

iv. Costs of this application shall abide the outcome of the Appeal.

Order accordingly.

DATED AND DELIVERED ON THIS 19TH DAY OF MARCH, 2021.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

M/S Kibatia & Co. Advocates for the Applicant.

Mr. Joel Gikundi Kungutia Respondent in person.