



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 76 OF 2020

CAROLINE MWANGI.....APPELLANT

VS.

YVONNE WANGARI MUNGA.....RESPONDENT

Appeal from the ruling of the Principal Magistrate's court at Ruiru civil case NO 241 of 2019

delivered on 29th May, 2020

RULING

1. **CAROLINE MWANGI (Caroline)** has filed this appeal against the decision of 29th May, 2020 before Senior Principal Magistrate Ruiru in Civil Case No. 241 of 2019. Before the Ruiru Court an interlocutory ex parte judgment was entered in favour of Yvonne Wangari Mungai respondent against Caroline for Kshs.2million. Before that court Caroline sought by her application dated 3rd December, 2019, to set aside that judgment. That court dismissed that application by its ruling of 29th May, 2020. It is that ruling that is appealed by Caroline hereof.

2. Caroline filed an application, Amended Notice of Motion dated 17th June, 2020, which is the subject of this ruling. By that application Caroline seeks stay of execution of the judgment of Ruiru Court. The application is based on the grounds that her application before Ruiru court was dismissed on a technicality contrary to the provisions of the constitution and on the ground that if stay of execution is not granted her appeal will be rendered nugatory.

ANALYSIS

3. Consideration of an application for stay pending appeal is guided by **Order 42 Rule 6(2)** of the Civil Procedure Rules. That Rule invites the court to consider whether the applicant will suffer substantial loss if stay of execution is not issued, the court should also consider whether the application was made without unreasonable delay and the court may order security be provided for the due performance of the decree.

4. Parties to this matter have expended unnecessary submissions on whether the applicant/appellant has an arguable appeal. That, at this point is not a consideration for this Court.

5. The applicant deponed in here affidavit in support of her application that if stay of execution pending appeal is not granted the pending appeal will be rendered nugatory. The Ruiru court decree is a monetary one. It is for Kshs.2million. This is the amount that Caroline stated would render her appeal nugatory if stay is not granted. Once Caroline raised that issue that she would suffer substantial loss if stay of execution was not granted the burden to disprove that statement immediately shifted to the respondent. In other words the respondent then bore the evidential burden to prove she would be in a position to refund the decretal sum in the event the appeal was successful. This was so stated in the case **VICTORY CONSTRUCTION VS. BM (minor suing through next friend on PMM) (2019) eKLR** thus:-

“The same sentiments were expressed in Civil Application No. 238 of 2005; NATIONAL INDUSTRIAL CREDIT BANK LTD VS. AQUINAS FRANCIS WASIKE in which the Court of Appeal expressed itself at Page 3 Paragraph 2 as follows: -

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

6. It follows that the respondent having failed to show by evidence that Caroline would not suffer substantial loss the application for stay of execution succeeds.

DISPOSITION

I grant the following orders:-

- (a) There shall be stay of execution of Ruiru Senior Principal Magistrate’s Court Civil Case No. 241 of 2019 pending hearing and determination of this appeal.
- (b) The appellant having deposited into this Court Kshs.150,000/= no further security will be required from the appellant as condition of that stay.
- (c) The costs of the Notice of Motion dated 17th June, 2020 shall abide with the outcome of this appeal.

RULING DATED AND DELIVERED AT KIAMBU THIS 19TH DAY OF APRIL, 2021.

MARY KASANGO

JUDGE

Coram:

C/A : Kevin

For the Appellant..... N/A

For the Respondent.....Ms. Kigeri H/B Mr. Muriuki

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE