



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 251 OF 2018

MOSES KAGAI CHEGE.....APPELLANT/APPLICANT

VERSUS

JOEL MBURU KANUKU

HANNAH MAUKUHI KAMITHA.....RESPONDENT

(Suing as the administrators of the estate of SIMON MUTURI)

RULING

- 1) Moses Kagai Chege, the appellant/applicant herein, took out the motion dated 31st May 2018 whereof he sought for an order for stay of execution of the trial court's decree issued on 17.02.2016 pending appeal.
- 2) The motion is supported by the affidavit sworn by Stella Mathenge. When served with the motion, the respondents filed the replying affidavit of Dominic Njuguna Mbigi to oppose the application.
- 3) When the motion came up for interpartes hearing, learned counsels appearing in this matter recorded a consent order to have the application disposed of by written submissions.
- 4) I have considered the rival written submissions together with the material placed before this court. It is the submission of the appellant/applicant that on 17.2.2016 the Chief Magistrate's court vide Milimani C.M.C.C.C. no. 4779 of 2011 delivered a judgment awarding the respondents a sum of ksh.2,513,400/= being general and special damages. The appellant being dissatisfied, filed this appeal.
- 5) The appellant pointed out that he had filed an application for stay of execution of the decree pending appeal before the trial court giving rise to the ruling delivered by the trial court granting the appellant a stay order on condition that half the decretal sum is paid to the respondent and the appellant to provide a bank guarantee for the balance within 60 days from the date of the ruling.
- 6) The appellant further averred that he complied with the first condition by depositing a sum of ksh.1,227,983/= with the respondent. It is the averment of the appellant that the appellant filed an application before the trial court seeking to vary the second condition while seeking for more time to comply which application was heard and dismissed.
- 7) The appellants are now before this court seeking for similar orders as sought in the application before the trial court. The applicant stated that he has a meritorious and arguable appeal with high chances of success and that if the orders sought are not granted the respondents may execute thus rendering the appeal nugatory and making him suffer substantial loss.
- 8) It is also stated in the written submission that the respondent may not be in a position to refund the decretal sum if paid and the appeal turns successful. The applicant stated that he is ready to comply with the conditions imposed for the grant of the order for stay.
- 9) The respondents opposed the application stating that the same is resjudicata in that the applicant was granted an order for stay on 27.6.2018 by the trial court on condition that the appellant would pay half the decretal sum to the respondent within 21 days and to provide a bank guarantee for the balance within 60 days.
- 10) The respondent pointed out that the applicant paid to the respondents half the decretal sum though outside the time of 21 days fixed by the court. It is also stated that the appellant has failed to provide the bank guarantee even after his application for extension of time was dismissed.

11) Having considered the grounds stated on the face of the motion dated 21st may 2018 and the facts deponed in the supporting and opposing affidavits plus the rival written submissions, it is apparent that the main ground raised by the respondents to oppose the applicant's application is that the motion is resjudicata.

12) The applicant appears not to dispute the fact that he filed a near similar application before the trial court and was actually granted an order for stay of execution on condition that he pays half the decretal amount and provides a bank guarantee for the other half. It is also not in dispute that the applicant complied with the first condition by paying the respondents half the decretal sum.

13) The applicant unsuccessfully sought for extension of time to comply with the second condition. The applicant has not provided a bank guarantee for the balance of the decretal sum but has instead filed the instant application.

14) The applicant is not seeking for a review of the order granted by the trial court. The applicant has promised to comply with any conditions this court may impose for the grant of the order for stay. A similar order was granted by the trial court on conditions which the applicant has failed to fulfil.

15) It is trite law that an applicant may approach either the trial court or the appellate court for the grant of an order for stay. In this case the applicant successfully applied for the order for stay. It is therefore not open for the applicant to make a similar application before this court. The applicant is abusing the court process in seeking for orders already granted.

16) In my humble view, the application is simply resjudicata hence incompetent. With respect, I agree with the respondents that the doctrine of resjudicata covers this case.

17) In the end, the motion dated 31st May 2018 is found to be resjudicata. The same is dismissed with costs to the respondent.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 20th day of May, 2021.

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J. K. SERGON

JUDGE

In the presence of:

..... **for the Appellant/Applicant**

..... **for the Respondent**