



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 783 OF 2016**

**NELSON KANINI.....APPELLANT/APPLICANT**

**-VERSUS-**

**ELIKANAH KAGUNDA KANGETHE.....RESPONDENT**

**RULING**

1. The subject matter of this ruling is the Notice of Motion dated 30<sup>th</sup> September, 2019 taken out by the appellant/applicant herein, in which he sought for the following orders:

**i. Spent.**

**ii. THAT this Honourable Court be pleased to grant leave to the firm of Messrs. Ndemo Mokaya & Company Advocates to come on record for the appellant.**

**iii. Spent.**

**iv. THAT this Honourable Court be pleased to grant a stay of execution of the ruling/order delivered by the subordinate court on 16<sup>th</sup> December, 2016 and all subsequent orders pending the hearing and determination of the appeal.**

**v. THAT in the alternative, this Honourable Court be pleased to order the appellant/applicant to furnish a reasonable security being the filing of the title deed for the property known as Limuru/Ngecha/4028 other than the decretal amount as ordered by the subordinate court on 1<sup>st</sup> September, 2017 in Milimani Commercial Case No. 2345 of 2015 pending the hearing and determination of the appeal.**

**vi. THAT costs of the application be provided for.**

2. The Motion is supported by the grounds laid out in its body and the facts stated by the applicant in his affidavit.

3. The applicant deponed that he is aggrieved by the subordinate court's decision which dismissed the applicant's notice of preliminary objection that it lacked jurisdiction to entertain the suit.

4. The applicant further deponed that following delivery of the impugned ruling, a notice to show cause and subsequently, warrants of arrest, were issued against the appellant.

5. It was the applicant's assertion that he filed an application seeking an order for stay of his committal to civil jail, which application was heard and consequently dismissed by the subordinate court.

6. The applicant explained that he is unable to raise the decretal amount and he is apprehensive that he may not be able to recover the decretal sum from the respondent in the event that the appeal succeeds.

7. In that regard, the applicant urged this court to allow him to deposit the title document to his property known as Limuru/Ngecha/4028 ("the subject property") as an alternative security.

8. The respondent put in a replying affidavit to oppose the Motion, stating that following entry of judgment in his favour and against the applicant on 16<sup>th</sup> December, 2016 the applicant filed an application before the subordinate court seeking a similar order for stay of execution

pending hearing and determination of the appeal, which application was allowed on the condition that the applicant deposits the decretal sum in court but which condition the applicant did not comply with.

9. According to the respondent, the applicant thereafter filed a similar application before this court on 29<sup>th</sup> September, 2017 and which application was dismissed.

10. The respondent stated that by virtue of being in contempt of court orders earlier made coupled with the fact that the conditions for granting an order for stay of execution have not been satisfied, the applicant is not deserving of the orders being sought.

11. When the Motion came up for interparties hearing before this court, the respective advocates for the parties made brief oral submissions.

12. *Mr. Oyunge* learned advocate for the applicant submitted that by virtue of being the subject matter of the dispute, the subject property constitutes an appropriate security for the due performance of the decree and that in any event, the subject property is registered in the name of the applicant and this court has the power to vary the terms relating to provision of security as it deems fit and in pursuit of the interest of justice.

13. Counsel also argued that given his financial status, the applicant is unable to raise the decretal sum, hence the need to have the title document to the subject property stand in as security.

14. *Mr. Wachira* counsel for the respondent retorted with the argument that the security being offered by the applicant is not substantive since both the value and location of the subject property are unknown, as is the issue on whether there are subsisting third party interests on the subject property.

15. The advocate further argued that there has been a delay in bringing the application.

16. In his rejoinder, *Mr. Oyunge* contended that the delay can be explained by the ongoing litigation between the parties by way of previous applications. He also urged that this court exercises its discretion in granting the order for stay of execution subject to the applicant surrendering the title document and filing a valuation report.

17. I have considered the grounds laid out on the body of the Motion; the facts deponed in the affidavits supporting and challenging the Motion and the rival oral arguments by the parties' advocates.

18. The applicant is seeking two (2) distinct prayers in his application.

19. The first prayer concerns itself with the granting of leave for the firm of Messrs. Ndemo Mokaya & Company Advocates to come on record for the appellant.

20. From the documents placed before me, I noted that the aforementioned prayer was not disputed by the respondent. I will therefore exercise my discretion in granting this prayer.

21. The second prayer is for stay of execution of the decree pending appeal. It is noted that the applicant had previously made a similar application before the trial court, which application is indicated as having been allowed conditionally. It is not disputed that the applicant did not comply with any of the conditions.

22. It is also apparent from the record that this court entertained yet another similar application filed on 29<sup>th</sup> September, 2017 which it eventually struck out. It can therefore be said that the aforementioned application was not heard on merit.

23. In view of the foregoing, this court is not prevented from considering a fresh application seeking a similar order for a stay of execution.

24. The guiding provision is **Order 42, Rule 6(2)** of the **Civil Procedure Rules** which sets out the conditions in determining an application for stay of execution.

25. The first condition is that the application must have been made without unreasonable delay. Going by the record, the impugned judgment was delivered on 16<sup>th</sup> December, 2016 in favour of the respondent and against the applicant in the sum of KShs.2,599,969.10.

26. The present application was filed on 18<sup>th</sup> October, 2019 which is slightly short of three (3) years since the date of judgment. In my view, while there has been a delay in bringing the application, it is also true that part of the time was taken up by the various applications filed by the applicant both before the subordinate court and this court. In the circumstances, I do find that the delay has been explained.

27. Under the second condition, the applicant must show to this court's satisfaction the substantial loss he stands to suffer if the order for stay is denied. I noted the applicant's apprehension that his freedom and liberty are at stake and there is no guarantee that he will be able to recover the decretal amount from the respondent should his appeal succeed, thus rendering the appeal nugatory.

28. There was no comment from the respondent regarding his ability to refund the decretal sum.

29. On the one hand, the respondent is correct in arguing that he is entitled to the fruits of his hard earned judgment which is to say that execution is deemed a lawful process.

30. On the other hand, the courts have rendered that where a party has raised an issue of the opposing party's probable inability to refund the decretal sum, the evidential burden shifts to the opposing party to demonstrate his or her financial capability to repay the decretal sum.

31. In the present instance, the respondent neither indicated nor demonstrated his ability to refund the decretal amount which I must admit is fairly colossal.

32. Further to the foregoing, it is apparent from the record that warrants of arrest were at one point issued against the applicant by the subordinate court which supports his argument that his freedom is at risk.

33. I am therefore satisfied that in the premises, the applicant has reasonably demonstrated that he stands to suffer substantial loss if the order for stay is not granted.

34. The final condition is the provision of security for the due performance of the decree or order. In this regard, the applicant conveyed his willingness to deposit the title deed to the subject property, while the respondent opposed the proposal arguing that the same is neither appropriate nor ascertainable, though he did not make any proposals on a suitable mode of security.

35. I agree with the respondent that it would not be proper in the circumstances for the applicant to be permitted to deposit title document as security and in any event, there is no way of establishing whether the value of the subject property constitutes adequate security commensurate to the decretal amount. In my view, the appropriate security is for the applicant to deposit the decretal sum.

36. The upshot is that the Motion dated 30<sup>th</sup> September, 2019 is found to be meritorious hence it is allowed with the following orders being made consequently:

- a. The firm of Messrs. Ndemo Mokaya & Company Advocates is hereby granted leave to come on record for the appellant/applicant.
- b. There shall be an order for stay of execution of the judgment and decree issued on 16<sup>th</sup> December, 2016 pending the hearing and determination of the appeal on the condition that the applicant deposits the decretal sum of ksh.2,599,969.10 in court within 60 days from the date of this ruling in default of which the stay order shall lapse.
- c. Costs of the Motion shall abide the outcome of the appeal.

**Dated, Signed and Delivered at Nairobi this 30<sup>th</sup> day of January, 2020.**

.....

**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent