



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MAKUENI
CIVIL APPEAL NO.71 OF 2018
FORMERLY MACHAKOS HCCA NO. 151 OF 2015
URBANUS KYALO WAMBUA.....APPLICANT
-VERSUS-
BRIGGITTA NDILA MUSAU.....RESPONDENT

RULING

1. This ruling is with respect to the Notice of Motion application dated 28/08/2019 and a preliminary objection (P.O) dated 06/11/2019. The application was filed under certificate of urgency and is brought under, Order 42 Rule 6 (1), Order 51 Rule 1 of the Civil Procedure Rules. It seeks the following orders;

a) That pending the hearing and determination of the Applicant's appeal in the Court of Appeal, the honorable court be pleased to order a stay of execution of the judgment of the honorable G.M Mutiso dated 30/06/2015 in CMCC No. 85 of 2011, Makindu and that of Lady Justice Ong'udi H.I delivered on 19/09/2019 in Civil Appeal No. 71 of 2018 and all decrees emanating therefrom.

b) That costs of this application be provided for.

2. The application is supported by the grounds on its face, the Applicant's supporting affidavit sworn on the same date and a supplementary affidavit sworn on 19/11/2019. The Applicant deposes that he has filed an appeal in the Court of Appeal which is arguable, has high chances of success and will be rendered nugatory if stay is not granted. It's also his disposition that this application has been filed without any delay and that it is imperative that the Respondent be restrained from collecting the sum awarded.

3. The application is opposed through the Respondent's replying affidavit sworn on 06/11/2019, a further affidavit sworn on 27/11/2019 and the Preliminary Objection (P.O). The Respondent deposed that the application is only meant to frustrate her and ensure that she does not enjoy the fruits of her judgment which she has been following for over nine (9) years.

4. It's also her deposition that the Applicant has conducted himself inequitably since commencement of the suit and is therefore undeserving of the orders sought. She avers that she has the financial means to refund the decretal award in the unlikely event that the Applicant's second appeal succeeds. Further, she has deposed that the application was filed after inordinate delay.

5. The application and P.O were canvassed by way of written submissions.

The Preliminary Objection

6. The grounds in support of the P.O are stated as follows;

a) *The notice of appeal as drawn and filed has been made by advocates who are not on record and with no leave of the court.*

b) *The request for proceedings letter has been made by advocates who are not on record and with no leave of the court.*

c) *There is no competent notice of appeal or application before the court.*

d) *The Appellant has not offered any security of costs and for performance of the decree which is a money decree.*

e) *The law firm of Muumbi & Company neither sought nor obtained leave of court prior to drawing and filing notice of appeal, request for proceedings and the application.*

7. To support the P.O, the Respondent submits that the application to effect change of advocate and notice of change of advocate were not served on her, contrary to Order 9 Rule 9 of the Civil Procedure Rules (CPR).

8. Secondly, she submits that the appellant has not offered any security for the due performance of the decree, contrary to Order 42, Rule 6 of the Civil Procedure Rules.

9. In opposing the P.O, the Applicant submits that all the documents were filed by his current advocate after a proper change had been effected and that there was full compliance with Order 9 Rule 9 of the Civil Procedure Rule. He contends that even this court in its wisdom saw it fit to grant leave without asking that the application be served.

10. On the issue of security, the Applicant submits that both the application and supporting affidavit contain averments to the effect that he is ready and willing to deposit such security for costs as the court may order. He contends that such an undertaking amounts to compliance with Order 42 Rule 6 of the Civil Procedure Rules. It is also his contention that there is no requirement in law that a party applying for stay must first furnish security before filing the application.

Analysis and determination of the Preliminary Objection

11. **Order 9 Rule 9** of the CPR provides as follows;

“9. Change to be effected by order of court or consent of parties.

When there is a change of advocate or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court;

a) Upon an application with notice to all the parties or

b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

12. The change of advocate in this case was effected by way of a consent signed between the former advocates, O.N Makau & Mulei advocates and the current advocates, Muumbi & Co. Advocates. The consent was preceded by an application dated 02/10/2019 which was compromised on the same day through the aforesaid consent. The record shows that all the documents were filed by the current advocates after the consent order thus valid. My understanding of paragraph (b) above is that where advocates are in agreement, an application is not necessary. They should simply file the consent and have it adopted by court.

13. Be that as it may, my view is that the filing of an application in this case is not fatal and does not negate the fact that the change was done under paragraph (b). The use of the word ‘or’ between the two paragraphs means that the change should be done either under paragraph (a) or (b) and as rightly submitted by the Applicant, there is no requirement of service under paragraph (b).

14. With regard to security for costs, it is evident from the application and supporting affidavit that the Applicant is ready and willing to deposit such security for costs as the court may order. He has deposed as follows in paragraph 7 of the supplementary affidavit;

“...The aforesaid sum is adequate security but I am ready and willing to provide such further/additional security as the honorable court may deem fit and reasonable.”

15. Accordingly, I agree with the Applicant that the above undertaking is sufficient compliance with Order 42 Rule 6 (2) of the Civil Procedure Rules. It is therefore my considered view that the P.O has no merit.

The Applicant’s submissions on the application

16. The Applicant submits that if stay is not granted and his second appeal is successful, he will go through hardship by instituting proceedings to recover the decretal sum. He submits that the respondent has been desperately trying to get the money held in the advocates’ joint account and according to him that casts doubt on her ability to refund the decretal sum.

17. It is also his submission that the Respondent has not provided evidence to show that she owns the business known as *Graceline supplies* and that this court has neither been told the worth of the business nor its income. He relies *inter alia* on **G.N Muema P/A (sic) Mt. View maternity & Nursing Home –vs- Miriam Maalim & Anor (2018) eKLR** where the Court held;

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an Applicant seeking stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a Respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

18. He submits that the application was brought without unreasonable delay in that, judgment was delivered on 19/09/2019 and the application filed on 31/10/2019.

19. It is also his submission that security already exists by way of Kshs.300,000/= held in a joint account operated by both advocates. He is

also ready and willing to put any additional security as the court may order. He further urges this court not to be persuaded by the bill of costs prepared by the Respondent's advocates and contends that the same is exaggerated and has not been taxed. It's also his contention that the matter herein has very straightforward issues and cannot attract instruction fees of Kshs.200,000/=.

The Respondent's submissions

20. The Respondent submits that the Applicant has not demonstrated any substantial loss and continues to maintain that the amount in question was a loan which he failed to pay. She contends that the intended appeal is frivolous and does not raise a single issue of law. It's also her submission that failure to grant stay will not render the appeal nugatory.

Analysis and determination

21. Having considered the application, the affidavits in support, the responses and rival submissions, I find the only issue for determination to be whether grant of stay of execution is merited.

22. As rightly submitted by the parties, the conditions which should guide the court in determining whether to grant stay pending appeal are; whether substantial loss will occur if stay is not granted, whether the application has been filed without unreasonable delay and furnishing security for the due performance of the decree.

23. The application was filed slightly over a month after delivery of judgment and I don't find that to be unreasonable delay.

24. As for security the Applicant has, expressed willingness to comply with orders to be issued by this court.

25. With regard to substantial loss, the genesis of this matter is a claim of Kshs.300,000/= against the Applicant by the Respondent. Her claim is that she loaned the amount to the Applicant who refused and/or neglected to pay. Two courts have already found in the Respondent's favor and allowed her claim with costs. The trial court also allowed interest and it is noteworthy that the matter commenced in 2011. It has therefore been in court for approximately 9 years.

26. Now, the Applicant wants stay to prevent the Respondent from accessing the Kshs.300,000/= being held in a joint bank account in the names of his former advocates and the Respondent's advocates. He wants the amount to operate as security pending the hearing and determination of his second appeal.

27. The Respondent deposed that she has the financial means to refund the decretal amount if the second appeal succeeds. It is not enough for the Applicant just to allege that the Respondent does not have the means to refund the money. She was in business in 2010 when this transaction took place.

28. There is nothing produced to show that the Respondent is no longer in business or that her business has deteriorated since 2010. I am not convinced that the Applicant will suffer any substantial loss or that the appeal will be rendered nugatory, if the money is released.

29. On the issue of costs I will only state that the same have to be taxed as ordered by the two courts that have dealt with this matter. I find no justification for granting stay at this point.

30. The upshot is that the application lacks merit and is dismissed. The Applicants former advocates O.N. Makau & Mulei advocates are ordered to sign the relevant bank mandate authorizing the release of the money.

Costs to the Respondent.

Delivered, signed and dated this 27th day of February, 2020 in open court at Makueni.

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H. I Ong'udi

Judge