



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 409 OF 2019

BIBIANA MBATHA NGOTHO.....APPELLANT/APPLICANT

-VERSUS-

ODERA OBAR & CO. ADVOCATES.....RESPONDENT

RULING

1. The subject matter of this ruling is the Notice of Motion dated 7th October, 2019 taken out by the appellant/applicant herein, in which she sought for the following orders:

(i) Spent.

(ii) Spent.

(iii) THAT this Honourable Court be pleased to grant a stay of execution of the judgment of Honourable L.L. Gicheha (Chief Magistrate) delivered on 19th June, 2019 and the resultant decree issued on 5th July, 2019 pending hearing and determination of the appeal.

(iv) Any other orders and/or directions as this Honourable Court deems just and appropriate to grant including that the properties set out herein which the respondent intends to attach in satisfaction of the decree be held as security for the orders sought herein.

(v) 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 her affidavit.

3. The applicant averred that judgment was entered in favour of the respondent and against her on 19th June, 2019 in the sum of Kshs.4,244,509.18 in Chief Magistrate's Civil Case No. 8084 of 2017 and that she has lodged the appeal against the aforesaid judgment.

4. The applicant stated that the respondent has since threatened to execute the decree and only recently filed an application before the lower court seeking restraining and prohibitory orders thereby restraining and prohibiting her from transferring or charging specific properties listed in her affidavit; and that if the respondent is permitted to proceed with execution, the applicant stands to suffer substantial loss, thereby rendering the appeal nugatory.

5. It was also the applicant's averment that she is ready and willing to pledge the properties in question as security.

6. *Odera Obar Kennedy* resisted the Motion by way of a replying affidavit stating *inter alia*, that the parties herein shared an advocate-client relationship which turned sour and resulted in judicial proceedings.

7. The deponent also stated that there has been a delay in bringing the application and further, that the applicant has utterly failed to demonstrate substantial loss. As concerns the provision of security, it was the deponent's assertion that the applicant should be made to deposit the decretal sum in court since she is a resident in the United States of America (USA).

8. In presenting oral arguments on the Motion, *Mr. Kago* learned advocate for the applicant relied on the application and supporting affidavit, and further submitted that the application has been timeously filed. The advocate also contended that his client is ready and willing to surrender titles to the properties in question as a show of goodwill.

9. In retort, *Mr. Odera* while relying on the facts deponed in his replying affidavit contended that there is need to have half of the decretal sum paid to the respondent and the remaining half be deposited in court.

10. *Mr. Kago* in his rejoinder argued that his client would prefer to deposit the decretal sum in an interest earning account and urged this court to exercise its discretion in her favour.

11. 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 presented by the parties' advocates.

12. The Motion concerns itself with the subject of a stay of execution. 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.

13. The first condition is that the application must have been made without unreasonable delay. In the matter before me, it is apparent that the impugned judgment was delivered on 19th June, 2019 whereas the Motion was filed on 9th October, 2019 barely three (4) months thereafter. I am satisfied that there has been no unreasonable delay in bringing the application.

14. 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. In this respect, I noted the applicant's apprehension that the respondent has taken active steps towards executing the decree by seeking to attach her properties and that unless an order for stay of execution is granted, she stands the risk of losing the said properties.

15. The courts have rendered that substantial loss is that which ought to be prevented, hence an applying party ought to demonstrate the specific manner in which he or she stands to suffer substantially since execution of a decree is regarded a lawful process. Take for instance the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012]** where the court opined that:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”

16. In the present instance, the applicant did not establish factors to show the irreparable impact of the intended execution by the respondent, neither did she argue that there is a likelihood she may be unable to recover the decretal sum from the respondent once the same is paid and the appeal succeeds in the end.

17. Needless to say that I have considered the fact that the decretal amount is fairly colossal in nature and courts of law are called upon to create a level playing field for parties.

18. The final condition is the provision of security for the due performance of such decree or order. Upon considering the proposal offered by the applicant, I would have to agree with the respondent that it would not be proper in the circumstances for the applicant to be permitted to deposit title documents as security since there is no way of establishing whether the value of the subject property constitutes adequate security commensurate to the decretal amount and furthermore, it is not disputed that the applicant does not reside within this court's jurisdiction and it would also prove difficult for the respondent to realize such security should the appeal be concluded in its favour. In my view, an appropriate security is for the applicant to deposit part of the decretal sum in court.

19. The upshot is that the Motion dated 7th October, 2019 is allowed with the following orders being made consequently:

a) There shall be an order for stay of execution of the decree resulting from the judgment delivered on 19th June, 2019 pending hearing and determination of the appeal on the condition that the applicant do pay to the respondent half of the decretal sum and the other half be deposited in a joint interest earning account to be opened in the names of the parties and/or their advocates. The two conditions to be met within 45 days from the date of this ruling in default of which the stay order shall lapse.

b) Costs of the Motion shall abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 20th day of February, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant/Applicant

.....for the Respondent