



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO. 26 OF 2019

SOUTH SIOUX FARM LIMITED.....APPELLANT/APPLICANT

VERSUS

JANE NYAMBURA KINUTHIA.....RESPONDENT

(An appeal from the judgement and decree of Hon Gesora, P.M., delivered on 20th day of August 2019 in Narok CMCC NO. 209 OF 2018, Jane Nyambura Kinuthia v South Sioux Farms Limited)

RULING

The case for the applicant

1. The applicant through his notice of motion, which was filed under certificate of urgency pursuant to the provisions of Order 42 Rule 6, Order 51 of the 2010 Civil Procedure Rules and sections 3A of the Civil Procedure Act (CAP 21) Laws of Kenya, has sought the following orders.
 1. *spent*
 2. an order to extend the stay of execution of the lower court's judgement pending the hearing and determination of the instant application *inter partes*.
 3. an order to extend the stay of execution of the lower court's judgement pending the hearing and determination of the instant appeal.
 4. an order directing that costs of this application be costs in cause.
2. The application is based on the grounds that are set out on the face of the notice of motion and the supporting affidavit of its counsel (Hellen Wangui Kinuthia).
3. The major grounds are as follows. The applicant was granted stay of execution by the lower court for six (6) months, which stay was to expire on 17th June 2020 and counsel for the respondent promised to hold taking any further action till the cessation of movement was lifted. The cessation of movement was imposed due to the corona virus pandemic.
4. Counsel for the respondent has now threatened to execute despite his earlier promise to execute.
5. The applicant has already filed the appeal. And has also filed a record of appeal. She also is ready to file written submissions. If the respondent executes, the intended appeal will be rendered nugatory as the chances of recovering the money from the respondent shall be slim. The respondent means of income are unknown and the applicant might suffer substantial loss if the money is paid out. The respondent is minded to execute the judgement and decree and may attach the applicant's properties any time.
6. In addition to the foregoing grounds in support of the notice of motion, the applicant through its counsel (Hellen Wangui Kinuthia) has deposed to the following major averments in a seventeen paragraphs (17) supporting affidavit. First, counsel has deposed that her firm has the conduct of this matter in respect of which they were instructed to appeal against the magisterial judgement. Second, she duly filed an appeal in this court being Civil Appeal No 26 of 2018.
7. Third, she has deposed that soon after filing the appeal the corona pandemic and restriction of movement started. Fourth, she has deposed that due to the corona virus pandemic and cessation of movement, counsel for the respondent indicated that they were waiting for the situation to get back to normal and promised to hold any further action till the cessation of movement was lifted.

8. Finally, she has deposed to other matters that are already set out as grounds in the notice of motion which I find unnecessary to repeat.
9. Counsel for the applicant filed a 24 paragraphs supplementary affidavit dated 16th July 2020 in response to the replying affidavit of the respondent. Her major averments are as follows. She has averred that after they left the court on 1st July 2020, despite counsel for the respondent having undertaken that the auctioneer was not going to attach the properties of the applicant; the auctioneer went ahead and attached the goods of the respondent. As a result, the applicant was forced to urgently raise Kenya shillings two hundred thousand (Kshs 200,000/-), which it gave to the auctioneer. The applicant's counsel has averred that the attachment was in disregard of the court order.
10. Counsel for the applicant has further averred in reply to the respondent's averment in paragraph 5, that she filed the instant application seeking an extension of the lower court order for stay of execution. She also has averred that contrary to the averment by the respondent that she has not taken any further steps in the matter, she has now filed a record of appeal.
11. Furthermore, counsel for the applicant has also averred that the current covid 19 pandemic did disrupt all activities including the preparation of the record of appeal. The cessation of movement into and out of Nairobi further complicated the matter as she could not leave Nairobi to attend the court.
12. Finally, counsel has averred that in response to paragraphs 17, 18, 19 and 20 of the respondent, that she had a practicing certificate which she had paid for in time and that the statements of counsel for the respondent that she did not have a valid practicing certificate caught her by surprise; a matter in respect of which she has attached her payment cheque and the certificate.

The submissions of the applicant

13. Counsel for the applicant filed skeleton submissions as directed by the court.
14. Counsel for the applicant (Messrs Wangui Gatere & Co. Advocates) have submitted that the applicant was granted a stay of execution for 6 months which lapsed on 17th June 2020. As a result, counsel filed a record of appeal although some pages were missing; which was not deliberate. She has submitted that the proceedings had been supplied to them. Counsel has further submitted that covid 19 started and as a result everything was thrown into disarray including restrictions of movement outside and they were unable to travel out of Nairobi to Narok. Additionally, the Chief Justice issued a directive staying all executions. Counsel has therefore urged the court to take judicial notice that when the corona pandemic started all operations were distorted and the situation took time before returning to normal.
15. Counsel has also submitted that the corona pandemic was not foreseeable and no blame can be attributed to any party and that it is this pandemic that necessitated the filing of this instant application.
16. Furthermore, counsel has cited the well-known case of *Butt v. Rent Restriction Tribunal [1982] KLR 417*, in which the Court of Appeal held that the discretion to grant an order of stay of execution should be exercised in a manner that would not prevent an appeal.
17. Counsel has also submitted that the respondent filed the suit almost nine years after the accident and that although leave was granted to file it out of time; it was in relation to a different party and not the appellant. He has further submitted that the suit was therefore time barred in terms of section 4 of the Limitation of Actions Act (Cap 22) Laws of Kenya and should not have been allowed to proceed.
18. The applicant has submitted that the respondent has not disclosed his source of income that he would use to refund the applicant the decretal sum should the appeal succeed. According to counsel, the applicant has therefore established that it will suffer substantial loss if the intended execution is not stayed and its appeal will be rendered nugatory.
19. The applicant has urged the court to be guided by *Nduhiu Gitai & Another v Anna Wambui Warugongo [1988] 2 KAR*, which cited the decision of Sir John Donaldson M.R. in *Rosengrens v Safe Deposit Centres Ltd [1984] 3 All ER 198*, in which the latter court stated that it was concerned with preserving the rights of both parties pending the appeal without disadvantage to the defendant while giving no legitimate advantage to the plaintiff. That court also stated that it was its: "*duty to hold the ring even-handedly without prejudicing the issue pending the appeal.*"
20. Counsel has urged the court to order the applicant to file its record of appeal and take a date in the matter within 30 days failing which the order will lapse. They have also submitted that the applicant is willing to deposit a half of the decretal sum of money in the joint interest earning account as a show of good faith.
21. Counsel has submitted that it is willing to abide with any reasonable condition which the court may impose.
22. In the alternative to the foregoing, counsel has urged the court to exercise its discretion and grant fresh orders of stay subject to the condition that a half of the decretal sum be deposited in a joint interest earning account within 30 days and to speedily bring the appeal to its conclusion.

The case for the respondent

23. Mr. P. Wambugu Kariuki, counsel for the respondent has filed a twenty-four paragraphs (24) replying affidavit in opposition to the application; in which the major averments are as follows.
24. First, he has deposed that he prosecuted the suit in the magisterial court from which this appeal emanates and he is therefore conversant with the facts of the application. Second, he has deposed that the application particularly the prayers being sought namely numbers 2 and 3

are incurably defective for the following reasons. The High Court never issued any stay of execution in this matter that is being sought to be extended and that the record of appeal is incomplete.

25. Third, the National Government and the judicially (*sic*) protocols of operations in respect of the covid-19 pandemic are facts within the public domain and that the lower court on 17/12/2019 granted an order stay of execution for six months.

26. Fourth, on 23/6/2020 the respondent applied for execution to issue after the lapse of the six months stay of execution and as a result Gladsom Auctioneers proclaimed the applicant's movable assets and issued their fee note in the sum of Shs 446,000/-.

27. Fifth, being a money decree, the applicant has not given any undertaking for the due performance of the decree in lieu of orders for stay of execution as legally required; which makes the application unmeritorious.

28. Sixth, additionally counsel has averred that one of the conditions for the issuance of an order for stay of execution by any court of law is a deposit of the decretal sum of money which is shs. 4,152,790/ - in the instant application, in a joint interest earning account in the joint names of the advocates on record in a reputable bank or financial institution.

29. Seventh, counsel has averred that Hellen Wangui Gatherer Advocate had not renewed or taken out a practicing certificate for the year 2020 that runs from 1/1/2020 to 31/12/2020 as mandatorily required by section 24 of the Advocates Act (Cap 16) Laws of Kenya.

30. Eighth, counsel has averred that in view of the foregoing, counsel Hellen Wangui Gatherer is not authorized to practice law for the period of 2020 as of 29/6/2020. She has therefore committed an act of professional misconduct.

31. Ninth, counsel has averred that the instant application that is dated and filed on 24/6/2020 as well as the record of appeal filed on 11/3/2020 have been filed by an unqualified person to practice law in the year 2020 and ought to be struck out.

32. Tenth, counsel has also averred that the counsel by the name Robert Ng'ang'a Mugo, who many times holds brief for the said Hellen Wangui Gatherer in the matter also has no practicing certificate for the year 2020.

33. Counsel has finally averred that the issue of both counsel (Hellen Wangui Gatherer and Robert Ng'ang'a Mugo) not holding practicing certificates: *"shall be raised as a preliminary objection so as to have the application dated & filed on 24/6/2020 & the record filed on 11/3/2020 be struck out with costs."*

34. Negotiations for an out of court settlement.

35. At the prompting of the court as mandated by article 159 (2) (c) of the 2010 Constitution of Kenya (which is in relation to alternative dispute resolution), both counsel engaged in an out court settlement of the matter with the following results. Counsel for the respondent abandoned his preliminary objection in respect of whether counsel Hellen Wangui Gatherer was practicing without a valid practicing certificate. He however insisted that the applicant should deposit the full decretal amount in a joint account in the names of both counsel on record in an interest bearing account with a reputable bank or financial institution.

36. Furthermore, counsel for the respondent offered to deposit only a half of the decretal sum of shs 2,076,395/- in an account as proposed by counsel for the applicant and on the same terms.

37. In the end the negotiations failed to yield fruitful results.

Issues for determination.

38. I have considered the affidavit evidence of the parties, their submissions, the authorities they cited and the applicable law. As a result, I find the following to be the issues for determination.

- 1) Whether the preliminary objection as to whether both counsel for the applicant had valid practicing certificates and whether this issue warrants further investigations by this court.
- 2) Whether the attachment was in disregard of a court order.
- 3) Whether this court can extend a lower court order granting stay of execution, which had lapsed on 17th June 2020.
- 4) Whether the applicant has satisfied the requirements set out in Order 42 Rule 6 of the Civil Procedure Rules.
- 5) Whether or not the applicant should deposit the full or a half of the decretal sum of money.

ISSUE 1

39. I find from the averments in the supporting and supplementary affidavits of counsel Hellen Wangui Gatherer, that she had a valid practicing certificate is in sharp conflict with the averment in the replying affidavit of counsel for the respondent, that she did not have a valid practicing certificate. It is difficult to resolve this evidentiary conflict on the basis of the current affidavits of both counsel. Furthermore, counsel for the respondent has also submitted that even counsel holding brief (Mr. Robert Ng'ang'a Mugo) does not also have a

valid practicing certificate.

40. Counsel Robert Ng'ang'a Mugo did not have the opportunity to respond to the submission of counsel P. Wambugu Kariuki that he did not have a valid practicing certificate.

41. I find that the averment that both counsel (Hellen Wangui Gatherer and Robert Ng'ang'a Mugo) did not have valid practicing certificates if proven amounts to professional misconduct. This is a serious allegation.

42. The allegation that both counsel did have valid certificates has been raised as a preliminary objection. A preliminary objection is a point of law that is raised after the close of pleadings. It should be clear from the pleadings and does not need further investigation. When successfully raised the preliminary objection has the effect of bringing the dispute to a final conclusion. In the instant application if the issue is sustained the application should be struck out as being incompetent. This is what counsel for the respondent has urged court to do; which is a draconian measure and may only be resorted to as a matter of last resort.

43. In view of the sharp conflict in the evidence of the affidavits of counsel for the applicant on the one hand and counsel for the respondent on the other hand, it is difficult to make a finding as to whether the two counsel had or did not have valid practicing certificates. It therefore follows that this court is not in a position to investigate further the issue raised by counsel for the respondent due to the conflict in the evidence with the result that the preliminary objection fails and is hereby dismissed.

44. However, it is in the interests of justice that this issue be referred to the Law Society of Kenya (LSK) for investigations. I accordingly refer the issue to the LSK with a recommendation that the matter be investigated and appropriate action be taken.

ISSUE 2.

45. I find that the undertaking given by counsel P. Kariuki Wambugu was on condition that counsel Hellen Wangui Gatherer was to produce a valid practicing certificate. She was unable to do so. In the circumstances, I find that there was no breach of the said undertaking.

ISSUE 3

46. Counsel for the applicant submitted that this court can extend a lower court order that granted a stay of execution pending the filing of an application for stay in the High Court. Counsel for respondent submitted that this court had not issued any order of stay of execution that counsel for the applicant sought to be extended. I find that this court cannot extend an order of stay of execution granted by the lower court, because the grant of stay by the High Court is governed by Order 42 Rule 6 of the Civil Procedure Rules; which sets out the conditions to be met before an order of stay of execution is granted. The order of stay of execution granted by the lower court is to enable the applicant to initiate the appellate processes in the High Court and is therefore not capable of being extended. Furthermore, the moment an application is filed in the High Court the order of the lower court is spent; since the order of the lower court is to preserve the status quo pending the filing of the application in the High Court.

ISSUE 4

47. Order 42 Rule 6 of the 2010 Civil Procedure Rules provides the legislative frame and the requirements that an applicant has to comply with before he is granted an order of stay of execution pending the determination of his application and the appeal.

48. One of the requirements imposed is for the applicant to demonstrate that unless an order of stay of execution is granted, the applicant might suffer substantial loss. Upon the evidence presented by both counsel I find that unless an order of stay of execution is granted the appeal filed by the applicant will be rendered nugatory. The applicant is also likely to suffer substantial loss unless an order of stay of execution is granted.

49. Furthermore, I find that the appeal was filed on 27th August 2020. I also find that the judgement appealed against was delivered on 20th day of August 2019. It is therefore clear that the appeal was filed within the prescribed period of 30 days in terms of section 79G of the Civil Procedure Act (Cap 21) Laws of Kenya. The said section excludes the days the period that is required for the preparation of the record of the trial namely the proceedings and judgement. I therefore find that there has not been any unreasonable delay in the prosecution of the instant application.

50. The applicant had not completed in preparing the record of appeal due to the missing pages, which was as a result of an excusable human error. The said error cannot disentitle the applicant from being granted the orders sought.

51. Furthermore, Order 42 Rule 6 requires the applicant to provide security for the due performance of the obligation that the court might eventually find binding upon it.

52. Finally, the issue that now falls for consideration is whether the applicant should deposit the full or a half of the decretal sum of money. In this regard, I find as apt the observation of the court in the case of *Nduhiu Gitai & Another v Anna Wambui Warugongo [1988] 2 KAR, supra*, that it is its "duty to hold the ring even-handedly without prejudicing the issue pending the appeal."

53. In balancing the conflicting interests of the two parties, it is imperative for this court to strike a balance. The applicant is entitled to have its appeal heard so that if there are errors of law and fact committed by the trial court this court must correct them. On the other hand, if there are no errors the judgement of the trial must be confirmed. In this regard, I find that once an applicant has met the requirements of Order 42 Rule 6 the Civil Procedure Rules, the court is required to exercise its discretion in facilitating the applicant to have its appeal heard and determined.

54. Furthermore, the respondent is also required to provide security for the due performance of the obligation that the court might eventually find binding upon him. And in the event the applicant's appeal fails, the respondent will be able to have access to the security deposited either in court or in an interest bearing joint account with a reputable bank or financial institution.

55. The issue that arises for consideration is the form of security, which the applicant has to provide. This issue should not really arise, since the trial court has determined in its judgement the decretal sum of money. It is upon the applicant to demonstrate as to why it should not deposit the whole decretal sum, which burden has not been discharged by the applicant.

56. In the instant application, I find no basis for ordering the applicant to deposit a half of the decretal sum of money.

57. It therefore follows that the applicant's application is merited and is hereby allowed on condition that it deposits the entire decretal sum of shs. 4,152,790/- in a joint account in the names of both counsel on record in an interest bearing account with a reputable bank or financial institution within 30 days, failing which this order will lapse.

58. Costs of this application will be costs in cause

59. The deputy registrar is hereby directed to forward a copy of this ruling to the LSK for their further action as ordered in paragraph 44 of this ruling.

Ruling signed, dated and delivered in open court at Narok this 22nd day of September 2020 in the presence of Ms. Gatherer for the applicant and in the absence of Mr. P. K. Wambugu for the respondent.

J M BWONWONG'A

JUDGE

22/9/2020