



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

CIVIL APPEAL CASE NO.35 OF 2018

TERESIA NYAWIRA MAGOTHE.....APPELLANT

VERSUS

EPHANTUS MWAMBIA GATHU.....RESPONDENT

RULING

Before me is the Notice of Motion brought by the appellant under Orders 42 Rule 22 of the Civil Procedure Rules 2010, Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 and all other enabling provisions of the law. She seeks for a stay of execution pending hearing and final determination of the appeal herein and costs of this application.

The application is premised on the grounds on the face of the Notice of Motion and supported by an Affidavit of Teresia Nyawira Magothe, the Appellant, who deponed *inter alia*:

- a) The matter arises out ***Karatina SPMCC no. 44 of 2012 Ephantus Mwambia Gathu vs. Teresia Nyawira Magothe*** whereby judgment was entered in favour of the defendant in the sum of Ksh 1,300,000 for breach of contract.
- b) The judgment was delivered in absence of the Appellant's advocates on record who were not served with the judgment notice.
- c) After learning of the said judgment the Appellant was dissatisfied with the same and preferred the instant appeal.
- d) The Respondent has already extracted a decree and if stay is not granted he may proceed to execute the same against the Applicant and render the instant appeal useless.

The application is opposed by the Respondent who filed the following grounds of opposition dated 14th September 2018;

- a) The application is misconceived and an abuse of the due process of the Court.
- b) The application is meant to delay the conclusion of the dispute.
- c) The Respondent is entitled to fruits of the dispute.
- d) The provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 provides that an Applicant who is seeking a stay of execution pending appeal must establish the following: -
 - i) Substantial loss may result to the applicant unless the order was made;
 - ii) The application was made without unreasonable delay; and
 - iii) Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
- e) The balance of convenience does not tilt in favour of the applicant.

The application was canvassed by way of written submissions. In her written submissions dated 12th November 2018, argued that her appeal

stands a good chance of success and if the Respondent is paid the decretal amount it may be impossible to recover the same if the appeal succeeds. That it was testified in the lower Court that the Respondent lives in the USA, his means of income are unknown hence paying him the decretal sum pending the appeal would be prejudicial to the Appellant.

The Applicant relied on Kenya Orient Insurance Ltd vs. Paul Mathenge Gichuki & Another (2014) eKLR and Peter Ondande t/a SpreawetChemis vs Josephine Wangari Karanja (2016)eKLR. In the latter case, it was held:-

“The issue for determination by the Court is whether the Applicant has established a case to enable this Court grant him the Orders sought. For this Court to grant stay of execution, it must be satisfied that substantial loss may result to the Applicant if stay is not granted. Further the Applicant must have filed the application for stay without unreasonable delay and finally the Applicant must provide such security as may be ultimately be binding upon him”

The Respondent filed written submissions dated 2nd October 2018 in which he argued that the application did not meet the threshold in Order 42 Rule 6(2) for an order of stay of execution. That the applicant had not demonstrated what substantial loss she stood to suffer if the stay was not granted. That the applicant had not offered any security for the due performance of the decree should the appeal fail as required by law, and that the application should be allowed only on condition that the applicant deposits the decretal sum, costs and interest in an interest earning account in the joint names of both counsel within a period not exceeding 30 days pending hearing and determination of the appeal. In the conditional stay be discharged and the Respondent to be at liberty to execute the decree.

The Respondent relied on the case of G.N Muema P/A(Sic) Mt View Maternity & Nursing Home vs. Miriam Maalim Bishar & Another (2018)eKLR.

The pertinent issue for determination is whether the applicant has met the threshold under Order 42 Rule 6 (2) for the grant of an order of stay of execution pending appeal.

The Respondent lives outside the jurisdiction of this Court, should the appeal succeed it may be difficult for the applicant to recover the decretal sum. That would be substantial loss. The respondent has not challenged that bit of the applicant’s averments.

Judgment in the lower court was delivered on 20th June 2018 and the instant application was filed on 29th August 2018. The affidavit in support of the application states that the applicant was not issued with the judgment notice and that when she learnt about it she immediately filed a Memorandum of Appeal on 20th July 2018. Whatever delay this may amount to is not inordinate and the respondent has not demonstrated any prejudice suffered.

As regards the last requirement of security, neither the application nor the supporting affidavit makes any commitment. The Applicant has however shown her willingness to provide security in her submissions. This Court finds this willingness sufficient in the interest of discharging justice without undue regard to technicalities as envisaged in Article 159 of the Constitution.

The upshot is that this application is allowed on the following terms: -

1. There shall be a stay of execution of Judgment delivered by Hon. E. Michieka on 20th June 2018 pending the hearing and determination of the appeal.
2. That the stay is on condition that within 30 days hereof the Appellant shall deposit the sum of Ksh 1, 500, 000 into an interest earning account in the joint names of her advocates and those of the Respondent as security for the due performance of the said decree.
3. In the event that Appellant shall default on (1) above, the conditional stay of execution shall automatically lapse and the Respondent shall be at liberty to execute.
4. Costs of this application shall be in the appeal.

Dated, delivered and signed at Nyeri this 25th Day of January 2019.

Mumbua T Matheka

Judge

In the presence of:

Ms.Mwikali holding brief for Mr.Macharia for Appellant

Mr.Muthigaru for respondent –No appearance

Mumbua T Matheka

Judge

