



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 99 OF 2018

JENIFFER WACHUKA NJEHU.....APPLICANT

VERSUS

GITITU COFFEE GROWERS CO-OPERATIVE SOCIETY.....RESPONDENT

RULING

1. Before this court are two applications by way of Notice of Motion filed on 22nd August, 2018 and 25th September, 2018 respectively. In the first application the appellant sought for an order of stay of execution of the judgment given on 9th August, 2018 and any other consequential orders in **Githunguri PMCC No. 13 of 2015** pending inter-partes hearing and determination of the application and/or appeal lodged herein.
2. On 12th September, 2018, stay of execution pending inter-partes hearing was granted. The Applicant was to deposit in court the sum of Kshs. 336,000/= within 14 days as a condition for the stay.
3. Consequently, upon the Applicant's failure to comply with the court's order mentioned above she filed the 2nd application seeking the court to extend its order of stay made on 12th September, 2018 and /or review the said order and order that the cash deposit ordered by this court as security be substituted by depositing land parcel title No. LIMURU/BIBIRIONI/4034, approximately 0.405 belonging to GEORGE KAMAU GATHERU ID/NO. 0715414 as security pending the hearing and determination of this application and/or appeal.
4. The substance of the two applications is the prayer for an order for stay of execution pending the hearing and determination of the appeal herein. **Jeniffer Wachuka Njehu** filed a supporting affidavit. She deposed that due to her advocate's negligence in the lower court, she was not able to file an amended statement of defence thus she failed to file a counterclaim as well as challenge the jurisdiction of the trial court. She deposed that the matter was heard ex parte upon and her application to file an amended defence being disallowed. That consequently judgment was entered against her, and her subsequent application for stay of execution was not certified as urgent thus exposing her to execution. She deposed that unless the order for stay of execution is granted, her pending appeal will be rendered nugatory. She contended that the appeal is arguable and has high chances of success and that no prejudice will be occasioned to the Respondents.
5. The Respondent filed two affidavits in opposition, citing the Applicant's failure to pay rent to the Respondents over many years; the Respondent's ability to refund the decretal sum and rejecting the title document offered as security.
6. The applications were canvassed by way of oral submissions. Mr. Gekonge, counsel for the Applicant submitted that the appeal was filed on time and is arguable, as it is challenging jurisdiction of the lower court. Counsel submitted that the Applicant will suffer irreparable loss if the prayer for stay of execution is not granted. It was submitted that the Applicant's businesses would collapse. Counsel submitted that the Applicant failed to comply with the conditional order given because of the time period allowed. It was stated that the Applicant seeks to use a title deed of a third party as security, rather than cash deposit. Finally counsel submitted that no substantial loss will be suffered by the Respondent being a corporate body.
7. Ms. Wanjiru Advocate submitted on behalf of the Respondent. She opposed the applications. Counsel submitted that there existed a tenancy agreement between the two parties and that the Applicant has not paid rent since the year 2012. It was also submitted that the Applicant failed to comply with the order of conditional stay granted by this court. Counsel stated that the Respondent cannot accept security from a third party as he is a stranger. It was submitted that the applicant has not demonstrated how she will suffer loss. Lastly, counsel submitted that the Respondent is a corporate body and is able to refund the decretal sum in case the appeal succeeds.
8. The court has considered all the material canvassed in respect of the motions by the Applicant. Concerning the first motion, to be successful, an applicant invoking the provisions of Order 42 and 6(1) and (2) of the Civil Procedure Rules is required to satisfy three conditions. He must:-

- i) approach the court without unreasonable delay.
- ii) satisfy the court that substantial loss may result unless the order sought is granted.
- iii) furnish security for the due performance of the decree appealed from.

9. At this point, the court is not concerned with the merits or validity of the grounds of appeal. The Applicant timeously approached the court. She offers a security owned by a third party, having failed to comply with this court's order for the deposit of the sum of Kshs.336,000/= as condition for temporary stay of execution. Has she demonstrated the likelihood of suffering substantial loss if the stay of execution pending appeal is denied?

10. One of the most enduring legal authorities on the issue of substantial loss is the case of **Kenya Shell Ltd V Kibiru & Another [1986] KLR 410**.

11. Holdings 2,3 and 4 therein are particularly relevant. These are that:

“1.

2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.

3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.

4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.

5.”

12. The ruling by **Platt Ag JA**, in the **Shell** case, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Ag JA (as he then was) stated inter alia that:

“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts...”

13. The learned Judge continued to observe that:-

“It is usually a good rule to see if Order XLI Rule 4 of the civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”
(emphasis added)

14. Earlier on, **Hancox JA** in his ruling observed that:

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would,..... render the appeal nugatory.

This is shown by the following passage of Cotton L J in Wilson -Vs- Church (No 2) (1879) 12ChD 454 at page 458 where he said:-

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.”

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

15. It appears in this case that the Applicant's claim of the likelihood of substantial loss emanates from the order of eviction, which she asserts will expose her to irreparable damage. However, there is no dispute that the suit premises in respect of which an eviction order was made belong to the Respondent. Moreover, apart from recounting the lapses in the lower court that resulted in the judgment against her, the

Applicant does not seem to contest that the judgment in the lower court was in respect of a demand for arrears of rent. Indeed she is seeking variation of the order of deposit of cash by offering documents in respect of a land parcel No. **Limuru/Bibirioni/4034** owned by one **George Kamau Gatheru** as security in respect of the said decretal sum made up of rents.

16. The said **George Kamau Gatheru** as correctly pointed out by the Respondents, is a stranger to this suit. He has not in any way confirmed his willingness to provide security on the Applicant's behalf. The Respondents have rejected the title citing the fact that the owner is not a party to the suit. Moreover, the decretal sum if paid over to the Respondents can be repaid in the event the appeal succeeds, and indeed the Applicant has not expressed the fear that the Respondent society is incapable of doing so. It is not clear to the court how the impending eviction from premises owned and leased from the Respondents will occasion her substantial loss. The mere fact of the impending execution of a lawful judgment is not of itself evidence of likelihood of substantial loss to the Applicant.

17. The words stated in **Nduhiu Gitahi and Another -Vs- Anna Wambui Warugongo [1988] 2 KAR**, citing the decision of **Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198** are apt:

“We are faced with a situation where a judgment has been given. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff.....”

It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal.....”

That too is the import of part of the court's observations in **James Wangalwa & Another –Vs- Agnes Naliaka Cheseto [2012] eKLR**.

18. The court is not inclined to review its order on deposit of cash into court. The Applicant did not pay any amount of the sum ordered as a show of willingness to comply. Nor disclosed her means.

19. The Applicant's offer of a third party's title is not a tangible security for the performance of the monetary part of the decree. The title proffered is owned by a third party and is in my view, difficult to realize as security. I agree with the Respondents that it is not suitable for purposes of securing performance of the monetary part of the decree. It would be a travesty of justice to allow the Applicant's continued occupation of the suit premises in the circumstances herein, to the obvious prejudice of the landlord Respondent; it appears that the rent arrears go back to 2012.

20. In the circumstances, the court finds no merit in the Applicant's motions filed on 22nd August 2018 and 26th September 2018. The same are dismissed with costs.

DELIVERED AND SIGNED AT KIAMBU THIS 21st DAY OF FEBRUARY 2019

C. MEOLI

JUDGE

In the Presence of:-

Mr. Olaka holding brief for Mr. Orina for Appellant

Respondent – No appearance