



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 393 OF 2017

WILLIAM WAFULA.....1ST APPELLANT/APPLICANT

KENYA WATER INSTITUTE.....2ND APPELLANT/APPLICANT

-VERSUS-

SYLVESTER MUTINDA KAMAU.....RESPONDENT

RULING

1. The Appellants/Applicants herein took out the Notice of Motion dated 3rd August, 2018 and supported by the grounds set out on the face thereof together with the supporting affidavit sworn by *Erastus Mbaka*. The orders sought therein are as follows:

i) Spent

ii) Spent

iii) Spent

iv) THAT this Honourable Court be pleased to grant a stay of execution of the orders made by Honourable G.A. Mmasi (Mrs.) (SRM) in CMCC NO. 3350 of 2015 on 16th February, 2018 to the extent the court ordered that the decretal sum be deposited in court within 30 days from the date thereof, pending hearing and determination of the appeal.

v) THAT this Honourable Court be pleased to grant a stay of execution of the judgment delivered on 17th July, 2017; decree and all consequential orders pending the hearing and determination of the appeal.

vi) THAT costs of the application be provided for.

2. In his supporting affidavit, *Erastus Mbaka* (the legal officer of CIC General Insurance Ltd-the Insurer), averred inter alia that judgment was entered against the applicants by the lower court on 17th July, 2017. That the applicants, being aggrieved by the aforesaid judgment, have lodged an appeal to the High Court.

3. The deponent further stated that the trial magistrate thereafter granted a stay of execution conditional upon the applicants depositing the decretal sum in a joint interest earning account within 30 days of the date of her ruling. That the applicants through their advocates thereafter sought the co-operation of the respondents in opening a joint account but their attempts did not elicit a response from the respondents.

4. The above prompted the applicants to return to the lower court seeking an order to have them deposit the decretal amount in court. This was granted by the abovementioned trial magistrate on 16th February, 2018 together with a stay order. It was the deponent's further averment that the applicants at first experienced challenges in their attempts at complying with the court order but eventually managed to deposit the decretal sum in court on 4th July, 2018. That despite their compliance, the respondent has proceeded to execute the decree.

5. In opposition to the present Motion, the respondent filed Grounds of Objection on 14th September, 2018. The substance of the Grounds is that the application is incurably defective and an abuse of the court process since a stay of execution had previously been sought; that execution commenced after the stay orders previously granted had lapsed and hence any payments made thereafter have no effect; and that the applicants have not established substantial loss to warrant the order for a stay sought.

6. In response thereto, a further affidavit sworn by *Erastus Mbaka* was filed on 2nd November, 2018 by and large reiterating the statements alluded to in the supporting affidavit.

7. The Motion was canvassed by way of oral submissions exclusively by the applicants in the absence of the respondent's counsel. Ms. Kisa counsel for the applicants began by arguing that while the applicants do not dispute that there was a delay in depositing the decretal sum in court as ordered, such delay resulted not only from challenges in extracting the decree but also from internal challenges within the Insurer.

8. Ms. Kisa reiterated that the respondent has moved to execute despite the deposit of the decretal sum having been made to the court. The counsel was careful to add that the applicants have since filed a Memorandum of Appeal and requested for typed copies of the proceedings. It was further argued that the applicants stand to suffer prejudice if the orders sought are not granted since the respondent did not adduce any evidence of income and the applicants are apprehensive that if the decretal sum is released to him, the same may not be recoverable and the appeal will be rendered nugatory. Authorities were cited to that effect. The advocate also admitted that there was an oversight on their part in failing to seek an extension of time to comply with the order of 16th February, 2018.

9. I have considered the grounds set out on the application and supporting affidavit; the grounds of objection; the further affidavit in response thereto and the oral arguments by the applicants, given that the respondent made no submissions.

10. Before I go any further, I have observed that one of the substantive prayers relates to the order made by the trial magistrate on 16th February, 2018. It is unfortunate that neither of the parties thought to avail a copy of the same to this court for clarification purposes. Suffice it to say, the parties have indicated that the aforementioned order was conditional in nature. The applicants have already admitted that they did not meet the condition set out in good time. Resultantly, the order lapsed. To my mind, there is nothing to stay since the order is no longer in force. Prayer iv) of the Motion is untenable.

11. In the same line, it was the respondent's contention that since the applicants had sought a stay of execution, they cannot seek a stay for the second time. I find no basis in this argument since the stay of execution was sought before the trial court and there is nothing barring this court from entertaining a separate application for a stay. The application is properly before this court.

12. Having determined the above, I now turn to prayer v) in the Motion. In this regard, I make reference to *Albert Gacheru Kiarie T/A Wamaitu Productions v Simon Muiruri Kirehu T/A One Step Nduti Music Store [2005] eKLR* cited by the applicants which I have noted does not touch on a stay of execution. Likewise, *African Safari Club Limited v Safe Rentals Limited [2010] eKLR* relates to appeals from the High Court to the Court of Appeal. As such, these authorities are inapplicable here.

13. That said, the relevant principles are clearly set out in *Order 42, Rule 6 (2)* of the Civil Procedure Rules and further reiterated in the relevant authorities cited by the applicants.

14. I shall address the *first* principle on whether the present application was filed without unreasonable delay. I am informed that the judgment was delivered on 17th July, 2017 in favour of the respondents, prompting the applicants to file a memorandum of appeal on 2nd August, 2017. The said applicants later sought and were granted a conditional stay of execution by the lower court on 16th February, 2018. There was an indication that the applicants were unable to comply with the order due to lack of co-operation from the respondent. I have perused the annexures to the Motion and established that correspondences were made to the respondent in this regard but it would appear there was no response from the respondent. It is clear the applicants had made genuine efforts to comply accordingly and hence the respondent cannot be heard to argue that the application is an abuse of the court process.

15. To add on, the applicants suggested that there was a further delay in extracting the decree and such communication was made to the respondent. I have inspected the decree and confirmed that the same was issued on 7th June, 2018 whereas the application before me was filed close to one (1) month thereafter. The applicants have not contested that there has been a delay and the same has been explained. There is no indication that the delay was inordinate and I am satisfied with the reasons expressed before me.

16. The *second* principle is on substantial loss. In weighing the applicants' arguments against the statement by the respondent in his Grounds of Objection that substantial loss has not been established, I turn my attention to the authorities cited by the applicants. Take for instance *Praxades Okutoyi v Medical Practitioners and Dentists Board [2008] eKLR* in which case the judge made reference to the analysis in *Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018* that:

“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.”

As well as:

“...there is in my judgment no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects.”

17. Furthermore, in *Jacinta Njeri Kimani v Catherine Macharia & another [2015] eKLR* the court reasoned that:

“I have always held the view that once an applicant in an application for stay deposes that, for whatever reason, he/she believes the Respondent is a person of straw and that if the decretal sum is paid over and the appeal succeeds, he will be lost of that money, he would have discharged his burden on the principle of substantial loss. The burden then shifts to the Respondent to rebut the same. This is so because, the personal finances and ability of a Respondent to refund a decretal amount is in the sole and exclusive personal knowledge of the Respondent.”

18. I recall that whereas the applicants submitted that if the order for a stay is not granted, there is a likelihood the decretal amount will not

be recovered. However, I have noted that this position is not deponed to, in the application or affidavit in support thereto. While I do appreciate that the respondent did not adduce evidence of income, I opine that there was no requirement for him to do so since this issue was not properly raised. It has been emphasized time and time again that substantial loss must be demonstrated and I am not convinced that this has been done.

19. On the third and final principle regarding the provision of security, I take the following view. It is not in dispute that much as the applicants did not deposit the decretal sum within the timelines set out by the trial magistrate, the same was eventually done. This condition has already been met albeit late in the day. In any case, the applicants gave an explanation for the delay and I already found the same to be reasonable.

20. The upshot is that the Motion has merit and the same is allowed in terms of prayer v). Time within which to deposit the decretal sum in court is hereby extended upto the time it was finally deposited. Costs shall abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 21st day of February 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellants/Applicants

..... for the Respondents