



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 30 OF 2018

MICHAEL GATHOGOAPPELLANT/APPLICANT

VERSUS

NAIROBI CITY COUNTY.....RESPONDENT

RULING

1. The application dated 12th March, 2018 seeks orders that pending the hearing and determination of Civil Appeal No.30 of 2018, this honourable court be pleased to issue a stay of execution of the lower court's ruling delivered on 16th January, 2018 Hon. M. Obura , Senior Principal Magistrate CMCC No. 516 of 2017 Milimani Commercial Courts.

2. It is stated in the grounds and the affidavit in support that the ruling of the lower court was delivered on 16th January, 2018. That the Applicant is dissatisfied with the said ruling and instructed the advocate to obtain the copy of ruling and appealed herein. That the appeal has merits and the application at hand has been filed without any delay. That the Applicant will suffer substantial loss and the appeal rendered nugatory if the orders sought herein are not granted.

3. The application is opposed. It is stated in the replying affidavit that the application herein has been made by an unqualified person to wit an advocate without a practicing certificate. That the deponent of the affidavit in support, Michael Gathongo has not annexed any authority to swear the affidavit in support on behalf of the others. That the annexures to the affidavit bear a date that they were commissioned which date comes before the date the affidavit was commissioned, bringing into question the authenticity of the same.

4. It is further averred that there cannot be a stay of a negative order discharging an injunction. That the application herein was filed after an unreasonable delay of two months. That the appeal is not arguable as the grounds of appeal are frivolous. That if stay orders are granted, the Respondent herein stands to lose approximately Ksh.200,000,000/= per month as the Respondent will not be able to charge cess. That in any event, the Applicant can be refunded the money he will have paid whereas the Applicant has no known means. That no security has been offered for the due performance of the decree.

5. The application was disposed of by way of written submissions which I have considered.

6. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

“No order for stay of execution shall be made under sub-rule (1) unless –

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) 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.”

7. It is undisputed that the ruling of the lower court was delivered on 16th January, 2018. The application at hand was filed on 12th March, 2018, almost two months later. Taking into account the period taken to instruct the advocates and to obtain the copies of the ruling as stated in the affidavit in support, I find the delay is not unreasonable.

8. Although it is stated that the Applicant will suffer substantial loss, the affidavit evidence is bear in that regard and fails to demonstrate the substantial loss that will be suffered. There is also no offer of security for the due performance of the decree.

9. On the other hand, the Respondent has stated that the effect of granting the order sought would be tantamount to excusing the Applicant from payment of cess amounting to Ksh.200,000,000/= per month, yet the Applicant's means to refund the same are unknown. The Applicant has not said anything about his ability to refund.

10. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UR 144/2005) National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another**:

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

11. The Applicant did not respond to the issues raised in the replying affidavit. They instead attached the authority to file suit and the advocates practicing certificate and other evidence given in the submissions. Submissions are not evidence.

13. With the foregoing, I find no merits in the application and dismiss the same with costs.

Dated, signed and delivered in Nairobi this 28th day of March, 2019

B. THURANIRA JADEN

JUDGE