



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 715 OF 2017

WAMBUA VICTORIAAPPLICANT

VERSUS

FREDRICK NDIVO KIIO.....RESPONDENT

RULING

1. The application dated 22nd January, 2018 principally seeks the following orders:

(a) That this Honourable court be pleased to stay execution of the Decree issued in CMCC No. 8047 of 2014 pending the hearing and determination of Appeal No. 715 of 2017.

(b) That this Honourable Court be pleased to stay all and/or any further proceedings in CMCC 8047 of 2014 Milimani pending the hearing and determination of Nairobi Civil Appeal No. 715 of 2017.

(c) That the exparte judgment and all other consequential orders thereof entered on 5th October, 2017 against the Applicant be set aside and the Applicants be granted a chance to ventilate their Defence on merit.

(d) That the Applicant be allowed to file Defence, list of witnesses and documents accompanying Defence and the same to be deemed to have been filed within the proper time limits.

2. It is stated in the grounds and the affidavit in support of the application that exparte judgment was entered for the Respondent against the Applicant in the sum of Ksh.1,062,400/=. That the Applicant's application to set aside the said judgment was dismissed vide a ruling delivered on 15th December, 2017. The Appellant was dissatisfied with the said ruling and has appealed to this court. It is stated that the appeal is arguable and that the execution may render the appeal nugatory and the Applicant will suffer irreparable loss as the decretal sum may not be recoverable from the Respondent.

3. The application is opposed. It is stated in the replying affidavit that the appeal has no merits and has no chances of success. It is further stated that the Applicant has not offered security for the due performance of the decree nor annexed a copy of the judgment and/or the decree and that the application should be dismissed.

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

5. 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.”

6. The ruling the subject of the application was delivered on 15th December, 2017. The appeal herein was filed on 18th December, 2017. The application at hand was filed on 23rd January, 2018. Taking into account that under Order 50 rule 4 Civil Procedure Rules the period from

21st December, to 13th January, time does not run, the application was filed without unreasonable delay. However, questions linger as to whether the appeal was filed within the 30 days provided for under Section 79G Civil Procedure Act.

7. The Applicant has expressed his apprehension that the decretal sum may not be recoverable. The Respondent has not said anything to give re-assurance that he is capable of refunding the decretal sum in the event that the appeal is successful. 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.”

8. To balance the competing interest of both parties, I allow stay of execution pending appeal in terms of prayer (a) and (b) on condition that the Applicant do deposit the decretal sum in an interest earning bank account of the counsels for the parties herein or in court within 30 days from the date hereof. Prayer (c) and (d) to be determined in the appeal herein.

Dated, signed and delivered in Nairobi this 27th day of March, 2019

B. THURANIRA JADEN

JUDGE