



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 223 OF 2016

ANTHONY MBWABI KHAYIMBA.....PLAINTIFF/RESPONDENT

VERSUS

LAXMANBHAI CONSTRUCTION LIMITED.....DEFENDANT/APPLICANT

RULING

1. The defendant/applicant has brought a Notice of Motion dated 19th December, 2018. The same is supported by the averments on the body thereof and the affidavit deponed by *Ramadas Iyer*. The prayers sought therein are:

(i) Spent.

(ii) THAT the consent dated 7th November, 2018 between the applicant's incoming and outgoing advocates be adopted as an order of the court.

(iii) Spent.

(iv) THAT there be a stay of execution of the judgment and decree of this Honourable Court rendered on 25th October, 2018 pending the hearing and determination of the intended appeal.

(v) THAT the costs of the application do abide the outcome of the appeal.

2. The deponent averred that the applicant is aggrieved with the judgment delivered by this court on 25th October, 2018 and wishes to appeal against the same and which appeal is believed to have reasonable chances of success. The deponent in addition stated that execution of the decree is imminent and that unless the prayer for a stay is granted, the appeal will be rendered nugatory.

3. *Ramadas Iyer* also asserted that it is likely that the respondent will not be able to refund the decretal amount in the event that the appeal succeeds by virtue of his financial status while on the other hand, the respondent does not stand to suffer prejudice since the applicant is a well-established entity with sufficient assets. The deponent was clear that the Motion is timeously filed and that the applicant is ready and willing to abide by any conditions that will be required by this court.

4. In reply, *Anthony Mbwabi Khayimba* swore an affidavit to the effect that the deponent had no authority to swear the affidavit supporting the application; that the Motion is an abuse of the court process and is intended to hinder the respondent from enjoying the fruits of his judgment; that the conditions for granting a stay of execution have not been established and that the applicant is not expediting the prosecution of its appeal. In response thereto, a supplementary affidavit and further replying affidavit were filed on behalf of the applicant and respondent respectively.

5. The Motion was canvassed by way of oral arguments. *Mr. Leshan* counsel for the applicant started off by reiterating the grounds in the Motion coupled with its supporting affidavit, adding that the applicant has applied for copies of the typed proceedings and has annexed a draft memorandum of appeal to its application. The advocate proceeded to argue that not only does the appeal raise arguable grounds but the applicant has met the requirements for the granting of a stay. Reference was made to authorities.

6. *Mr. Nyasae* advocate for the respondent in his submissions reaffirmed that the applicant has not shown that substantial loss will be suffered and in the event that a stay is granted, he urged that half of the decretal sum be given to the respondent and the other half be deposited in a joint interest earning account. He was also of the view that the appeal is non-arguable.

7. I have considered the averments made in the application and its supporting affidavit, not to mention the reply in opposition thereto and the rival oral arguments by the respective parties' counsels with reference to authorities. The prayers sought are two-fold: that is, the adoption of the consent and the granting of a stay of execution pending appeal. However, before I proceed any further, I need to point out that the parties

addressed the subject of the merits of the Appeal; it should be appreciated that since my analysis is limited to the prayer for a stay of execution, the merits of the appeal does not come into play at this point.

8. As concerns the first prayer, no objection has been raised on the same and I am also able to confirm the contents of the consent are as averred in the application. It is also true that the said consent was filed on 8th November 2018 in line with *Order 9, Rule 9 (b)* of the Civil Procedure Rules. In the premises, I find no reason to deny the prayer for adoption.

9. This leads me to the second prayer. It is acknowledged that the principles governing a stay of execution are captured under *Order 42, Rule 6 (2)* of the Civil Procedure Rules.

10. As to whether or not the application has been filed without unreasonable delay, the judgment herein was delivered on 25th October, 2018 and a 30 days' stay of execution was granted. The Motion was filed about two (2) months following the judgment. To my mind, the delay is not inordinate.

11. I will now address substantial loss. I must mention that this forms the cornerstone of any application for stay of execution. For purposes of reference, I draw attention to *Praxades Okutoyi v Medical Practitioners and Dentists Board [2008] eKLR* with reference to *Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018* in this way:

“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.”

12. In light of the above, for a party to establish substantial loss, he or she will be required to show that he will suffer irreparably, since the courts have appreciated the general principle that successful parties ought not to be prevented from enjoying the fruits of their judgment.

13. The applicant contended that the execution is imminent and unless the same is stayed, the appeal will be rendered nugatory. In response thereto, I turn my attention to the reasoning presented in *James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR* hereunder:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.”

As well as:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”

14. From the above, it is clear that imminent or ongoing execution cannot form a ground on which to argue that substantial loss will occur. The reasoning behind this is that execution is a lawful process in every sense of the word and which should not be impeded save where sufficient reason has been given. The applicant's argument in this respect cannot therefore stand.

15. Needless to say, the applicant also contended that the respondent may not be in a position to refund the decretal sum should the appeal ultimately succeed. I have considered the circumstances of the respondent and his counsel's submission that the decretal sum will be invested once paid, the specifics of which were not made known. I have also noted on the one hand that the respondent made no indication that he has a means of income currently.

16. That said, I am convinced that there is uncertainty as to whether the respondent will be able to refund the decretal sum in the event that the appeal succeeds and therefore, it is plausible that substantial loss will result to the applicant.

17. On the condition of provision of security, the applicant made it clear that it is ready and willing to comply accordingly.

18. In view of the foregoing, I will allow the substantive prayers sought in the Motion. Consequently, I order the applicant to deposit the entire decretal sum in court within 30 days from today, failing which the order for stay shall lapse. Costs shall abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 14th day of March, 2019.

L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the Defendant/Applicant