



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 133 OF 2018

THE ATTORNEY GENERAL.....APPELLANT/APPLICANT

VERSUS

FRANCIS MUBWERU.....RESPONDENT

RULING

1. Before me is the application dated 14th December praying for a stay of execution of the judgement dated 11th December 2018 and consequential proceedings thereto pending the hearing and determination of the appeal. The Application is supported by the sworn affidavit of Justin M. Kiongo, Senior Litigation counsel in the Appellant's office.

2. The relief of stay of execution pending appeal is provided for in Order 42 rule 6 of the Civil Procedure Rules. The remedy is however granted at the discretion of the court upon sufficient reason being shown by the applicant. Needless to state therefore that stay of execution is not granted as a matter of course. In evaluating whether there is sufficient reason or not, the court will have to be satisfied that:

- a. The application has not been brought with unreasonable delay;
- b. That substantial loss would occur unless stay is granted; and
- c. The need for security for the performance of the decree.

See Order 42 Rule 6 of the Civil Procedure Rules below:-

(2) No order for stay of execution shall be made under subrule (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.

Unreasonable Delay

1. The Application was filed on 14th December whereas the judgment was issued on 11th December 2018 hence the Application was made timely and/or without unreasonable delay.

Substantial Loss

2. The appellant is the Attorney General. According to article 156(4) (b) of the Constitution, the Attorney-General—

(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings;

And, article 156(6) requires the Attorney-General to promote, protect and uphold the rule of law and defend the public interest. I expected the AG to demonstrate how substantial loss would occur if stay is not granted. They know and they do not need to be reminded that the applicant bears the burden of proving substantial loss for purposes of stay of execution pending appeal. But when I look at the supporting affidavit, it has concentrated on the potency of the appeal but has nothing to show that substantial loss would occur unless stay is granted. Mere statement that there is a high probability that the Respondent will proceed to utilize the existing legal mechanisms to execute the

judgement is not enough.

3. On the other hand, the Respondent averred in its Replying Affidavit dated 8th February 2019 that he is a man of means capable to refund the decretal sum. He attached business permits and letters of allotments to prove this assertion.

4. I am not able to see any proof that the Respondent cannot make a refund herein should the appeal succeed. He has shown to be of means. I therefore hold that the applicant did not establish on a balance of probabilities that it will suffer substantial loss. But is there any other sufficient reason for granting stay?

Security

5. Even though the applicant did not mention a thing on provision of security I will say the following. The respondent has a right to immediate realization of his judgment. But I am also aware of the appellant's right of appeal which includes legitimate expectation that the appeal should not be rendered nugatory. The respondent attached a draft appeal and emphasized the success of the appeal. In balancing these competing rights- and the foregoing findings on substantial loss notwithstanding- in the interest of justice, I order that the appellant shall pay half of the decretal sum to the respondent within 30 days. The other half shall await the outcome of the appeal. In the event of default, the stay shall lapse without the need of applying for such declaration. It is so ordered.

Dated, signed and delivered in open court on 27th May 2019

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F. GIKONYO

JUDGE

IN PRESENCE OF

Gatari for Wanjohi

Kiongo for A.G

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F. GIKONYO

JUDGE