



REPUBLIC OF KENYA

IN THE HIGH COURT KIAMBU

CIVIL APPEAL NO.7 OF 2017

JAMES KARANU KINYANJUI.....1ST APPELLANT

KIKUYU TOWN COUNCIL.....2ND APPELLANT

-VERSUS-

JOHN MWANGI.....RESPONDENT

RULING

1. Judgment in the primary suit was delivered in favour of the plaintiff on the 20th December 2016. A decree was drawn on the 13th November 2017 showing the decretal sum as Kshs.2,636,424/=.

2. Being aggrieved by the judgment and decree, the defendants filed this appeal by a Memorandum of Appeal dated 20th January 2017 and filed on even date, and a Record of Appeal filed on the 6th December 2017.

I heard the Appeal on the 14th May 2018 and the judgment delivered on the 20th September 2018 dismissing the appeal for lack of merits.

3. The appellant by an application dated 1st October 2018 sought an order of Review of the judgment as well as a stay order pending hearing and determination of the appeal, subject to an order of review being granted in the first instance. The application was based on the provisions of Order 45 rule 1 and 2, Order 51 rule 1 of the Civil Procedure Rules and Sections 1A and 1B of the Act among others.

4. However, before I could deliver the ruling, parties recorded a consent order that

“By consent the appellant shall release Kshs.1,500,00/= to the Respondent in furtherance to stay orders given by Hon. Justice Meoli on the 18th February 2019 within 15 days as a condition for extension of stay of execution orders pending ruling on the application that was scheduled for the 4th July 2019. In default the stay orders dated 27th March 2019 to lapse.”

5. On the 4th July 2019 Ms. Mwithirania Advocate for the appellant and Mr. Mwangi for the Respondent appeared before me for a mention having urged the court to stay the ruling on the application as circumstances had changed.

Mr. Mwangi submitted that the appellants defaulted and failed to comply with the conditional stay orders. Thus they had lapsed. He sought an order to proceed with execution of the trial court’s judgment and decree.

6. Ms. Mwithirania was hard pressed to explain why the court orders were not complied with citing some purported negotiations with the decree holder, which position was vehemently denied.

That being the position I am not persuaded to extend the interim stay orders.

7. Back to the Notice of Motion dated 1st October 2018

Prayer No. 1 and 3 are now spent.

Left for determination are prayers No. 2, 4, and 5.

In prayer No.2, the appellant seeks an order of stay of execution pending hearing and determination of this application.

8. The judgment in the appeal was reviewed and set aside. The appeal is therefore alive.

By its prayer 4, the appellant seeks leave to file a supplementary Record of Appeal to include Dr. Bhanji's medical record.

The prayer is unopposed the application. As a necessary document to enable the court to determine the issues fully as stated in the Appeal, I shall allow the doctor's medical report to be introduced by a supplementary Record of Appeal to be filed and served within 14 days of this ruling.

9. The gravamen of the application is whether or not I should grant an order of stay of execution pending hearing and determination of the Appeal.

I have considered parties submissions for and in opposition.

10. The legal provision that underpin such an order is **Order 42 rule 6 (2)** of the Civil Procedure Rules. By design or inadvertent omission, the appellant did not cite this very important legal provision. Nevertheless, I will look into the merits of the application.

11. Under **Order 42 rule 6(2) CPR**, the court must be satisfied that

(a) *Substantial loss may result to the applicant unless the order is made*

(b) *The application has been brought without unreasonable delay*

(c) *The applicant has furnished security for the due performance of the decree being appealed from.*

12. In cases, **Antoine Ndiaye -vs- African Virtual University (2015) e KLR, James Wangalwa & Another –vs- Agnes Naliaka Cheseto (2012) e KLR, Jaber Hohsen Ali & Another (2014) e KL and Cabro East Africa Ltd –vs- Rosoga Investments Ltd (2018) e KLR**, among others, the thread running through is that substantial loss is the cornerstone in an application for a stay order.

An applicant is bound to place sufficient material before the court that should lead to a conclusion that it stands to suffer substantial loss if such order is denied.

13. The decree in issue is a money decree in the sum of Kshs.2,636,376 plus costs.

This application was filed almost two years after delivery of judgment on the 20th December 2016. That for all intent and purposes cannot be said to be reasonable delay, and in conformity with provisions of Order 42 rule 6 – Civil Procedure Rules.

14. On substantial loss, other than stating the Respondent is a man of no means and may not be able to refund the decretal sum should the appeal succeed, no material has been placed before the court **Section 107 – 108** of the **Evidence Act** is clear that he who asserts must prove. It is not enough for a party to state. It must bring sufficient evidence to support the averment.

15. In the matter of security the appellant avers that it is ready and willing to offer any security that the court may find sufficient.

16. I have considered that the appeal is against *quantum* of damages only, apportionment of liability having been settled by consent of the parties at 90% against the appellants.

There are two conflicting interests here that the court must consider and the justice of the case. They must be balanced so as not to prejudice either of the parties.

17. The court finds that pre-conditions stated under **Order 42 Rule 6 CPR** have not been met by the applicant save that it is willing to offer security for the due performance of the decree. I am minded that the court ought to consider the consequences of a denial of the stay order should the appeal succeed, against the prejudice and loss it would cause to the applicant if the Respondent may not be able to repay.

As stated in the case **James Wangalwa (Supra)** a state of affairs that will irreparably affect or negate the very essence of the application should be avoided.

18. Upon consideration of the parties submissions, and not to negate the purpose of the appeal, and being minded of both parties interests and more so I am persuaded to allow and grant an order of stay, but subject to the following conditions:

(1) The appellants shall pay to the Respondent 60% of the decretal sum within 30 days of this ruling.

(2) That the balance (40%) of the decretal sum shall be deposited into a joint interest earning account in the parties advocates names in a reputable bank within 45 days of this ruling to await outcome of the appeal.

(3) If there is default by the applicants of orders (1) and (2) above, the stay order shall lapse, and the Respondent shall be at liberty to execute the lower court's decree.

(4) The appellants shall bear costs of this application.

Delivered, Signed and Dated at Nakuru this 29th day of July 2019.

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J.N. MULWA

JUDGE