REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO.37 OF 2019

DENNIS ODHIAMBO PAMBO.....APPELLANT/APPLICANT

VERSUS

LUCY OTIENO.....RESPONDENT

(Being an appeal from the Ruling of the Hon. Thomas Obutu, SPM, delivered on 3rd April, 2019 in Homa Bay CMCC No.41 of 2015)

RULING

[1] In a ruling delivered on the 3rd April 2019, in **Homa Bay CMCC No.41 of 2015**, the trial court made the following orders:-

> **(i) That the ex-parte judgment entered on 13th March 2017 and the decree therein together with all consequential orders are hereby set aside and the second defendant is at liberty to defend the suit.**
>
> **(ii) That the second defendant is hereby allowed to file and serve her defence within the next twenty one (21) days in full compliance with the Civil Procedure Rules.**
>
> **(iii) That the plaintiff through the auctioneers M/s Icon Auctioneers are hereby ordered to immediately release and return the second defendant's movable properties as itemized in the auctioneer's notification of sale of movable property on the schedule of movable property column.**
>
> **(iv) That the auctioneers charges to be borne by the plaintiff.**
>
> **(v) Costs of the application will be in the cause.**

[2] The ruling was in respect of an application dated 4th March 2019, by **Michael Ouma Ojuok**, and **Lucy Akoth Otieno**, the first and second defendants respectively against **Dennis Odhiambo Pambo**, the plaintiff, for orders of stay of execution of the judgment and decree of the court dated 13th March 2017 and for setting aside of the judgment together with all consequential order. Leave to defend the suit was also sought by the second defendant.

The plaintiff was aggrieved by the aforestated orders of the trial court and expressed an intention to lodge an appeal.

[3] The present Notice of Motion dated 10th April 2019, by the said plaintiff is made on the presupposition that the intended appeal is already filed herein as **Homa Bay High Court Civil Appeal No.37 of 2019**.

Indeed, the motion is essentially brought under **Order 42** of the **Civil Procedures Rules** insofar as it seeks the basic order that there be a stay of execution of the impugned ruling of the trial court made on 3rd April 2019 and subsequent order issued thereon in favour of the respondent's pending the hearing and determination of the intended appeal.

[4] The grounds in support of the application are contained in the body of the Notice of Motion as fortified by the plaintiff/applicant's averments contained in the supporting affidavit dated 10th April 2019. These are opposed by the second defendant/applicant on the basis of the grounds of opposition dated 24th April 2019, reinforced and/or buttressed by the averments in her replying affidavit also dated 24th April 2019.

Apparently, grounds two (2), three (3) and four (4) coupled with paragraph 42 of the replying affidavit raise a very fundamental issue regarding the propriety and competence of the application and this must be dealt with in priority to any other issues, particularly the issue of stay of execution pending appeal which is most germane in the present circumstances.

[5] In that regard, it is procedural that a party aggrieved by the decision and/or ruling of a lower court must first file an appeal by presenting a memorandum of appeal followed by any other relevant document or documents. In the process, the appeal is admitted by the court for hearing.

Thereafter, the parties take directions on the date and mode of hearing of the appeal. Any interlocutory application filed with the appeal and which draws its competence from the appeal itself is normally heard and determined prior to the hearing of the appeal.

[6] The Notice of Motion herein is such interlocutory application whose competence and properly is drawn or supposed to be drawn from an appeal properly filed and admitted for hearing by the appellate court.

This file contains no memorandum of appeal duly stamped and filed herein as a proper record. The only memorandum of appeal which is in this file is the one annexed as part of the applicant's supporting documents in the present application. It has not been filed as the actual memorandum of appeal in the intended appeal. It has not been authenticated as a valid and proper court record by necessary stamping and if it were, there is no indication of the intended appeal being filed and duly admitted for hearing. It would therefore follow that the present Notice of Motion was pre-maturely filed by the plaintiff/applicant and is therefore not proper and competent before this court. Consequently, grounds two (2), three (3) and (4) of the respondent's grounds of opposition and paragraph 42 (b) (c) and (d) of her replying affidavit are hereby sustained to the extent that the application be and is hereby struck out and dismissed with costs to the second respondent.

[7] Even if the application were to be considered as being competent and proper before the court, the applicant did not from his supporting grounds and submissions establish the requirements of **Order 42 Rule 6 (2)** of the **Civil Procedure Rules** for this court to exercise discretion in his favour. He was unable to establish that he stands to suffer substantial loss if stay of execution is not granted. His contention and argument that the intended appeal is arguable and may be rendered nugatory if stay is not granted would not be tenable in the present circumstances considering that the application is largely grounded on the provisions of **Order 42 Rule 6 (2) of the Civil Procedure Rules**, in which case the element of substantial loss is the cornerstone of the jurisdiction for grant of stay at this juncture (See, **Kenya Shell Limited –vs- Benjamin Karuga Kabiru & Another [1986] e KLR)**.

[8] In sum, not only is this application incompetent and improper before this court, it is also lacking in merit and a clear abuse of the court process suitable for striking out and dismissal as hereinabove ordered.

J.R. KARANJAH

JUDGE

23.07.2019

[Read and signed this **23rd** day of **July, 2019**]

[In the presence of Mr. Ayieko for Applicant/Appellant and M/s Kerubo holding brief for M/s Opiyo for Respondent]