



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO. 93 OF 2019**

**BETWEEN**

**ABEL MORANGA ONGWACHO.....APPELLANT/APPLICANT**

**AND**

**OSCAR OTIENO ODONGO T/A**

**ODONGO INVESTMENTS.....1<sup>ST</sup> RESPONDENT**

**NEHEMIAH ONGAKI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a notice of motion amended on 07<sup>th</sup> August, 2019, brought under Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, Appellant/Applicant pray for orders

**That there be a stay of execution of proceedings in Kisumu Misc. Application No. 25 of 2019 pending the hearing and determination of this appeal**

2. The application is based on the grounds among others that the Respondents have in defiance of a stay order granted by the trial court on 01<sup>st</sup> July, 2019 taken out a notice to show cause why execution should not issue.

3. The application is supported by the Applicant's affidavit sworn on 06<sup>th</sup> August, 2019. Attached is a notice to show cause dated 18<sup>th</sup> July, 2019 which was issued within the 30 days' period of the stay of execution order granted 01<sup>st</sup> July, 2019; and a memorandum of appeal filed on 26<sup>th</sup> July, 2019.

4. The application is opposed by a replying affidavit sworn by the 1<sup>st</sup> Respondent on 09<sup>th</sup> September, 2019 who avers among other issues that the notice to show cause alluded to by the Appellant was withdrawn on 01.08.19 as shown by annexure OOO1 and was adopted as an order of the court on 02<sup>nd</sup> August, 2019, and a fresh notice was issued and fixed for hearing on 09<sup>th</sup> August, 2019. The respondent urged the court to decline the application on the ground that the order of stay being sought relates to a notice to show cause that has already been withdrawn.

**Analysis and Determination**

5. I have carefully considered the notice of motion *vis a vis* the affidavit and grounds of opposition on record and the submissions filed on behalf of the Applicant.

6. Order 42 (6) of the Civil Procedure Rules provides:

**(2) 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**

b. That the application has been made without unreasonable delay; and

c. 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.

**i. Unreasonable delay**

7. The impugned judgment was delivered on 08<sup>th</sup> March, 2019. The notice of motion herein was filed on 07<sup>th</sup> August, 2019 exactly 5 months after the impugned order was issued. The Applicant has not offered any explanation why it did not file an application immediately or not long thereafter and it is my considered view that the application was filed with unexplained delay.

**ii. Substantial loss**

8. There are a myriad of cases on what constitutes substantial loss. In Civil Appeal No. 186 Of 2007 Standard Assurance Co. Ltd –Vs- Alfred Mumea Komu the Court stated-

**“Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”**

9. Similarly in Civil Case No. 41 Of 1995 United Builders & Contractors (Africa) Limited –Vs- Standard Chartered Bank Ltd the Court stated-

**“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other suits.”**

10. Additionally, the court in ABN Amro Bank N.V. v Le Monde Foods Ltd Civil Application No. Nairobi 15 of 2002 held that:

**“Each party bears a specific burden regarding proof of substantial loss in a case such as before us. ....So all an Applicant in the position of the bank (Appellant) can reasonably be expected to do is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”**

11. The Respondent’s bill of costs was taxed at Kshs. 255,970/-. The Applicant has not demonstrated that the Respondents are not in a position to refund the said sum in the event that the appeal succeeds. (See Carter & Sons Ltd. vs. Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997).

12. From the affidavit evidence, I am not convinced that the Applicant has demonstrated that it is likely to suffer substantial loss if the order of stay of execution is not granted.

**iii. Security**

13. Security is a legal requirement under 42 (6) (2) (c) of the Civil Procedure Rules. The Appellant has not cared to furnish security for due performance of the decree herein pending the hearing and determination of the appeal.

**iv. Arguable Appeal**

14. The Appellant however raises an arguable issue as to whether he was the only one liable to pay the taxed costs to the exclusion of the 2<sup>nd</sup> Respondent.

15. **Equity** requires that **whoever comes** to a court of **equity** must do so with clean hands. It is also required that he who seeks **equity** must do **equity**. The plaintiff herein was before obtaining the stay order issued on 07<sup>th</sup> August, 2019 under an obligation to disclose to the court that the notice to show cause dated 18<sup>th</sup> July, 2019 that he is challenging had indeed been withdrawn by a notice dated 01<sup>st</sup> August, 2019 and that the same had been entered as an order of the court on 02<sup>nd</sup> August, 2019 but he failed to do so.

16. The foregoing notwithstanding, there’s evidence that a fresh notice to show cause was issued on 02<sup>nd</sup> August, 2019 which was still within the 30 days stay period granted by the trial court. A reading of the present application shows that the Appellant is not challenging that notice to show cause although it was issued irregularly.

17. Although I have found that the application was filed 5 months after the impugned order was issued, which delay is unexplained, I am minded, in the interest of justice to exercise this court’s discretion under section 3A of **the Act** to afford the Appellant an opportunity to prosecute his appeal.

18. The upshot of the foregoing is that the notice of motion dated 07<sup>th</sup> August, 2019 is considered and the same is allowed in the following

terms:

**1) That there be a stay of execution of proceedings in Kisumu Misc. Application No. 25 of 2019 pending the hearing and determination of this appeal on condition THAT:**

**i.) ½ of the taxed costs be paid to the 1<sup>st</sup> Respondent within 14 days from today's date**

**ii.) ½ of the taxed costs decretal sum be deposited into an interest earning account in the names of the advocates for the Appellant and for the 1<sup>st</sup> Respondent within 30 days from today's date**

**2) In default of Order (1) above, stay order shall lapse**

**3) Appellant shall bear the costs in the appeal**

**DELIVERED AND SIGNED IN KISUMU THIS 26TH DAY OF SEPTEMBER 2019**

**T.W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - **Amondi/Okodoi**

For Appellant/Applicant - N/A

For the Respondent - N/A