



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 110 OF 2017

SYRILLA ADONGO BARASA.....APPELLANTS/APPLICANTS

VERSUS

MARGARET BARASA.....RESPONDENT

RULING

1. The appellants/applicants have filed an application dated 26th February, 2018 seeking for orders that:-

(a) Spent

(b) Pending the hearing of the application inter-parties, there be stay of execution of the warrants of arrest issued in Mumias SPMCC No. 272 of 2016 and the 2nd appellant be released from custody forthwith.

(c) There be a stay of proceedings and execution of the decree in Mumias SPMCC No. 272 of 2016 pending the hearing and determination of this appeal.

(d) Costs of the application be provided for.

2. On the same day of the application this court certified the application as urgent and granted prayer (b) pending the hearing of the application inter partes. The applicants now seek for orders in prayer (c) that there be stay of proceedings and execution of the decree in Mumias SPM CC No. 272 of 2016 pending the hearing and determination of the appeal filed herein.

3. The application was supported by the affidavit of the 2nd applicant, **Stella Nyarotso Barasa** on behalf of the other two appellants. The grounds in support of the application are that the appeal has high chances of success; that the 2nd applicant/appellant has been arrested and that the other applicants are at risk of being arrested and committed to civil jail following an ex-parte decree which execution shall occasion substantial loss to the applicants. That the applicants are willing to comply with such conditions that the court shall impose as it thinks fit.

4. The application was opposed by the plaintiff/respondent through her grounds of opposition dated 9th March, 2018 which are that:-

(a) The applicant has not satisfied the conditions precedent to grant of the orders sought.

(b) The appeal herein was filed out of time.

(c) The decree herein is a money decree and the applicant has not deposited the amount in court and/or has shown no such intention to warrant the grant of the orders sought upon payment of security for costs.

(d) The decree herein is a money decree and the amount involved is modest and it has not been shown how the appeal will be rendered nugatory if payment is made to the respondent.

The respondent urged the court to dismiss the application.

5. The above grounds were supported by the replying affidavit of the respondent's counsel, **Elizaphan Mokaya Bogonko**. The advocate states that the applicants are not entitled to the reliefs sought as they have not demonstrated that they will suffer irreparable damage incapable of being compensated in monetary terms if the stay of execution sought is not granted. Further that the decree appealed against is a money

decree and as such stay cannot be granted unless the applicants offer security as required under Order 42 of the Civil Procedure Rules.

6. The advocates for the applicants, **R. Omar & Co. Advocates**, submitted that the appellants are seeking for stay of further proceedings in the lower court and stay of execution of the ex parte decree. That the appeal has very high chances of success. That the appellants will suffer irreparably if stay orders are not granted as they risk being committed to civil jail. That the appeal is against a ruling and not the decree itself. Therefore that the issue of security does not apply.

7. The advocates for the respondent, **Bogonko Otanga & Co. Advocates**, submitted that the applicants have not satisfied the conditions precedent for stay of execution as set out in Order 42 of the Civil Procedure Act.

Analysis and Determination -

8. The court has powers under Order 42 Rule 6 to grant stay of execution or proceedings pending the determination of an appeal. Such stay is conditional on grounds set out in Order 42 Rule 6 (2) that provides that:-

“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 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.”

9. These principles were re-stated in **Elena D. Korir –V- Kenyatta University (2012) eKLR** where it was held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another –Vs- Thornton & Turpin Ltd where the Court of Appeal (Gicheru JA, Cheoni & Cockar Ag. JA) held that ‘The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely: Sufficient cause, substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay.

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo Vs Straman EA Ltd (11) (2013) as follows:-

‘In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other.’

10. The facts of the case at the lower court as can be gleaned from the pleadings filed herein were that the 1st and 2nd applicants were sued by the plaintiff/respondent. They were purportedly served with papers for the suit but they did not enter appearance. Ex parte judgment was entered against them. The plaintiff proceeded to execute the decree and attached the 1st and 2nd applicants’ property through an auctioneer. The 1st and 2nd applicants filed an application dated 17/2/2017 seeking for the ex parte judgment to be set aside on the grounds that they were never served with the suit papers. The 3rd applicant on the other hand had filed objection proceedings dated 10/5/2017 against the attachment of the property.

11. Both applications were dismissed by the lower court vide a ruling dated 11/9/2017. The trial court found that the 1st and 2nd applicants were served with the suit papers and failed to file a defence. The court found that the objection proceedings had been overtaken by events as the attached property had already been sold. The applicants then filed the appeal pending herein where they are contending that:-

(a) The learned magistrate erred in law and fact by misapplying the principles of the law relating to the setting aside of ex parte judgments which had been obtained against the 1st and 2nd appellants.

(b) The learned magistrate erred in law and fact by failing to give due consideration to the objection proceedings lodged by the 3rd appellant.

(c) The learned magistrate erred in law and fact by failing to appreciate that the execution proceedings as conducted by the Auctioneers was ultra vires the law.

12. The ruling by the trial magistrate indicates that when the 3rd appellant filed the objection proceedings on 10/5/2017, the attached property had been sold way back in February, 2017. There was thereby no subject matter when the objection proceedings were filed. There is nothing to be stayed at this stage since the property was sold. If the auctioneer irregularly sold the 3rd applicant’s property he should have filed a separate suit and not objection proceedings as there was by then no property to form the basis of objection proceedings. The appeal by the 3rd applicant has thereby little chance of success. The application for stay of execution and proceedings by the 3rd applicant has no basis.

13. I have considered the application for stay of execution by the 1st and 2nd applicants. It is obvious that the appeal will be rendered nugatory if the orders sought are not granted. The applicants have indicated that they are willing to comply with conditions that the court

may impose in granting the orders sought.

14. The warrant of arrest in execution of a decree filed herein indicates that the decree at the time of execution stood at Ksh. 131,660/=. I consider it prudent to order the applicants to deposit security in exchange of granting the orders sought. Stay of execution as prayed in prayer (c) of the notice of motion dated 26/2/2018 is granted in favour of the 1st and 2nd applicants on condition that they deposit with the court security in the sum of Ksh. 50,000/= within one month from the date of the delivery of this ruling failure to which the orders granted in prayer (c) herein will stand vacated.

Delivered, dated and signed in open court at Kakamega this 28th day of November, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Omar for Applicants/Appellants

No appearance for Respondent

Applicants/Appellants - absent

Respondent - absent

Court Assistant - Polycarp

30 days right of appeal.