



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 86 OF 2018**

**FRANCIS KARANJA MWANGI..... 1<sup>ST</sup> APPELLANT/APPLICANT**

**ROADSTAR LIMITED.....2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**JOB KIPKEMBOI KOSGEI (suing as the**

**personal representative of the late PATRICK KIPROP KOSGEI).....RESPONDENT**

**RULING**

The application before the court is one for stay of execution. The application was filed on 13<sup>th</sup> November 2019 seeking orders that there be stay of execution of the decree of the subordinate court pending the hearing and determination of the appeal; that the applicant be granted leave to furnish an alternative security in the form of a bank guarantee for the decretal dues. There was also a Preliminary Objection filed.

**APPLICANT'S CASE**

The applicant filed an affidavit in support of the application where she averred that the applications' insurers would only cover a judgment debt of up to kshs. 3,000,000/- and she could not raise the decretal sum within the time stipulated due to financial challenges. The appeal is against both liability and quantum and therefore the applicant was apprehensive that the respondent will not be able to refund the decretal sum in the event the appeal succeeds.

The application was dispensed by way of oral submissions. The applicant's advocate cited Order 42 Rule 6 of the Civil Procedure rules and submitted that the application was brought without undue delay as it was filed a month after the ruling of 11<sup>th</sup> October 2019.

On substantial loss she submitted that if orders of stay are not granted the auction will take place and the appeal will be rendered nugatory. The auction is scheduled for today as proclamation has already happened. The decretal sum is of 11 million and the appellant will suffer substantial loss.

The further affidavit by the respondent has annexed copies of the log book and titles to show that should the amount be released to them they would be able to refund. There is no valuation report to confirm the value of the properties.

On security, the applicant has offered a bank guarantee for the whole amount and is willing to abide by any conditions that the court may grant. Section 5 of the Insurance, Motor vehicles and Third Party Act, the insurance recovery is restricted to 3 million.

On the Preliminary Objection she relied on the submissions dated 21<sup>st</sup> November 2019. She averred that it is unmerited and should be dismissed with costs.

In response to the respondent's submissions the applicant submitted that *Section 7 of the Civil Procedure Act* does not apply as there is an appeal pending. The delay in preparing the record of appeal is due to the fact that the file was still active in the lower court until 11<sup>th</sup> October 2019 when it was released from the magistrates' chamber.

**RESPONDENT'S CASE**

Counsel for the respondent opposed the application and relied on the preliminary objection and replying affidavit dated 19<sup>th</sup> November 2019.

He averred that this is the second application brought under *Order 42* of the *Civil Procedure Rules*. They were granted stay through a ruling of 11<sup>th</sup> October 2019. Similar orders were sought and they were allowed to pay half the decretal sum to the respondent and deposit half in a joint account. The orders were not met and upon lapse they moved this court for similar orders. The application offends *Section 7* of the *Civil Procedure Act* as it is res judicata. They should have appealed if the orders were not favourable. The prayer to give a bank guarantee should have been made in the lower court.

There is no substantial loss which has been established by the applicant. The applicant cannot say he is a man of straw as the further affidavit has 13 properties shown meaning he can refund the decretal sum. There are 7 parcels of land shown in the further affidavit and even though there is no valuation, there is nothing to show that they would not meet the decretal sum.

The applicant has to show why it failed to comply with the earlier court order. There is inordinate delay. One year, five months and no step has been taken to progress with the appeal. Judgment in the lower court was delivered on 5th September 2017. 2 years and 2 months have passed and the respondent is still yet to enjoy the fruits of judgment. The delay is inordinate.

They have shown nothing to the court that they will comply with the orders by the court as they have also shown that they have a history of non-compliance. A bank guarantee from a bank we don't know may not be adequate.

The court should decline the application.

### ISSUES FOR DETERMINATION

a) Whether the application for stay is merited

The application is brought under *Order 42 Rule 6* of the *Civil Procedure Rules*. *Order 42 Rule 6* provides;

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**(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**

**(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 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.**

**(3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.**

**(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.**

**(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.**

**(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.**

The applicant must prove that:-

- a) The application was made without delay
- b) Substantial loss will be occasioned upon the applicant if stay is not granted
- c) Security will be provided

### **Whether the application was made without undue delay**

The judgment was delivered on 5<sup>th</sup> September 2017. Three years and 2 months have passed since the judgment was delivered and the respondent is yet to enjoy the fruits of judgment. Further, the applicants had filed an application seeking similar orders and the same was decided on 11<sup>th</sup> October 2019. They did not comply with those orders; neither did they file an appeal. I find that the delay was not unreasonable in filing the present application. However, the same appears to have been filed as a delay tactic. The applicants were better if had filed an appeal.

### **Whether substantial loss may result to the applicant**

In the case of *Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR* the court held;

**In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...**

The applicant has not shown how substantial loss will result if the orders for stay of execution are not granted.

The applicant contended that the further affidavit contained no valuation reports and had no probative value. I find that on a balance of probabilities the respondent has proven that he is in a position to reimburse the decretal sum if the appeal succeeds.

### **Security**

In *Arun C Sharma -V- Ashana Raikundalia T/A Rairundalia & Co. Advocates* Justice Gikonyo the Court stated that:

**“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor..... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”**

The applicant has only committed to depositing the bank guarantee as security. The bank that will guarantee is not identified. Given the history of non-compliance there is no guarantee that the applicant will comply with orders to deposit the guarantee as they have not complied with the initial orders on security. The applicant have themselves to blame for the position they find themselves in for failure to comply with the previous court directions.

In the premises the application is not merited.

It is dismissed with costs to the Respondents.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 21<sup>st</sup> day of November, 2019**

In the presence of:

Mr. Kamau holding brief Mrs Chesoo for the appellant/Applicant

Mrs Ndambuki holding brief for the respondent

Ms. Abigael – Court assistant