REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO 159 OF 2018

DAVID KIPSANG NYOLMO.....APPELLANT/APPLICANT

VERSUS

NARAN LALJI RABADIA T/A SHRUTI ENTERPRISES.....RESPONDENT

RULING

The applicant filed the present application dated 12th July 2019 seeking for the following orders in a nutshell;

a) Stay of execution of the judgment and decree delivered on 23rd November 2018 pending the hearing and determination of this application

b) Stay of execution of the judgment and decree delivered on 23rd November 2018

c) The court do quash the ruling delivered on 28th June 2018 and all consequential orders therefrom pending the hearing and determination of the application.

The judgment was delivered on 23rd November 2018 awarding the plaintiff/respondent Kshs. 600,000/- and costs of the suit. The appellant was aggrieved by the decision of the court in CMCC 844 of 2016 and lodged a Memorandum of Appeal against the said judgment.

APPLICANT'S CASE

The applicant filed submissions on 1st August 2019 in support of the application.

The applicant cited the case of ***Paul Gitonga Wanjau versus Gathuthi Tea Factory Company Ltd (2016)*** where the principles for granting a stay were stated as follows:-

a) The appeal has high chances of success.

b) The applicant provides security.

c) The Respondent has no means to refund the judgment and decree in case the appeal succeeds.

The applicant submitted that the application was brought without undue delay. Further, that the application meets all the tenets set out in the case cited above.

The applicant submitted that he is entitled to stay of execution as per *Order 22 Rule 22(1)* of the *Civil Procedure Rules*. The application is to further an appeal already filed at the high court. The memorandum raises triable issues which he believes have high chances of success.

The applicant submitted that he was willing to deposit his title deed no. Eldoret Municipality block 9/1741 with the court pending determination of the appeal. The value of the land is Kshs. 7,000,000/- as captured by the valuation done on 23rd January 2019. The valuation report was prepared by a registered valuer in conformity with section 3(1) of the Valuers' Act. He cited order 22 rule 55 on the issue of security for stay. He cited the case of ***House Finance Company of Kenya v Sharok Kher Mohammed Ali Hirji & Another (2015) eKLR*** on stay.

There is no contention that the application was filed without undue delay. The applicant will suffer irreparable and substantial loss as the amount in question is punitive and will occasion financial instability on the applicant.

The applicant relied on the case of ***Antoine Ndiaye v African Virtual University (2015) eKLR*** and submitted that he stands to suffer irreparably since the respondent will execute the decretal amount at any time.

The appeal will be rendered nugatory if the respondent executes the decree. The appellant is against the execution of the whole decretal amount and the depositing of half of it in a joint account as per the ruling by the trial court.

The Respondent is a man if straw and would be unable to pay back the decretal amount if the appeal succeeds. The respondent has not proven that he is a man of means as per paragraph 16 of the respondent's replying affidavit. There is no documentary evidence to prove that the respondent still operates the business. The applicant cited the case of ***Nairobi Civil Application no. 238 of 2005 – National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another*** to support the submission that the respondent has not adduced any evidence to persuade that he will be able to refund the decretal sum if the appeal succeeds.

RESPONDENT'S CASE

The respondent filed a replying affidavit on 30th July 2019. There are no submissions on record for the respondent.

In the replying affidavit the respondent averred that the application is bad in law and patently misconceived. He averred that the memorandum of appeal does not show chances of success and the applicant has not shown irreparable loss will occur. The applicant made a similar application and was willing to abide by any conditions issued by the court with regards to security. The court ordered half the amount be deposited in a joint account. He now wants to dictate to the court how and what he wishes deposited as security. The respondent was not willing to accept the parcel of land as security as it would make it difficult for him to levy execution once judgment is delivered.

The respondent's position is that if stay is granted it should be granted on condition that the applicant pays the costs of the lower court and the entire decretal amount be deposited in a joint interest earning account in the names of the advocates on record for both parties. Further, the search annexed as DKN3 does not indicate current proprietorship as it was done in January 2019 and is not current. The valuation report was done and prepared by a firm that is not accredited or on the panel of the Judiciary to undertake such services hence reliance cannot be placed on the same. He averred that he still runs his business at Maili Nne and operates a hardware with big stock.

The application should be dismissed with costs.

ISSUES FOR DETERMINATION

a) Whether the applicant has satisfied the threshold for orders of stay of execution to be granted.

Stay of execution is governed by *Order 42* of the *Civil Procedure Rules. Order 42 rule 6(2)* of the *Civil Procedure Rules 2010* states;

> ***(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.***

Whether the applicant shall suffer substantial loss

The applicant has merely stated that he shall suffer substantial loss as the respondent will execute the decretal sum at any time. The supporting affidavit and the submissions have not illustrated how this loss would occur and how it would impact on the applicant.

However, on whether the Respondent is capable of refunding the decretal sum incase the appeals succeeds, in ***Stanley Karanja Wainaina & Another -V- Ridon Ayangu Mutubwa Nairobi H.C.C.A. 427/2015*** it was stated:

> **"It is not enough for the Respondent to merely swear that fact in an affidavit without going further to provide evidence of his liquidity. In my view the Respondent has evidential burden to show that he has the resources since this is a matter that is purely within his knowledge. The Court of Appeal while dealing with a similar situation in National Industrial Credit Bank Limited -V- Aquinas Francis Wasike and Another (UR) C.A. 238/2005 stated: -**
>
> **This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the respondent or lack of them. Once an applicant expresses that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge."**

The Applicant has expressed concern that the respondent is a man of straw who will not be able to pay back the decretal amount if the appeal succeeds. This is the only semblance of substantial loss in place. As per the case cited above, it is upon the respondent to prove that he is not

a man of straw. He has failed to prove that he is not a man of straw and that he would be able to pay back the decretal amount if the appeal succeeds.

Whether the application was made without unreasonable delay

The judgment was delivered on 23rd November 2018 and the ruling made on 28th June 2019. The present application was made on 12th July 2019. I find that the delay was not unreasonable.

Security

The applicant had committed to abide by the conditions of the court as to security in the trial court. He has now changed tact and seeks to have his title as security instead of depositing half the decretal amount as ordered by the court. I agree with the respondent that executing the decree by selling the suit land would be more difficult if the appeal does not succeed. The applicant should deposit half the decretal amount in court.

In ***Arun C Sharma -V- Ashana Raikundalia T/A Rairundalia & Co. Advocates*** Justice Gikonyo 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."**

Having the title deed as security may not serve the purpose of security as much as the depositing of half the decretal amount would.

I find the application merited and do grant orders of stay on the condition that the applicant deposits half the decretal sum in a joint interest earning account in the names of both the parties' advocates, within the next 30 days. Failure to comply ceases the orders herein. Costs be in the cause.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST DAY OF NOVEMBER, 2019.

In the presence of:-

Mr. Aloo holding brief for Mr. Wanyonyi for Plaintiff/Respondent

Mr. Okangi for defendants.

Ms Abigael - Court clerk