



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL APPEAL CASE NO. 473 OF 2017

KENYA UNION OF POST
PRIMARY EDUCATION TEACHERS.....APPLICANT
VERSUS
JUDITH GUSERWA
T/A J.A GUSERWA & CO. ADVOCATES.....RESPONDENT

RULING

1. This ruling is in respect of two applications which were argued simultaneously.
2. The application dated 4th September, 2017 seeks orders that:

“1. Spent.

2. Spent.

3. That this Honourable court do order a stay of execution of the Judgment and decree made by the Honourable Court on 7th August, 2017 pending the hearing and final determination of the Applicant ‘s appeal.

4. That there be a stay of proceedings in CMCC No. 128 of 2017; Judith Guserwa T/a Guserwa & Co Advocates v Kenya Union of Post Primary Education Teachers (KUPPET) pending the hearing and determination of this appeal

5. That the costs of this application be in the cause.”

3. The application is predicated on the grounds stated therein and supported by the affidavit and further affidavit sworn by Akello T Nusori, the Applicant’s Secretary General. It is stated that judgment on admission was entered by the Lower Court on 7th August, 2017 against the Applicant herein for the sum of Ksh.5,486,146.40. The Applicant was aggrieved by the said judgment and filed the appeal herein. The Applicant is apprehensive that if stay of execution is not granted, the appeal will be rendered nugatory and the Applicant will suffer irreparable loss and damage.

4. The application is opposed. It is stated in the replying affidavit that the Appeal has no merits and that

the Applicant has not demonstrated where the Lower Court went wrong. That the Applicant has not demonstrated that it will suffer substantial loss nor provided security. It is averred that this being a money decree, the Respondent who is an advocate of the High Court of more than 33 years standing is capable of refunding the same.

5. The Application dated 19th September, 2017 seeks orders that: **“1.Spent**

2.Spent

3.That this Honourable Court do order a stay of the garnishee proceedings in Milimani Chief Magistrate’s Court Civil Suit No. 128 of 2017; Judith Guserwa v Kenya Union of Post Primary Teachers & Stanbic Bank Kenya Limited pending the hearing and determination of this application.

4. That this Honourable court do set aside the orders issued by Hon I Orenge on 7th September 2017 attaching Ksh.5,486,140.40/= in the Applicant’s Account No. 0100002457 held at Stanbic Bank Kenya Limited, Buruburu Branch.

5. That the cost of this application be in the cause.”

6. The application is based on the grounds stated therein and is supported by the affidavit of Akello T Nusors. The central issue raised is that the Respondent through garnishee proceedings filed in the Lower Court has already commenced execution vide attachment of the Decretal sum through the funds held in the Applicant’s bank account.

7. The Respondent has opposed the application through the grounds of opposition dated 25th September, 2017. The said grounds are as follows:

“1. The application has no merit. In particular, this being an appeal, the Applicant has not demonstrated in terms of Order 42 rule 6(2):

(i) The substantial loss the Applicant will suffer if order for stay is not granted.

(ii) Provided security for the due performance of the decree or order that may ultimately be binding on the Applicant.

(iii) And in terms of Order 42 rule 7(1) demonstrate sufficient cause why the stay granted on 13th September 2017 should be varied.

2. The replying affidavit of the Respondent filed on 12th September 2017 as the Notice of motion dated 19th September 2017 and of 4th September 2017 are basically the same.”

8. I have considered the submissions made by the parties and the cited authorities. Essentially, both applications herein seek stay of execution orders.

9. Order 42 rule 6 (2) provides for the following conditions to be met in an application for stay of execution.

“6. (2) No order for stay of execution shall be made under subrule

(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.”

10. The applications herein have been made without unreasonable delay. On the question of substantial loss, the Applicant has expressed the apprehension that the Appeal will be rendered nugatory and that it stands to suffer substantial loss. However, there are no allegations that the Respondent is not capable of refunding the decretal sum. On the other hand, although the Respondent has stated that she is capable of refunding the decretal sum, there is no evidence to specifically demonstrate how the same will be achieved. As stated by the Court of Appeal in the case of **Wangethi Mwangi v Hon. Amb. Chirau Ali Mwakere CA Nbi.353/2009**.

“It is plain from the grounds set forth in the draft memorandum of appeal that the applicants have asked the appellate court to interfere with the awards of damages and there is possibility that the appellate court may either decline or reduce the awards considerably. In the event of the former there might be a long delay in recovering from the respondent the decretal sum as there are so many imponderables in the sale of the respondent’s land which forms the bulk of his assets. It is obvious therefore that in such a likely eventuality, the applicant might be greatly inconvenienced. The balance of convenience is definitely in favour of the applicants, we would think so.”

11. On whether the appeal raises any triable issues, under Order 42 Rule 6(2) of the Civil Procedure Rules, the Applicant is seeking orders of stay pending appeal from the Subordinate Court to the High Court. The Applicant is not required to prove that he has an arguable appeal, unlike if it was an application in respect of an appeal to the Court of Appeal seeking stay of execution of the decree of the High Court pending appeal to the Court of Appeal. (See for example **Nakuru HCCC 211/98 – Maritha Njeri Wanyoike & 3 others vs Peter Machewa Mwangi & 5 others; Bake ‘N’ Bite (Nrb) Limited v Daniel Mutisya Mwalonzi [2015] eKLR**).

12. To balance the competing interests of both parties herein, I allow both applications on condition that the Applicant do deposit the decretal sum in a joint interest earning bank account of the counsels for both parties herein or in court within 30 days from the date hereof. Costs in cause.

Date, signed and delivered at Nairobi this 30th day of Jan. , 2018

B. THURANIRA JADEN

JUDGE