



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 67 OF 2016

NEHEMIAH ODHIAMBO.....1ST APPELLANT/RESPONDENT

JOHN OTIENO OWOUR.....2ND APPELLANT/RESPONDENT

GEORGE O. WAMEYO.....3RD APPELLANT/RESPONDENT

VERSUS

MANJEET H. SEMBI.....1ST RESPONDENT/APPLICANT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. By a notice of motion dated 30.10.17 brought under Section 1A, 1B and 3A of the Civil Procedure Rules (**Act**) and Order 42 Rule 6 (1) and Order 51 rule 1 of the Civil Procedure Rules (**Rules**) and all enabling provisions of the Law, the 1st respondent/applicant prays for orders that:

a. This application be certified urgent

b. The Honourable court be pleased to grant a stay of execution of the judgment and decree in this case pending the hearing and determination of this application interpartes

c. The Honourable court be pleased to grant a stay of execution of the judgment and decree in this case pending the hearing and determination of the appeal filed in the Court of Appeal at Kisumu

d. Costs of the application be provided for

2. The application is based on the grounds among others that the appeal has a good chance of success and that the appeal may be rendered nugatory as it will be well-nigh impossible to recover the decretal sums from the decree holders herein who are persons of straw.

3. The application is supported by an affidavit sworn on 30th October, 2017 by the 1st respondent/applicant who reiterates the grounds on the face of the application. In addition, the applicant avers that he is willing to furnish security in the form of a bank guarantee or by depositing the decretal amounts or such portion of the decretal amounts in an interest bearing account in the names of both counsels.

4. The application is opposed on the grounds set out in the 3rd respondent's replying affidavit sworn on 1st November, 2017 in which he avers that the applicant has not satisfied the requirements of Order 42 rule 6 and has not demonstrated that he has an arguable appeal.

5. I have considered the application in the light of the supporting affidavit, the replying affidavit and submission by the 1st respondent/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 notice of motion herein was filed on 30th October, 2017 which was 18 days after the judgment sought to be stayed was delivered. It is my considered view that the application was filed without delay.

ii. Substantial loss

8. There are a myriad of cases on what constitutes substantial loss. In **Equity Bank v Taiga Adams Company Limited (2006) eKLR** cited by the applicant, the court reiterated that substantial loss would be established if it can be shown that the respondent would not be in a position to pay as he is a person of no means.

In **Civil Appeal No. 186 Of 2007 Standard Assurance Co. Ltd -Vs- Alfred Mumea Komu** the Court reiterated that-

“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. The respondents' earnings are unknown. As a result therefore; I find that the applicant is unlikely to recover the decretal sum if the appeal succeeds and is likely to suffer substantial loss.

iii. Security

10. The applicant avers that he is willing to furnish security in the form of a bank guarantee or by depositing the decretal amounts or such portion of the decretal amounts in an interest bearing account in the names of both counsels

Decision

11. The overriding objective of the court is to exercise latitude in its interpretation of the law so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. I am satisfied that the applicant has satisfied the requirements of Order 42 rule 6 and to proportionately balance the interests of all the parties, this court hereby makes the following orders:

The notice of motion dated 30.10.17 is considered and allowed on the following conditions:

a. The applicant deposits the total decretal sum in an interest bearing account in the names of both counsels within 30 days from today's date

b. Costs shall abide the costs of the outcome of the appeal

DATED AND DELIVERED THIS ...25th.....DAY OF ...January.....2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellants - N/A

1st respondent/Applicant - Mr Okello holding brief Mr Menezes

2nd respondents - N/A