



REPUBLIC OF KENYA

THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 132 OF 2017

JOSEPH KIPRUGUT MUTAI.....APPELLANT

-VERSUS-

SIMON MATIRI MBURU.....RESPONDENT

RULING

1. The application before me dated 11th October, 2017 seeks orders to stay the execution in Nakuru C.M.C.C. No.239 of 2017 pending appeal. It is brought on grounds that a warrant of arrest has been issued against the applicant (who is the judgment debtor) and that his possible incarceration would further incapacitate him from paying the debt; and, that he would suffer irreparable loss and damage if the orders were not granted.
2. In his supporting affidavit, the applicant deposes that he has reduced the original debt of Kshs.2.5 million by Kshs.900,000/= and that the respondent had failed to give him a statement thereof. He further avers that the notice to show cause followed a suit that was defective and whose ruling he has now appealed.
3. The application is opposed by the respondent. **Matiri Njuguna** advocate filed a replying affidavit sworn on 23rd October, 2017 in which he deposed that both the application and the appeal were incompetent as the orders sought were not appealable as of right and no leave was sought by the appellant before filing the memorandum of appeal. The respondent further averred that the registry stamp on the appeal was backdated to reflect that the appeal was filed on 11th September, 2017 instead of 11th October, 2017 as indicated in the court receipt. On the payment already made by the applicant, Matiri advocate disputed the amount and avers that the applicant has paid Kshs.600,000/= leaving a balance of Kshs.1,700,000/= excluding interest.
4. The application was argued orally. In his brief submissions **Mr. Achola** for the applicant relied on the supporting affidavit and added that his client has been willing to pay the decretal amount but had been taken ill hence failure to pay.
5. **Mr. Matiri** on his part submitted that he had filed a preliminary objection stating that the appeal was filed out of time and therefore there was no competent appeal, the memorandum having been filed on 11th October, 2017 and not 11th September, 2017. He further submitted that the applicant had not demonstrated that the respondent would be unable to repay if the appeal was not in his favour. In response to the averment that the filing date was backdated **Mr. Achola** submitted that he had sent a clerk to do the filing and that he personally was not aware how the backdating, if any may have occurred.
6. The application is brought under **Order 42 Rule 6**. The requirement is that the applicant must show that substantial loss may result unless the order is made and that the application has been made without unreasonable delay; and, that the applicant has furnished security for the performance of such decree or order as may be ultimately binding on him. See **Baiba Dhidha Mjidho Vs. Van Leer East Africa Ltd. (Greif) (K) Ltd. 2006 eKLR**.
7. There was a dispute respecting the date of filing of the memorandum of appeal. I have perused the documents filed by the parties. The memorandum of appeal filed by **Ogega Achola & Co. Advocates** is dated 11th October, 2017 and bears 2 court stamps one dated 11th September, 2017 and another dated 11th October, 2017 with a cancellation of the September and insertion of October in the former stamp. The application and certificate of urgency together with annexures bear two stamps dated 11th September and 11th October, 2017. The Notice of Motion dated 11th October, 2017 together with annexures bears a stamp of the High Court and the Employment and Land Court dated 11th September, 2017 and 11th October, 2017 respectively. **Mr. Achola** stated that he was not aware of backdating. He however gave no explanation on why the documents bear two different court stamps.
8. It is therefore not clear to the court whether there was impropriety on the part of the registry. It is a matter that court has vide orders on record directed the Executive Officer of the court to investigate. Be that as it may, the applicant makes reference to the ruling having been

delivered on 9th September, 2017 while the respondent states that the date of delivery was 6th September, 2017. Neither party however attached the ruling appealed for the court to confirm the date of ruling. I observe however that the two dates were close and the difference would not make any material difference in considering whether there was delay in the filing of the present application.

9. I have considered the application and the respective oral submissions of the parties. The question whether or not the appeal was filed out of time cannot be determined without the investigation already referred to above. I will therefore confine this ruling to whether the applicant has met the conditions set out under **Order 42 Rule 6 (2)** aforestated.

10. The applicant fears that he will be arrested. It is common ground that a warrant of arrest in execution has been issued against the applicant. In this case it is indisputable that the applicant shall suffer loss of liberty if arrested and incarcerated. While loss of liberty cannot be quantified in monetary terms, nonetheless it is a loss whose impact would spill over to the applicant's family and employment.

11. As stated earlier, the application is dated 11th October, 2017. It is common ground that the ruling of the lower court was rendered on 9th September 2017. It is also common ground that the parties had been engaged in negotiating on how to settle the decretal amount. In the circumstances, I consider that the application has been brought timeously.

12. The present application has been necessitated by the failure of the applicant to pay the decretal sum. It would therefore only be just that the decretal sum is secured. In the circumstances, I grant stay of execution on condition that the applicant provides a Bank guarantee for the balance of the decretal sum within 14 days. The applicant shall continue to make monthly payments in accordance with the parties' consent. The parties shall be at liberty to apply.

Orders accordingly.

Ruling delivered, dated and signed at Nakuru

This 29th day of March, 2018

R. LAGAT KORIR

JUDGE

In the presence of:-

Emojong Court Clerk

N/A for appellant

Mr. Maina holding brief for Matiri for respondent