



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO. 9 OF 2014

RICHARD B. O. ONSONGO.....PLAINTIFF

VERSUS

HON. ROSE OGENDO NYAMUNGA.....1ST DEFENDANT

MRS JOYCE OLWEYA..... 2ND DEFENDANT

MR. PAUL OGENDO.....3RD DEFENDANT

RULING

1. By the Notice of Motion dated 21st March 2018 and filed herein on even date the Defendants/Applicants seek orders that:-

1) *“(Spent)”*

2) *“THAT this court be pleased to issue an order staying any/all proceedings further to the Judgment of Hon. Justice E. N. Maina dated 27th February 2018 and all consequential orders flowing there from pending the hearing and determination of this Application.”*

3) *“THAT this court be pleased to issue an order staying any/all proceedings further to the Judgment of Hon. Justice E. N. Maina dated 27th February 2018 and all consequential orders flowing there from pending the hearing and determination of the Appeal.”*

4) *“THAT an interim order of injunction do issue restraining the Respondents either by themselves, their servants and or agents or anyone whomsoever from attaching or commencing execution process against the Applicant’s property in furtherance of the Judgment pending the hearing and determination of this application.”*

5) *“THAT an interim order of injunction do issue restraining the Respondents either by themselves, their servants and or agents or anyone whomsoever from attaching or commencing execution process against the Applicant’s property in furtherance of the Judgment pending the hearing and determination of the intended Appeal.”*

6) *“Costs of the application be in the cause.”*

2. The application is expressed to be made Under Rules 5(2) (b), 42(1) and 47(1) & (2) of the Court of Appeal rules, Order 40 Rules 1, 2, 3(3), 4 of the Civil Procedure Rules and all other enabling provisions and is premised on grounds that:-

1) *“THAT the Applicant has appealed against the ruling of the High Court and the Appeal will be rendered nugatory if the application is not allowed.”*

2) *“THAT the appeal has high chances of success.”*

3) *“THAT it is in the interest of justice that this application be allowed.”*

3. The application is vehemently opposed. At the hearing of the application Mr. Onsongo, who though he is the Respondent was holding brief for his Advocate Mr. Sam Onyango, relied on a replying affidavit sworn by himself on 28th March 2018 in which he deposes that the purported appeal was filed out of time and hence there is no appeal and that should the application be allowed then the Applicants should be ordered to deposit the entire decretal sum.

4. Essentially this should be an application for stay of execution pending appeal under Order 42(6) of the Civil Procedure Rules but instead it is an application for stay made under the Court of Appeal Rules and for a temporary injunction under Order 40 Rules 1, 2, 3(3) and 4 of the Civil Procedure Rules.

5. I have considered the application, the grounds thereof, the supporting and replying affidavits and the rival submissions of the Learned Advocates and it is my finding that first the application is mischievous and misconceived and secondly that it has no merit. It is mischievous and misconceived because instead of applying for a stay of execution pending appeal it seeks orders which essentially can only be granted by the Court of Appeal exercising its jurisdiction under the Rules 5(2)(b) of the Court of Appeal Rules. The only power vested in the High Court under the Appellate Jurisdiction Act falls under Section 7 which provides inter alia that –

***“the High Court may extend the time for giving notice of intention to appeal from a Judgment of the High Court or for making an application for leave to appeal*”.**

The application before me is not one for extension of time to give Notice to Appeal and if the Applicants were desirous of obtaining the orders Under Rule 5(2)(b), 42(1) and 47(1) and (2) of the Court of Appeal Rules then they ought to have made their application in the Court of Appeal as provided under those rules, a fact which I am certain their Counsel very well knows.

6. The above notwithstanding it is my finding that whichever way one looks at the application whether as an application for stay of execution pending appeal or as an application for a temporary injunction the same has no merit as the Applicants have not satisfied the requirements for grant of either of those orders.

7. In respect to stay of execution pending appeal Order 42 Rule 6(2) of the Civil Procedure Rules sets out three conditions that must be satisfied before a stay is granted. These are:-

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.”

8. While the Applicants in this case have complied with one of the above conditions which is that their application was filed timeously, they have not brought any evidence to satisfy this court that they stand to suffer substantial loss should this application be refused and the appeal succeeds. Indeed neither in their grounds nor in the supporting affidavit or in the oral submissions of their Counsel have they alluded to substantial loss. As was stated by Platt, JA in **Kenya Shell Limited V. Kibiru & Another [1986] KLR 410 at page 46:-**

“If there is no evidence of substantial loss to the applicant it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”

9. Similarly in this case the applicants have not demonstrated that they risk to suffer substantial loss should their application be refused and the appeal succeeds. Their argument that their appeal shall be rendered nugatory has not been demonstrated either as this being a money decree the decretal sum can be refunded in the event that the appeal succeeds and there is no fear at all expressed that the Respondent would not be in a position to refund it.

10. Additionally the Applicants have also by their own submissions expressed their unwillingness to comply with the terms of any condition as to security that this court may impose instead stating that they can only do so if asked to deposit a title deed. The nature of the security to be deposited is in the discretion of the court and can never be dictated by an applicant, the only requirement being that the discretion must be exercised judicially so as not to lock out the applicant from the seat of justice.

11. The above argument would also apply in respect of the temporary injunction. The Applicants have clearly not demonstrated that they are likely to suffer loss that cannot be compensated by an award for damages. I say so given that the temporary injunction I am considering here is one under Order 40 of the Civil Procedure Rules and not under Rule 5(2)(b) of the Court of Appeal Rules which gives that court discretion to grant an injunction, a stay of execution, or a stay of any further proceedings on such terms as the court may think just.

12. Moreover a temporary injunction under Order 40 of the Civil Procedure Rules can only be granted under the circumstances set out in Rules 1 and 2(1) none of which apply to this case.

13. As the Applicants have not satisfied the criteria for either a stay of execution or a temporary injunction their application is dismissed with costs to the Respondent.

Signed, dated and delivered at Kisumu this 19th day of April 2018

E. N. MAINA

JUDGE