REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL MISC. APPL. NO. 1100 OF 2003

CHRISTOPHER MUSYOKA MUSAU...PLAINTIFF/RESPONDENT

-V E R S U S –

N.P.G. WARREN

D.J.C. McVICKER

L.W. MURIUKI

K.H.W. KEITH

Z.H.A. ALIBHAI

RUBINA DAR

A. BHANDAR

S. RAVAL T/A DALY &

FIGGIS ADVOCATES.....DEFENDANTS/APPLICANTS

RULING

1) The subject matter or this ruling is the defendants'/applicants' application dated 16th June 2017 in which they sought for the following orders *inter alia*:

> ***i) ..... spent***
>
> ***ii) THAT pending the hearing of this instant application inter partes, this honourable court do issue an order of stay of execution of the judgment of the Hon. Justice G. V. Odunga delivered on 20th September, 2012 and the resulting decree as reinstated by the Court of Appeal on 12th May 2017.***
>
> ***iii) THAT pending the hearing and full determination of the appeal lodged in the Court of Appeal against the judgment and decree of the learned Justice Odunga in High Court Civil Case no. 1100 of 2003, Christopher Musyoka Musau –vs- Neville Patrick Gibson Warren & 7 others on 25th May 2017 this honourable court do issue an order of stay of execution of the judgment of the Hon. Justice G. V. Odunga delivered on 20th September, 2012 and the resulting decree as reinstated by the Court of Appeal on 12th May 2017.***

2) The motion is supported by the affidavit of Kenneth Hamish Wooler Keith. When served with the aforesaid motion, the plaintiff/ respondent filed the replying affidavit to oppose the motion.

3) When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the application disposed of by written submissions.

4) Before considering the merits of this motion, let me set out the history behind the application. Christopher Musyoka Musau, the

plaintiff/respondent, filed an action for breach of an alleged undertaking by the defendants who are trading as **Daly & Figgis Advocates** to pay for the balance of the purchase price of subdivisions of a parcel of land known as L.R no. 11066. This court in its decision delivered on 20.9.2012 held that there was an undertaking issued by the defendants and that the same had been breached. The court proceeded to issue an order directing the defendants to pay ksh.11,568,790/= with interest at court rates from the date of filing the suit. Pursuant to an application filed by the defendants, Justice G. V. Odunga set aside the decision by way of review vide the ruling delivered on 18.1.2013 wherein he dismissed the plaintiff's originating summons with costs. The plaintiff successfully challenged the decision in an appeal before the Court of Appeal. The review order dismissing the suit was set aside and was substituted with an order entering judgement in favour of the plaintiff. In other words the judgment of this court was reinstated which meant that the defendants are now required to pay ksh.11,568,790 to the plaintiff plus interest at court rates from the date of filing of suit. Being dissatisfied with the decision of this court, the defendants filed a notice of appeal against the same followed by the filing of a memorandum of appeal and the record of appeal.

5) Having given in brief the history of this dispute, let me now shift my attention to the merits or otherwise of the application forstay. The application is premised on the provisions of Order 42 rule 6(1), (2) and (4) of the Civil Procedure Rules. The principles to be considered in such applications are well settled. First, an applicant, must show the substantial loss he would suffer if the order for stay is denied.

Secondly, the application for stay must be filed without unreasonable delay.

Thirdly, the provision for the due performance of the decree should be taken into account.

6) Let me begin by considering whether or not the application for stay was timeoulsy filed. The record provided shows that the decision of this court which is being challenged was delivered on 12th May 2017 and the application for stay was filed on 16th May 2017. I find the application was filed without unreasonable delay.

7) The second principle to be considered is whether or not the applicants have shown the substantial loss they would suffer if the order for stay is denied. The applicants have deponed through the affidavit of Kenneth Hamish Wooler Keith that at the time the firm of Daly & Figgis was acting for the purchasers, the plaintiff/respondent had run out of cash and was therefore unable to complete the water works that was required on the subdivisions. It is the defendants' submission that a serious dispute between the parties arose as a result since the purchasers insisted that the water works had to be done as per the sale agreement before they could pay the balance of the purchase price. The applicants are apprehensive that the plaintiff would not be able to repay any sums paid to him in the event the appeal in the Court of Appeal turns successful.

8. In response to the applicants apprehension, the plaintiff pointed out that the applicants have not discharged the burden of proof of the nature of loss that they are likely to suffer should they be denied the order for stay. The plaintiff/respondent further argued that the applicants must have made provision in advance for liability arising out of knowing for a fact that they were indebted to the respondent for the balance of the purchase price.

9) It is clear in my mind that after considering the rival submissions, two issues arise. **First**, that the plaintiff may not be in a financial position to refund the money should the appeal be successful. **Secondly** that the applicants may suffer financial hardship. The first it is apparent that the plaintiff/ respondent has not controverted the assertion. The plaintiff merely pointed out that the action arose in or about 2003. The plaintiff also stated that he has been deprived of the balance of the purchase price for over 15 years. I think the applicants have in my view shown that they would suffer substantial loss if the judgment sum is paid to the plaintiff/respondent since he may not be in a position to make a refund should the appeal turn successful. The second ground cannot stand because in such applications a mere financial hardship does not constitute substantial loss.

10) The third and final principle to consider is the provision for security for the due performance of the decree. The applicants have offered to deposit half of the decretal sum i.e khs.5,784,395/= as opposed to the entire decretal sum plus interest. The applicants have argued that if they are ordered to deposit the entire decretal sum they will suffer undue hardship in the operations of the firm of Daly & Figgis would be out of proportion. The plaintiff/respondent is of the submission that the applicants should be directed to deposit the entire decretal sum. It is not in dispute that the parties in this dispute agree that there is need to provide security for the due performance of the decree. I have considered their proposals and I think the reasonable amount to be deposited is the already ascertained decretal sum i.e ksh.11,568,790/= without adding further accrued interest.

11) In the end, I find the motion dated 16.06.2017 to be meritorious.

Consequently, I grant an order for stay of execution of the decree pending appeal on condition that the applicants deposit a sum of ksh.11,568,790/= in an interest earning account in the joint names of learned advocates or firms of advocates appearing in this matter within 30 days from the date hereof. In default, the motion will be treated as having been dismissed. Costs of the motion to abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 18th day of May, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff/Respondent

..... for the Defendants/Applicants