



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

HCA NO. 9 OF 2018

SAMUEL MWANGI MUNYIRI.....APPLICANT

V E R S U S

JOSEPH NDWIGA M'THIMU.....RESPONDENT

R U L I N G

1. This is an application dated 15/03/2018 seeking for orders that this honourable court be pleased to issue orders for stay of execution of the ex-parte judgment in Embu CMCC No. 276 of 2016 pending hearing and determination of the appeal.

2. The grounds supporting the application are contained in the affidavit of the applicant who deposes that he is the defendant in CMCC No. 276 of 2016. He successfully applied for setting aside ex-parte judgment that had been entered against him on 20/01/2016. The ruling was delivered on the 27/11/2017 whereas he was ordered to file his defence within 7 days and pay the respondent throw-away costs of Kshs.10,000/=.

3. The applicant states that he filed his defence 3 days out of the time granted and deposited Kshs.10,000/= with his advocate for onward transmission to the respondent. The court had ordered that failure to file the defence within 7 days would lead to the ex-parte judgment being restored. His application for extension of time to comply with the orders of the court was dismissed despite the delay being inadvertent. He has learnt that a warrant of arrest has been issued to commit him in civil jail which would cause him suffering unless the stay is granted. His appeal would also be rendered nugatory.

4. The application was opposed by the respondent on ground that it was an abuse of the court process, scandalous and vexatious. The applicant failed to enter appearance nor attend court on subsequent dates. He was arraigned in court on 4/09/2017 in execution of warrant but was conditionally released to file his defence. On 15/09/2017 the applicant neither attended court nor complied with the orders of the court.

5. In a ruling delivered on the 27/11/2017, the applicant was allowed to file his defence within 7 days and pay costs of Kshs.10,000/= to the respondent but failed to do so. The reasons he has given for non-compliance are not plausible.

6. The respondent further states that the appellant has not undertaken to provide security for the due performance of the decree and neither has he given security for payment of the costs of this appeal.

7. The application was argued orally in court by the counsels for the parties. Mr. Andande representing the applicant argued that the appeal is arguable and that it may be rendered nugatory if the orders are not granted. It was further argued that the issue of a warrant of arrest is sufficient to demonstrate substantial loss on the part of the applicant in the event that the orders are not granted. In support of his argument the counsel relied on 2 cases:-

(i) KENLINE AGENCIES LTD VS HFCK LTD Nairobi Civil Appeal No. 83 of 2007.

(ii) GIBSON NGIGE & ANOTHER VS TURF DEVELOPMENT Nairobi Civil Appeal No. 66 of 209.

8. In opposing the application, Mr. Ochichi for the respondent argued that the application is an abuse of the court process since the applicant failed to comply with the conditions given by the magistrate's court. He submitted that Order 42 Rule 6 of the Civil Procedure Rules has not been complied with for the applicant has not offered any security for the due performance of the decree. Neither has he demonstrated that he will suffer substantial loss should the orders be refused.

9. It was further argued by the respondent that the decisions relied on by the applicant are relevant to applications in the court of appeal

where the applicant is required to show that his appeal is arguable. Mr. Ochichi relied on 2 authorities .

(i) ELDORET STEEL MILLS VS ERNEST NJEKA OMBANGO Eldoret High Court Civil Appeal No. 40'A' of 2009.

(ii) ABRAHAM LENAULA LENKEU VS CHARLES KATEKEYO NKARU Kajiado High Court Misc. Civil Application No.22 of 2016.

10. This application is brought under Order 42 Rule 6 which provides:-

No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

11. In an application of this nature the applicant is required to demonstrate the following:-

(1) That he will suffer substantial loss if the orders for stay are not granted.

(2) That his appeal will be rendered nugatory if the orders are refused.

(3) That security for the due performance for the decree have been provided.

12. The arguments of the applicant's counsel were based on the Court of Appeal rules that require that the applicant satisfies the court that his appeal is arguable and that unless the orders are granted the appeal will be rendered nugatory. These requirements differ from the ones provided for under Order 42 Rule 6. I agree with the respondent's counsel that the arguments that the appeal is arguable are misplaced.

13. In his affidavit, the applicant has not attempted to show that he is likely to suffer substantial loss in the event that the orders for stay are not granted. The mere fact that a warrant of arrest has been issued against the applicant is not sufficient to show substantial loss.

14. It is a requirement that the applicant provides for security for the decree of the lower court. There is no indication in his affidavit that such security is available or has been offered.

15. The orders issued by the magistrate in the ruling dated 27/11/2017 provided for conditions that the applicant was required to comply with within a given time. The court had accommodated him in an earlier application in which the ex-parte judgment was set aside and he was allowed to file his defence. He failed to file his defence within the stipulated time and to pay the amount for costs to the respondent.

16. The applicant was heard in his application dated 21/02/2018 seeking for stay of orders issued on 14/02/2018 and for extension of time within which to comply with the ruling dated 27/11/2017. The applicant had been released from custody and was given a chance to defend the suit which he abused. Earlier the applicant had been given time to file an application to set aside the ex-parte judgment but could not file it on time.

17. Without pre-empting the appeal, the conduct of the applicant in the lower court diminishes the chances of success of the appeal.

18. The applicant has failed to pass the test under Order 42 Rule 6 of the Civil Procedure Rules. In addition, the applicant has a history of non-compliance with court orders.

19. I find that this application has no merit and I dismiss it with costs to the respondent.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF MAY, 2018.

F. MUCHEMI

J U D G E

In the presence of:-

Mr. Kadera for Ochichi for Respondent

Ms. Mutegi for Andande for Applicant