



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 36B OF 2016

ANDREW KUBO.....1ST APPELLANT

BIOMEDICAL LABORATORIES LIMITED.....2ND APPELLANT

VERSUS

CHRISTOPHER CHEBIL.....RESPONDENT

RULING

1. The appellants moved this court by a notice of motion dated 21st July, 2017 seeking the following orders:

i. That there be a stay of execution of the judgment and decree issued on 6th April, 2016 in Mavoko PMCC No. 1169 of 2014 pending the hearing and determination of this appeal.

ii. That the orders of 4th May, 2017 dismissing this appeal be set aside and an order be granted reinstating this appeal for hearing and determination.

2. Dennis Magara, advocate on record for the appellants explained that there was delay in typing of proceedings of the trial court and the appellants took necessary steps to have the proceedings typed expeditiously, that the appellants received typed proceedings on 17th April, 2017 whereupon counsel moved expeditiously to prepare a record of appeal, that the appellants filed and served a record of appeal upon the respondents on 19th April, 2017 and 20th April, 2017 respectively, that the appellants realized that the decree emanating from the judgment had not been drawn and took necessary steps to have the decree drawn and signed and were awaiting for the same before fixing the appeal for directions. That the decree had not been drawn or signed as at the time this appeal was dismissed and has not been to-date drawn or signed. He denied that the delay in setting down this appeal for hearing was occasioned by the appellants. That the appellants only came to know that the appeal had been dismissed on 21st July, 2017 when counsel for the appellants in response to the respondent's invitation letter to fix a mention date, appeared at the court registry to fix the said mention date for the appeal and the respondent's representative expressed shock as well to find that the appeal had been dismissed. That the appeal having been dismissed, should the orders sought not be granted, the appellant is apprehensive that the respondent will proceed with execution exposing the appellants to substantial loss as the respondent is a man of straw and will not be able to make good the judgment sum and costs. Counsel expressed the appellants' willingness to abide by the conditions or timelines ordered by this court.

3. In response thereto, the respondent swore an affidavit on 27th November, 2017. He contended that the application is an afterthought. That prior to filing the present application, the appellants had filed an application for stay of execution on 3rd May, 2016 in Mavoko PMCC No. 1169 of 2014. The appellants were granted interim orders of stay for more than a year without pursuing the said application hence an abuse of court process. That the appellants have not deposited security for the due performance of the decree. He contended that he is a business man hence capable of paying the decretal sum and he should therefore not be denied the fruits of his judgment. He further contended that the memorandum of appeal does not raise any reasonable ground of appeal.

4. It was the appellant's submissions that no proof was tendered that the notice calling on the appellants to show cause why the matter should not be dismissed was ever served upon the appellants advocates. That service of such notice is a crucial element of natural justice. It was

submitted that the appellants have proved that they occasioned no delay in prosecuting this appeal. That the respondent has clearly indicated in his replying affidavit that he is not opposed to the application save for order of stay of execution. It was contended that no order was made by the lower court for the appellant to deposit any security as a precondition for orders of stay of execution.

5. The respondent on the other hand submitted that the appellants have not demonstrated how they shall suffer substantial loss other than merely mentioning that they would so suffer. It was contended that the appellants have been enjoying interim orders of stay since 3rd May, 2016, when the same was granted in Mavoko PMCC No. 1169 of 2014 but did not prosecute the appeal an indication of inordinate delay. In support of his case, the respondent cited; **Masisi Mwita v. Damaris Wanjiku Njeri [2016] eKLR** and **Antoiye Ndiaye v. African Virtual University [2015] eKLR**.

6. The principles guiding the grant of a stay of execution pending appeal are provided under Order 42 rule 6(2) of the Civil Procedure Rules. The court is thus to be satisfied that substantial loss may result to the applicant unless the order is made; that the application has been made without unreasonable delay; and 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.

7. What is sought to be stayed in this case is a money decree and as such in determining the issue of substantial loss financial position of both parties have to be put into consideration. See **Kenya Shell Ltd vs. Kiburu & Another [1986] KLR 410**.

8. The appellants made an allegation that the respondent will not be able to refund the decretal sum. In such a scenario, the burden is upon the applicant to prove that the Respondent will not be able to refund as alleged. See **Caneland Ltd. & 2 Others v. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999**. It would however not be possible for an applicant to know the respondent's financial means. The law as settled is that all an applicant can reasonably do, is to swear that the Respondent will not be in a position to refund the decretal sum. Upon so swearing, the evidential burden shifts to the respondent to show that he is financially capable. See: **Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001**. Applying the test, the respondent in his affidavit contended that he is a business man and able to refund the decretal sum in the event the appeal succeeds. However, no such evidence was tendered other than the mere assertion. In the circumstances, I find that the respondent failed to rebut the applicants' claim and it follows that the applicants are likely to suffer substantial loss.

9. From the chronology of events as stated by the applicants, it is clear that they made attempts to have this appeal prosecuted. They also learnt that the appeal was dismissed and made an application in due time and I therefore find that the application was timeously filed. Further, the applicants were never served with a notice to show cause as is required before dismissal of a matter. The applicants have offered to abide by the orders of this court as to security. In the end, I find that they have satisfied the requirements for grant of stay.

10. Accordingly, I find merit in the application and it is hereby allowed in the following terms:

a) The Order of 4th May, 2017 dismissing this appeal be set aside and this appeal is hereby reinstated for hearing and determination.

b) There be stay of execution of the judgment and decree issued on 6th April, 2016 in Mavoko PMCC No. 1169 of 2014 pending the hearing and determination of this appeal upon the Applicants depositing the decretal sum in a joint interest earning account in the names of the parties advocates within 30 days from the date of this ruling failure to which the order of stay of execution shall lapse.

Orders accordingly.

Dated and Delivered at MACHAKOS this 31st day of July, 2018.

D. K. KEMEI

JUDGE

In the presence of:

Mwangi for Magara - for the Appellant

No appearance for Shem Kebongo -for the Respondent

Josephine Court Assistant