



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISCELLANEOUS APPLICATION NO. 91 OF 2018

LAARE SPRINGS K. LIMITED.....APPLICANT

Versus

LAZARUS MBILO MUTU.....RESPONDENT

RULING

Stay of execution

[1] The Motion dated 21st May 2018 which is expressed to be brought under Sections 1A, 1B, 3A, 79G and 95 of the Civil Procedure Act seeks the following orders:

- 1. Leave to lodge an appeal against the entire judgment and decree in Meru CMCC No. 253 of 2016 ; and***
- 2. Stay of execution of the decree in Meru CMCC NO. 253 of 2016 pending the hearing and determination of the intended appeal.***

[2] The grounds upon which the application is premised are set out in the Motion and the supporting affidavit sworn on 21st May 2018 by Joseph Mwai, Legal Officer at M/S UAP Insurance Limited which is the insurer of the applicant. It was averred that the applicant was aggrieved by Judgment in Meru CMCC NO. 253 of 2016 delivered on 25th January 2018 and wishes to file an appeal. It was deposed that the intended appeal has a high chance of success. They explained that the delay in filing an appeal in time is neither inordinate nor deliberate and therefore excusable. And that, unless leave to appeal and stay of execution is granted, the applicant will suffer substantial loss. The applicant stated that it is ready and willing to deposit such security as the court may order for due performance of such decree or order as may ultimately be binding on it. Joseph deposed that instructions to file appeal was to be sent to their advocates on record but the Applicant got mixed up with other documents in the office and thus never sent out instructions to the advocates in time.

DETERMINATION

Leave to appeal out of time

[3] On 31st May 2018, the court granted the Applicant leave to file appeal out of time. I hope the appeal was filed. Therefore, prayer on leave to file appeal out of time has been spent. I will now consider the request for stay of execution.

Stay of execution

[4] The relief of stay of execution of the decree pending appeal is discretionary. It is provided for in Order 42 Rule 6 of the Civil Procedure Rules. In the exercise of the discretion in an application for stay of execution, the court should be satisfied that:-

- (a) That the application has been made without unreasonable delay;***
- (b) That substantial loss may result to the applicant unless the order is made and; and***
- (b) That 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.***

Whether application timeous

[5] On 31st May 2018, the court directed *inter alia* that it will determine the request for stay of execution on merit after it was satisfied that the Respondent had been duly served with the application but did not file any response. I will proceed to consider the merits or otherwise of stay of execution. The first hurdle on the timeliness of the application was surmounted when leave to appeal was granted. I go to the next

Substantial loss occurring

[6] This is the cornerstone of the discretion of the court in granting stay of execution. I have perused the application and the supporting affidavit. I am only able to find these averments, to wit: (1) that the intended appeal is arguable and if stay of execution is not granted, the insurer will suffer substantial loss; (2) that the Respondent will not suffer any prejudice if stay is granted; and (3) that the Applicant is able, ready and willing to deposit such security as the court will order. Ordinarily, in money decrees such as is the case here, substantial loss would occur if the Respondent will not be able to refund the decretal sum should the appeal succeed. Otherwise, how else will an appeal be rendered nugatory if the Respondent can refund the decretal sum in the event the appeal succeeds? Notably, ability to refund the decretal sum or otherwise is a matter of fact and should be established by the Applicant; it is not a matter that the court can take judicial notice of. Courts have said in cases without number that, just as the Appellant has right of appeal, the Respondent has right to immediate realization of the fruits of his judgment. The two competing rights needs noble balancing by the court, hence, the insistence by the law that sufficient cause must be shown to justify postponement or stay the Respondent's right to enjoy the fruits of his judgment. That is why the onus of proving substantial loss rests with the Applicant. In this case, there was no any or any single argument that the Respondent cannot refund the decretal sum if the appeal is successful. Accordingly, the Appellant did not show that substantial loss would occur unless stay is granted. In light thereof, I need not consider whether security should or should not be deposited. Here I must state that merely stating that appeal will be rendered nugatory or that the applicant is willing to deposit any security ordered by the court is not enough. I therefore dismiss their application for stay of execution. It is so ordered.

Dated, delivered and Signed in open court at Meru this 24th day of July, 2018.

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F. GIKONYO

JUDGE

In the presence of:

Mwanzia advocate for Mr. Munene advocate for applicant

Respondent – Non appearance

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F. GIKONYO

JUDGE