



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO 87 OF 2017

JUDITH KAGWIRIA.....APPELLANT

VERSUS

HELASABILI MOBILE CAPITAL LIMITED.....RESPONDENT

RULING

1. The application before me dated 21/8/2017 seeks orders for stay of execution of the judgment and decree in **Nakuru CMCC No. 992 of 2016** pending the hearing and determination of the appeal. The application is supported by the affidavit of **Judith Kagwiria** sworn on 21/8/2017.

2. The application is opposed by the respondent through a replying affidavit sworn by **Frida Makena Gitonga** a director of the respondent company. Parties initially sought time to settle the matter out of court. Their attempts seem to have borne no fruit because they subsequently sought directions to proceed with the application on 22/11/2017.

3. Parties filed written submissions which I have considered together with the sworn affidavits. The only issue which arises is whether the application is merited.

4. **Order 42 Rule 6 (2)** sets out the conditions to be met before stay can be granted. Stay may not be granted unless the applicant shows that substantial loss may result unless the order is made; that the application has been made without unreasonable delay and that such security for the performance of the decree has been provided by the applicant. These conditions have been expounded in numerous decisions. Indeed both parties have cited several authorities on this which I have considered.

Whether the applicant shall suffer substantial loss

5. The applicant depones that summary judgment was entered against her on 14th June 2017, which judgment she appealed on 12/7/2017. That the respondent took out a notice to show cause for sum of Kshs 900,000/= which was arbitrary and unreasonable; and, that she would suffer substantial loss if the decree was executed. She further deponed that the respondents had in their possession **title deed No. Nanyuki/Marura Block 8/45** whose value stands at Kshs 1,500,000/= as security for the outstanding debt; and, that she made the present application without undue delay. In written submissions filed on 1/2/2018 the applicant submits that she would suffer substantial loss. She cited **Kenya Shell Ltd vs Benjamin Karuga Kigibu & Ruth Wairimu Karuga [1982-1988] KAR 1018** for the proposition that “substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

6. The respondent on the other hand has set out the background to the suit in a lengthy replying affidavit. She deponed that the respondent advanced money to the applicant on the basis of an agreement dated 19/12/2011 and that a summary judgment was entered on 14/6/2017 when the applicant filed a sham defence. That a valid decree of the court (exhibit 8) was issued on 11/7/2017. She further deponed that the applicant failed to satisfy the decree and a notice of show cause was issued. That the applicant failed to turn up for the hearing of the N.T.S.C on 23/8/2017 and a warrant of arrest was subsequently issued by the court.

7. The respondent’s written submissions dated 28/11/2018 reiterate the averment in the replying affidavit. They submit that the applicant cannot suffer substantial loss as she owed money and the respondent who is the lender can afford to refund the same if the applicant were to succeed on appeal. They rely on **Kenya Shell Ltd vs Benjamin Kanya Kibiru & Anor [1986] eKLR**.

8. It is indeed not disputed that the decree in question was a money decree and therefore if executed would easily be refunded if the applicant was to be successful on appeal. In this sense, therefore the applicant has not demonstrated that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party on the appeal. See **James Wangalwa & Anor vs Agnes Nahaka Cheseto Bungoma Misc Application No. 42 of 2014 (unreported)**

9. In the present application however the applicant's grievance is that the decree resulted from a summary judgment on which the defence was dismissed. Her grievance which is the subject of her appeal is that she was driven away from the seat of justice. Without going into the merits of her appeal, I am persuaded that she would suffer substantial loss if she satisfied the decree only for her appeal to succeed. See **Mercy Karimi Njeru & Anor vs Kisima Real Estate Limited [2015] eKLR**.

Whether the application was brought timeously

10. Summary judgment was entered in the case on 14/6/2017. The decree was issued on 11/7/2017. The applicant filed the present application on 21/8/2017, some 5 weeks later. The delay of 5 weeks though not to be countenanced is not in the circumstances of this case inordinate. It is excusable.

Whether the applicant has offered security

11. The parties did not address the issue of security in their rival affidavits and submissions. Security however is a mandatory prerequisite under **Order 42 of the Civil Procedure Rules**. In **Carter & sons Ltd vs Deposit Protection Fund Board & 2 others, CA 291/97**, the court of appeal held that failure to make an order for security for the due performance of the decree amounts to a misdirection on the part of the court granting stay. In the circumstances therefore an order for security must ensue.

12. In the final analysis I allow the application on the following terms:

(i) There shall be stay of execution pending the hearing and determination of the appeal subject to the applicant executing a bank guarantee for the decretal amount being Kshs. 963,108/= within 30 days of the delivery of this ruling.

(ii) The applicant shall compile, file and serve the record of appeal within 45 days of this ruling.

Cost shall abide the outcome of the appeal.

Orders accordingly

Ruling signed at Garsen on 20th day of June 2018.

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R. LAGAT KORIR

JUDGE

Ruling delivered dated and Counter signed at Nakuru this 2nd day of August, 2018.

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JANET MULWA

JUDGE

In the presence of

.....CA

.....for applicant

.....for respondent