



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. 36 OF 2018

JOSPHAT KAMANDE KIARIE.....APPELLANT

VERSUS

MUTHOGA NGERA.....RESPONDENT

RULING

1. The appellant prays for *stay of execution* of the decree of the lower court pending the hearing and determination of this appeal.
2. He is aggrieved by the *order* made on 28th June 2018 in Civil Case 26 of 2017 at the Murang'a Chief Magistrates Court. He avers that the suit proceeded *ex parte*. A decree for Kshs 5,210,007 or thereabouts was issued against him. When he sought to enlarge time to file a defence; and, to stay execution of the decree, the learned magistrate dismissed the action for being *res judicata*.
3. The notice of motion is dated 27th July 2018. The appellant says he has an arguable appeal. He contends that unless stay is granted the appeal will be rendered nugatory. He has offered to deposit a *title* in court worth *half* of the decretal sum.
4. The motion is contested. There is the replying affidavit sworn by the respondent on 14th September 2018. It was submitted that the impugned ruling was a *negative* order. Accordingly, there is nothing to stay. Further, the reinstated *judgment* has not been appealed against. Instead, the applicant only challenges the *ruling* of 28th June 2018.
5. The respondent contends that the lower court was entitled to dismiss the appellant's motion as he had made a similar application before. He submitted that the applicant has not demonstrated that he will suffer substantial loss.
6. The motion is also attacked for *laches*. The respondent deposed that nearly a year has lapsed since the impugned decree. In a synopsis, the motion is a stratagem contrived to delay the fruits of the judgment.
7. On 17th September 2018, I heard brief arguments from both counsel.
8. The present motion is largely predicated upon Order 42 rules 6 of the Civil Procedure Rules. The court *may* grant a stay if *substantial loss* may occur; that the application has been made *timeously*; and, that the applicant furnishes *security* for the due performance of the decree that may ultimately be binding on him.
9. The impugned order was made on 28th June 2018. The memorandum of appeal and the present motion were presented within *30 days*. I cannot say that the delay is *inordinate*.
10. In *Butt v Rent Restriction Tribunal* [1982] KLR 417, Madan JA (as he then was) quoted with approval the views of Brett L.J. in *Wilson v Church* (No 2) 12 Ch. D [1879] 454 at 459-

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory”
11. In the *Butt* case (*supra*) there was a large amount of rent in dispute. The court held that it was a “*special circumstance*” that gave the applicant an undoubted right of appeal. See also *Madhupaper International Limited v Kerr* [1985] KLR 840 at page 846.
12. The decree here is substantial. I am alive that as a general proposition, the execution of a *money decree* does not constitute substantial loss. See *Kenya Shell v Benjamin Karuga* [1982-88] 1 KLR 1018, *Jaribu Credit Traders Ltd v Mumias Sugar Company Ltd* High Court, Nairobi, Commercial Case 465 of 2009 [2014] eKLR.

13. On the other hand, the respondent is *prejudiced* because he cannot reap the fruits of the decree. The offer to deposit a title deed worth only *half* of the decree is unappealing. The details or value of the land have not even been provided. It is just an empty offer.

14. I thus find that the appellant is only deserving of a *conditional* stay. That will balance the rights of the parties. See *Jubilee Insurance Company Ltd v Samuel Thumbé*, High Court, Nairobi, Civil Appeal 432 of 2009 [2010] eKLR.

15. The upshot is that the appellant's notice of motion dated 27th July 2018 is *allowed* in the following terms-

- a. That there shall be a stay of execution of the decree pending the hearing and determination of this appeal.
- b. The stay is granted upon the *condition* that the appellant deposits the sum of Kshs 5,210,007 in a joint interest earning account of both counsel in a reputable bank within *thirty days* of today's date.
- c. In default, execution shall issue.
- d. Costs shall be in the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 27th day of September 2018

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

No appearance by counsel for the appellant.

Mr. Njoroge holding brief for Mr. Ng'ang'a for the respondent instructed by Mbugua Ngang'a & Company Advocates.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.