



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 634 OF 2017

MAGNATE VENTURES.....PLAINTIFF

VERSUS

SIMON MUTUA MUATHA.....1STRESPONDENT

JAMES MAINA GITHII.....2ND RESPONDENT

(Being an appeal from the Judgment of the Chief Magistrate's Court at Nairobi by the Hon. A.M Obura (Mrs), Senior Principal Magistrate delivered on 18th October 2017 in CMCC 6863 of 2013)

RULING

INTRODUCTION

1. The Appellant's Notice of Motion application dated and filed on 4th April 2018 was filed pursuant to the provisions of Sections 1A and 1B and 3 and 3A of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules and all other enabling provisions of the law. Prayer No (1) was spent. It sought the following remaining orders:-

1. Spent.

2. THAT this Honourable court do order a stay of execution of the Judgment and order made by Hon. A.M. Obura (Mrs) Senior Principal Magistrate, in Nairobi CMCC No 6863 of 2013 Simon Mutua Muatha vs Magnate Ventures Limited and James Maina Githii delivered on 18th October 2017 pending the *inter parties* hearing of this application.

3. THAT the costs of this application and other costs incidental thereto be granted to the 3rd Defendant.

4. THAT such further orders be made as may be deemed just and reasonable to this Honourable Court.

2. The Appellant's Written Submissions were dated 26th June 2018 and filed on 27th June 2018. The Respondent's undated Written Submissions were filed on 22nd May 2018.

3. When the matter came before the court on 28th June 2018, the parties requested that the court deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE APPELLANT'S CASE

4. The Appellant's present application was supported by the Affidavit of Kevin Gikonyo that was sworn on 4th April 2018.

5. It pointed out that the 2nd Respondent did not enter appearance or file a defence.

It was categorical that the 1st Respondent was never its employee and he could only have been employed by the 2nd Respondent, an independent contractor, it had engaged on its site.

6. It was therefore its case that the Learned Trial Magistrate misdirected herself when she entered judgment against it in favour of the 1st

Respondent for:-

General damages **Kshs 700,000/=**

Special damages **Kshs 2,000/=**

Plus costs and interest of the suit.

7. It further contended that it filed its Memorandum of Appeal on 17th November 2017 and that its application seeking a review of the Trial Court's orders that was filed on 16th November 2017 was dismissed on 13th March 2018. It was therefore its averment that its present application was filed timeously on 4th April 2018.

8. It is also averred that if a stay of execution was not granted pending the hearing and determination of its appeal, it would suffer substantial loss thereby occasioning it prejudice. It also stated that it was ready and willing to deposit a substantial security, the judgment amount or any part thereof into court or into a joint interest earning account in the names of its counsel and counsel for the 1st Respondent.

9. It therefore urged this court to allow its application as prayed.

THE 1ST RESPONDENT'S CASE

10. In opposition to the said application, the 1st Respondent swore his Replying Affidavit on 25th April 2018. The same was sworn on 26th April 2018.

11. His case was that the Appellant had not shown this court the reason or prejudice it would suffer if it paid him the decretal sum of Kshs 702,000/= plus costs and interest as compensation of the injuries that he sustained while he was in its employment.

12. He termed the Appellant's present application an afterthought that was intended to buy time after it was denied a stay of execution after it failed to meet its obligations within the thirty (30) days it had initially been granted by the lower court. He stated that he was in dire need of Kshs 150,000/= to have the medical plate removed.

13. He was emphatic that the present application was mischievous and in bad faith and therefore asked this court to dismiss the same.

LEGAL ANALYSIS

14. The Appellant submitted that it had demonstrated that it would suffer substantial loss if its application for stay of execution pending appeal was not granted, that it had filed its present application without delay and that it was ready and willing to deposit security which were the conditions stipulated in Order 42 Rule 6(2) of the Civil Procedure Rules for the grant of a stay of execution pending appeal.

15. It argued that the only way of establishing if an applicant would suffer substantial loss was if he demonstrated that a respondent would not be able to repay the decretal sum he would have paid the respondent if his appeal succeeded. He relied in the case of **Northwood Service Ltd vs Mac & More Solution Ltd [2015] eKLR** in this regard.

16. In addition to stating that it had filed its present application without delay, it placed reliance on the case of **Gitahi & Another vs Warugongo [1988] KLR 621** that was authoritatively cited in the case of **Mathu vs Gichimu [2004] eKLR** where the court therein adopted the principles set out in Rosengren's case where Parker LJ at page 200 remarked as follows:-

“The process of giving security is one which arises constantly... So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way which is least disadvantageous to the party giving that security. It may take many forms. A bank guarantee and payment into court are but two of them... so long as it is adequate, then the form of it is a matter which is immaterial”.

17. On his part, the 1st Respondent argued that Section 1A (1) of the Civil Procedure Act expressly provides that the overriding objective of the Civil Procedure Act is **“the facilitation of the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act”.**

18. He was in agreement with the Appellant that a stay of execution pending appeal cannot be granted before an applicant satisfies the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules. It also placed reliance on the case of **Bob Morgan Systems Ltd & Another vs James [2004] 1 KLR 194** where the Court of Appeal held that the court will grant a stay if it is satisfied that the applicant has demonstrated that his appeal or intended appeal is arguable and that unless a stay or injunction is granted, his appeal or intended appeal would be rendered nugatory. He also relied on the case of **Blue Shield Insurance Co Ltd vs Muhinda [2009] KLR 55** where the court therein also made a similar determination.

19. It is important to point out right at the outset that the conditions for a stay of execution pending appeal in the Court of Appeal and the High Court are different.

20. Rule 5(2) (b) of the Court of Appeal Rules provides as follows:-

“Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may: -

In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75 order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just”.

21. In the Court of Appeal, the court will only grant a stay of execution pending appeal if the following two (2) conditions are met:-

1. The applicant should have demonstrated that his appeal or intended appeal is arguable;

2. The applicant should have demonstrated that unless a stay or injunction is granted, his appeal or intended appeal, if successful will be rendered nugatory.

22. As the application for stay of execution is presently before the High Court, the relevant provision of law to consider herein is Order 42 Rule 6(2) of the Civil Procedure Rules. The same provides as follows:-

“No order for stay of execution shall be made under subrule (1) unless-

a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

b. 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.

23. Order 46 Rule 6 (2) of the Civil Procedure Rules, therefore provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following:-

1. Substantial loss may result to the applicant unless the order was made;

2. The application was made without unreasonable delay; and

3. 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.

24. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is **“and”**. It connotes that all three (3) conditions must be met simultaneously.

25. It was the considered view of this court that substantial loss does not have to be a colossal amount of money. Its sufficient if an applicant seeking a stay of execution demonstrates that it will go through hardship such as instituting legal proceedings to recover the decretal sum it paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.

26. Notably, the 1st Respondent herein did not file an Affidavit of means to demonstrate that he was in a good financial position to repay the Appellant the decretal sum in the event it was successful in his appeal. In fact, his Replying Affidavit was silent on how he would repay the Appellant monies it would pay him before its Appeal could be heard and determined.

27. This therefore left the court in a quagmire especially as regards the ability of the 1st Respondent to pay back the decretal sum in the event the Appellant was successful in his Appeal herein. In the absence of proof of his ability to pay back the said sum, this court was satisfied that the Appellant would suffer substantial loss.

28. In that regard, court came to the conclusion that the Applicant had satisfied the first condition of demonstrating that it would suffer substantial loss if the order for stay of execution pending appeal was not granted.

29. Turning to the issue of the filing of an application for stay of execution, this court noted that Judgment in the lower court was delivered on 18th October 2017. The Appellant filed a Notice of Motion application dated 16th November 2017 on 17th November 2017 seeking a stay of execution pending appeal. It did not annex a copy of the Ruling showing that its said application was dismissed on 13th March 2018. However, as the 1st Respondent did not controvert the aforesaid assertion, this court was persuaded to find and hold that the Appellant filed the present application without any delay having been denied a stay of execution pending appeal, by the lower court on 13th March 2018. The Appellant has thus satisfied the second condition for the granting of a stay of execution pending appeal.

30. As regards the third condition, the Appellant had stated that it was ready and willing to provide security which could also be in form of depositing the decretal sum in court or in a joint interest earning account in the names of its counsel and counsel for the 1st Respondent. This court was therefore of the view that the Appellant met all the prerequisite conditions of being granted a stay of execution pending appeal.

31. Appreciably, in the case of **Ujagar Singh vs Runda Coffee Estates Limited [1966] EA 263**, the court therein invoked its jurisdiction and ordered the preservation of the *status quo* pending the hearing and determination of the appeal. The court therein observed thus:-

“...It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful...”

32. As this very court held in the case of Siegfried Busch vs MCSK [2013]eKLR:-

“A superior court to which an application has been made must recognise and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment...”

33. Accordingly, having considered the affidavit evidence, Written Submissions and the case law the parties herein relied in support of their respective cases, it was the considered view of this court that as the Appellant was entitled to exercise his right of appeal, it was in the interests of justice that a stay of execution pending the hearing and determination of the Appeal of the Learned Trial Magistrate’s judgment be granted so as not to render his appeal nugatory.

DISPOSITION

34. Accordingly, the upshot of this court’s ruling was that the Appellant’s Notice of Motion application dated and filed on 4th April 2018 was merited and the same is hereby allowed in the following terms:-

- 1. THAT there shall be a stay of execution of Judgment that was delivered by Hon A.M. Obura (Mrs) SPM in Nairobi CMCC No 6863 of 2013 Simon Mutua Muatha vs Magnate Ventures Limited and James Maina Githii delivered on 18th October 2017 on condition the Appellant shall deposit into an interest earning account in the joint names of its counsel and counsel for the 1st Respondent, the sum of Kshs 702,000/= within the thirty (30) days from the date hereof i.e. by 30th November 2018.**
- 2. For the avoidance of doubt, in the event, the Appellant shall default on Paragraph 34 (1) hereinabove, the conditional stay of execution shall automatically lapse.**
- 3. The Appellant shall file and serve a Record of Appeal within sixty (60) days of this Ruling i.e by 17th January 2019.**
- 4. Costs of the application herein shall be in the cause.**
- 5. Either party is at liberty to apply.**

35. The Deputy Registrar of High Court of Kenya Milimani Law Courts Civil Division is hereby directed to facilitate the expeditious typing of the proceedings to enable the Appellant file and serve its Record of Appeal within the time lines given herein and to also undertake all prerequisite process to ensure the hearing of the Appeal herein without any inordinate delay.

36. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of October 2018

J. KAMAU

JUDGE