



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO 294 OF 2010

GARTON LIMITED.....APPELLANT

VERSUS

NANCY NJERI NYOIKE.....RESPONDENT

RULING

By a notice of motion dated the 29th March 2016, the appellant/applicant has moved this court seeking the following orders;

- (1) Spent
- (2) That pending the hearing and determination of this application inter partes, the judgment delivered on 9th March, 2016 by Honourable Lady Justice Roselyn Aburili be stayed.
- (3) That there be a stay of execution of the judgment of the Honourable Lady Justice R. Aburili delivered on 9th March, 2016 pending the lodging, hearing and determination of the Applicant's intended appeal against the said Judgment.
- (4) That the respondent be restrained from executing the judgment and Decree in Resident Magistrate Civil Case No. 214 of 2009.
- (5) That this application be heard inter-partes as a matter of urgency on such date and such time as this Honourable Court may direct.
- (6) That the cost of this application be costs in the cause

The application is premised on the grounds set out in the body of the same and its supported by the annexed affidavit sworn by Hassan Ndicho on the 29th March, 2016.

The appellant/applicant has relied on the grounds that; judgment in this matter was delivered on the 9th March, 2016 in which the appeal was dismissed. That the appellant has lodged a notice of appeal against the said judgment.

The appellant's director avers that he believes that the respondent has appointed an advocate to commence execution proceedings for the recovery of the decretal sums which will render the intended appeal nugatory to the detriment of the applicant. That the application has been brought without undue delay in the circumstances.

It is further averred that the applicant has an arguable appeal which raises serious issues of law which are not frivolous. That the court is yet to prepare a typed copy of the judgment and there may be further grounds of appeal which have not been incorporated in the memorandum of appeal. The appellant avers that he has no knowledge of the respondent's assets and/or whereabouts, and in the event that payment is made to her as ordered and the intended appeal is successful, she will not be in a position to refund the decretal sum and the appeal will be rendered nugatory. That the applicant will suffer serious prejudice if the application herein is not heard expeditiously. The applicant is ready and willing to furnish security on such terms as the honourable court may deem just.

The application is opposed vide a replying affidavit sworn on 4th April 2016 by the respondent wherein she depones that what the appellant is doing is to deny her the fruits of her judgment. That she filed the suit that led to this appeal on 20th August, 2009, and on 12th July, 2010 judgment was entered in her favour and she was awarded Kshs.128.000/- after deducting contribution of 20%.

That the appellant/applicant filed an appeal against the said judgment. That she personally pushed for the appeal to be concluded as the appellant seemed never interested to conclude the appeal.

That she has been advised by her advocate on record, that, the intended appeal is frivolous and does not raise any issues of law worth consideration by the court of appeal, being a second appeal. She avers that she was injured while in the employment and in the work place of the appellant which is not a disputed fact and therefore the issue of compensation under Cap. 376 does not arise.

That according to her, the appellant is only demonstrating and flexing its financial muscle over her by dragging this matter on and the amount involved is so inimical that it does not even make economic sense to pursue it further that she is aware that the appellant is a hugely rich company with huge coffee plantations while she is not a person of such huge means and she really need to enjoy the fruits of her judgment. That notwithstanding, she is capable and ready to refund the decretal sum should the intended appeal succeed.

That she is a farmer cum employee in coffee plantations whilst her husband is a trader in avocado business and she can readily refund the small decretal sum in issue should the appeal succeed. She further depones that she has been advised by her advocate on record that the application must fail as there is nothing to stay since the decision of the court merely dismissed the appeal.

Parties filed their respective submissions which this court has duly considered. The application has mainly been brought under order 42 Rule 6 of the Civil Procedure Rules which provides;

“No order for stay of execution shall be made under sub rule (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.”

The applicant herein submits that it shall suffer substantial loss unless the order sought herein are granted. The court was referred to the case of ***Antoine Ndiaye Vs. African Virtual University (2015) eKLR*** wherein Gikonyo J. in delivering a ruling reiterated the findings of Ogola J. in the case of ***Tropical Community Suppliers limited*** where he held;

“substantial loss does not represent any particular mathematical formula, rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from loss without value or a loss that is merely nominal(emphasis added).”

The applicant also cited the case of ***John Mwangi Ndiritu Vs. Joseph Ndiritu Wamathai(2016) eKLR*** in

which Hon. Mativo J. cited the case of *Silverstein Vs. Chesoni 2002 1KLR 867*, in which the court held:-

“The applicant must establish other factors which show 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 in the appeal. This is what substantial loss would entail..... The issue of substantial loss is the corner stone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”..... (Emphasis added)

The reasons given by the applicant to support the contention that it will suffer substantial loss are that:-

- (i) There is imminent risk of execution of the decree.
- (ii) Unless an order staying execution is granted, it shall be exposed to the imminent risk of a multiplicity of actions thereby crippling it financially.
- (iii) There is likelihood that the applicant will be unable to recover the decretal amount in that the respondent’s assets are unknown, in the event that the intended appeal is successful.

In her rejoinder, the respondent has deponed that she can readily refund the small decretal sum should the appeal succeed. She avers that she is a farmer cum employee in a coffee plantation whilst her husband is a trader in avocado business.

It is now trite that once the applicant calls into question the respondent’s financial ability, the burden of proving such ability immediately shifts to the respondent. This position was adopted in the case of *Kenya Orient Insurance Company Ltd Vs. Paul Mathenge Gichuki & Another (2014) eKLR* where the court cited with approval the case of *ABN Amro Bank N.V. Vs LE Monde Foods Limited Civil Application No. Na/15/2002* and it expressed itself as follows;

“They, of course, cannot be expected to go into the bank accounts, if any, operated by the respondent to see if there is any money there.....in those circumstances, the legal burden still remains on the applicant, but the evidential burden would have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a respondent to discharge. He can simply show what assets he has.....such as land, cash in the bank and so on.....” (Emphasis added).

Can the respondent herein be said to have discharged that burden?

In my opinion, she has not. It is not enough to merely state that she can be able to refund the money. She has to go further and proof her financial ability to do so. She did not give this court an indication of how much she earns from her farming business or what her salary is. The figures would have been helpful in guiding this Honourable court in making a finding as to whether she would be in a position to refund the money or not. In absence of such evidence, this court finds that she did not discharge her evidential burden as required by the law.

On the issue of delay, the record shows that judgment in the lower court was delivered on the 9th day of March, 2016 whereas the applicant filed the application herein on the 29th May, 2016.

The application was filed after 20 days. I am aware that there is no exact measure as to what amounts to unreasonable delay. In the case of *Geoffrey Muriungi & Another Vs. John Rukunga M’Imonyo* suing as legal representative of the estate of *Kinoti Simon Rukunga(deceased) (2016) eKLR* the court had this to say about unreasonable delay;

“This ground is normally easy to determine and is usually straight forward. Although there is no exact measure as to what amounts to unreasonable delay, it will not be difficult to discern

inordinate delay when it occurs. It must be such delay that goes beyond acceptable limits given the nature of the act to be performed”.....(Emphasis added)

The delay in this matter was within the acceptable limits.

On the contention that failure to grant a stay in this matter will expose the applicant to the imminent risk of multiplicity of actions, thereby crippling it financially, the opinion of this court in that regard is that the applicant should not hold the respondent from realizing the fruits of her judgment simply because other people are likely to file suits against it. That argument does not hold any water and the same is untenable.

On the issue of security, the applicant has deponed in paragraph 13 of the supporting affidavit that it is ready and willing to furnish such security on such terms as the court may deem just. The respondent has argued that the applicant has not offered security save for stating that it is willing to offer security. In my view, the fact that the applicant has offered to furnish security is good enough as it simply means that the applicant is willing to abide by any terms that the court shall deem fit to impose.

On prayer 3 of the application, the respondent has submitted that the court cannot grant stay of execution of a negative order. The order that the applicant seeks to stay is the one dismissing the applicant’s appeal which, it is submitted, is negative order in that it does not require the applicant to pay any money to the respondent. In this regard, the court was referred to the case of ***David Kamau Vs. Savings & Loan Kenya Limited (2005) eKLR*** and ***Milcah Jeruto Tellam T/a Milcah Enterprises Vs. Fina Bank Limited & Another(2016) eKLR***.

I have perused the two authorities cited by the respondent, and I am persuaded by the reasoning of the two learned Judges and I am in agreement with them that a court cannot stay a negative order.

The respondent has also submitted that the court has no jurisdiction to grant prayer no 4 in the application. In that prayer, the applicant has sought to restrain the respondent from executing the judgment and decree in Resident Magistrate’s Civil Case No. 214 of 2009 which was the subject matter of the appeal that was dismissed by Aburili J. The order herein has been sought under order 42 rule 6 of the Civil Procedure Rules which provides;

“ Notwithstanding anything contained in sub-rule (1) of this rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction in such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with”

My understanding of the above provision is that this court can only grant an injunction in cases where there is an appeal pending before it from a subordinate court or from a tribunal as long as, the procedure of instituting such an appeal has been complied with.

In the case before me, there is no pending appeal, the appeal having been heard and dismissed by Aburili J. I am persuaded by the respondent’s arguments that this court has no jurisdiction to issue an injunction when there is no appeal pending before it.

Having made the findings that I have made herein above, this court holds that the application dated 29/3/2016 has no merits and the same is dismissed with cost to the respondent.

Dated, signed and delivered at Nairobi this 23rd day of February, 2017.

.....

L. NJUGUNA

JUDGE

In the Presence

..... ***For the Appellant***

..... ***For the Respondent***