



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 583 OF 2016

POPATLAL MADHAVJI & BRO'S LIMITED.....APPLICANT

VERSUS

JOHN MUKULYA MANTHI.....1ST RESPONDENT

JOSEPH MWANZIA MUSAU.....2ND RESPONDENT

JOEL KYALO MWEI.....3RD RESPONDENT

RULING

1. The application dated 14th September, 2016 seeks orders that this Honourable court be pleased to grant the Appellant an order for stay of execution of the decree passed on 16th August, 2016, pending the hearing and determination of the Appeal.

2. The Applicant also seeks orders that the Honourable court be pleased to grant the Appellant leave to furnish a bank guarantee (within such reasonable period of time as may be directed by this Honourable Court) for the entire decretal amount as security under Order 42 Rule 6(2)(b)(Civil Procedure Rules)

3. The application is based on the grounds stated in its body and is supported by the affidavit sworn by John Kiriama, the Applicant's general manager. It is stated that the lower court entered judgment in favour of the 1st Respondent for the sum of Ksh.1,460,150/= plus costs. Aggrieved by the said judgment, the Applicant appealed to this court. The Applicant is apprehensive that if the decretal sum is paid it may be impossible to recover the same in the event that the appeal is successful. It is further stated that the 1st Respondent's sources of income are not known. The Applicant is ready to furnish a bank guarantee as security for the due performance of the decree.

4. The application is opposed. According to the affidavit in support sworn by the 1st Respondent, John Mukulya Manthi, it is stated that M/s Waterways Ltd was the registered owner of motor vehicle registration No. KXS 035 on the date of the accident. That the Applicant purchased the business of M/s Waterways Ltd as a going concern two months after the accident. The 1st Respondent denied that he is impecunious with no known sources of income. That 1st Respondent averred that he is self-employed with a retail shop, commercial coffee growing, transport business and rental income. The 1st Respondent has further averred that he has inherited parcels of land from his parents and is able to meet his expenses which include paying school fees for his two children, running a car and payment of monthly instalments for a mortgage. According to the 1st Respondent, he is able, ready and willing to refund the decretal sum

in the unlikely event that the appeal is successful.

5. It is further stated that the Applicant has an enforceable judgment against a third party, M/s Geoffrey Karanja Gitau. The 1st Respondent has further stated that payment of the judgment amount would enable him finance a hip replacement surgery. The 1st Respondent stated that he is entitled to the fruits of his 8 ½ years of litigation.

6. The Applicant in a supplementary affidavit sworn by John Kiriama denied ownership of the motor vehicle in question and stated that the driver of the said motor vehicle was not his agent or his employee. It is asserted that the 1st Respondent's evidence in the lower court was that he was unemployed and did not have any income. That the 1st Respondent has not exhibited his bank statements and income tax returns to enable the court assess his worth. That the audited accounts of the 1st Respondent's shop reflects no earnings as the net profit of Ksh.169,411/= was transferred to capital account. That no audited accounts of the coffee farming have been shown to the court. That no records of the rental income and the transport business have also been shown to the court and that the 1st Respondent's land title No. Matungulu/Kyaume/2602 is charged to Co-operative Bank of Kenya. That the property belonging to the estate of the 1st Respondent's deceased mother was ordered by the court to be sold and the proceeds shared out between the 1st Respondent and other parties and therefore it is uncertain when the sale will take place and the amount the 1st Respondent will receive from the same.

7. The Application proceeded with the Applicant and 1st Respondent. The 3rd Respondent was not present though duly served. Interlocutory judgment was entered in the lower court against the 2nd Respondent according to the Applicant. The lower court file has not yet been availed to this court.

8. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

“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.”

9. Order 22 Rule 22 (1) of the Civil Procedure Rules provides as follows:

“22. (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

10. Sufficient cause is established if the conditions set out in Order 42 rule 6(2) are met. (See for example the following persuasive authorities: **Tabro Transporters Ltd v Absalum Dova [2012] eKLR, Wachira Karani v Bildad Wachira [2016] eKLR**).

11. The appeal herein was filed on 13th September, 2016. The application at hand was filed on 14th September, 2016. The judgment of the lower court was delivered on 16th August, 2016. The Application was therefore brought timeously.

12. On the issue of substantial loss, the Applicant has expressed his fear that the Respondent may not be able to refund the decretal sum and thereby render the appeal nugatory. As stated by the Court of Appeal

Kenya Shell Limited vs. Kibiru (1986) KLR:

“Substantial loss in its various forms, is the cornerstone of the jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”

13. The Applicant has expressed his fear that the 1st Respondent may not be in a position to refund the decretal sum. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UR 144/2005) National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another:**

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

14. The 1st Respondent has exhibited his financial statement for his hardware and Agricultural business for the year 2015. The statement reflects that the net income of Kshs.169,411/= was transferred to capital account and reflects no earnings. I agree with the Applicant’s counsel’s submissions that without the coffee farming/business audited accounts and without the records of the rental and transport income, it is difficult to assess the 1st Respondents income. The 1st Respondent’s land title No. Matungulu/Kyaume/2602 is charged to a bank and the inherited properties are to be shared out with other parties. The said properties are yet to be sold out and shared. The motor vehicle is an asset that depreciates in value. The other assets offered by the Applicant may take long to dispose of.

15. It is also noted that the 1st Respondent in his own affidavit has stated that he needs the judgment amount to finance a hip replacement surgery which he states is long overdue. In other words this means that the 1st Respondent is not able to meet the estimated Kshs.300,000/= cost for the hip replacement surgery yet on the other hand he says he is able to refund the decretal sum of approximately Ksh.1.7 million. A delay in the sale of the 1st Respondent’s properties might lead to a delay in the recovery of the decretal sum. As stated by the Court of Appeal in the case of **Wangethi Mwangi v Hon. Amb. Chirau Ali Mwakere CA Nbi.353/2009.**

“It is plain from the grounds set forth in the draft memorandum of appeal that the applicants have asked the appellate court to interfere with the awards of damages and there is possibility that the appellate court may either decline or reduce the awards considerably. In the event of the former there might be a long delay in recovering from the respondent the decretal sum as there are so many imponderables in the sale of the respondent’s land which forms the bulk of his assets. It is obvious therefore that in such a likely eventuality, the applicant might be greatly inconvenienced. The balance of convenience is definitely in favour of the applicants, we would think so.”

16. On whether the appeal raises any triable issues, under Order 42 Rule 6(2) of the Civil Procedure Rules, the Applicant is seeking orders of stay pending appeal from the subordinate court to the High Court. The Applicant is not required to prove that it has an arguable appeal, unlike if it was an application in respect of an appeal to the Court of Appeal seeking stay of execution of decree of the High Court pending appeal to the Court of Appeal. (See for example **Nakuru HCCC 211/98 – Maritha Njeri Wanyoike & 3 others vs Peter Machewa Mwangi & 5 others; Bake ‘N’ Bite (Nrb) Limited v Daniel Mutisya Mwalonzi [2015] eKLR**).

17. To balance the interests of both parties herein, I allow the application on condition that the Applicant do deposit the decretal sum in a joint interest earning account of the counsels for both parties herein or in

court within 30 days from the date hereof. In default the application stands dismissed. Costs of this application in cause.

Date, signed and delivered at Nairobi this 23rd day of March, 2017

B. THURANIRA JADEN

JUDGE