



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. 8 OF 2017

*(Being an appeal from a Ruling of the Chief Magistrate's Court at Naivasha Civil Case No.433 of 2013,
E. Kimilu - PM)*

PETER MUTHONDU KURIAAPPELLANT

-VERSUS-

TABITHA WANGARI MWIRIKIA.....RESPONDENT

R U L I N G

1. The Appellant's application filed under certificate of urgency on 23/2/2017 is expressed to be brought under Order 42 Rules 6 (1) and 6(6) of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act. The key prayer is for an order staying execution in respect of the ruling of **Kimilu PM in Naivasha CMCC No. 433 of 2013**, delivered on 24th January 2017. In the said ruling, the court had allowed the Appellant's prayer to set aside the *ex parte* judgment in the case, and granted him leave to defend, subject upon him depositing the decretal sum in an interest earning account.

2. Aggrieved by the decision, the Appellant filed a memorandum of appeal which only challenges the latter condition in the said ruling. The Appellant swore an affidavit in support of the application. The gist of the affidavit is that the order for deposit of a large sum of money which was arrived at *ex parte* was unjustified.

3. Two affidavits were sworn in opposition to the Motion; the first by the the Respondent, and the second, by a process server, one **George Rasugu**. The Respondent reaffirms service of process on different days upon the Appellant including the plaint, notice of entry of judgment and notice to show cause all issued in the lower court suit. She views the instant application by the Appellant as an attempt to frustrate her and an abuse of the court process, citing the alleged tardiness and mischief on the part of Appellant in his conduct in the lower court proceedings.

4. Parties agreed to dispose of the Motion by way of written submissions. In a brief submission, Mr. Owuor for the Appellant/Applicant argues that the Appellant stands to suffer substantial loss if forced to fork out Shs 971,325/=, being the condition for the setting aside of the lower court judgment. He asserts that the Respondent can be compensated through costs and that the appeal herein has high chances of success.

5. Further, that once the lower court judgment was set aside no order for deposit could be given. That the Appellant's complaint relates to the order for deposit and not the setting aside of the judgment, the latter which to his mind, is the focus at the Respondent's affidavits. He argues that the Applicant has satisfied the requirements for the grant of stay pending appeal as stated in **Kenya Power & Lighting Company Limited -Vs- Esther Njeri Wokabi [2014] eKLR**.

6. For her part, the Respondent submitted that the Appellant's Motion is an afterthought designed to avoid compliance with the deposit condition made in the lower court. That the Motion has not been made in good faith. Pointing to the age of the judgment in the lower court, the Respondent submits that the Motion is unmerited and brought to deny the Respondent from enjoying the fruits of her judgment.

7. I have given due consideration to the matters canvassed before me by way of rival affidavits and submission. Firstly, the Motion before me is brought under Order 42 Rule 6 (1) and (6) of the Civil Procedure Rules. Order 42 Rule 6 (2) stipulates the conditions for the grant of an order of stay of execution pending appeal as follows-

“(2) 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.”

8. The conditions cited by the Applicant in his submissions relate to stay of proceedings pending appeal, and are inconsistent with the Applicant's own affidavit material. It seems that the Applicant's submissions were prepared in a hurry as indeed they were filed on 20/4/2017. The court however is obligated in the interest of justice to look at the submissions, notwithstanding.

9. I do not find any merit in the Applicant's submission that there is no judgment at this moment, in light of the setting aside order in the lower court. The valid judgment of the lower court whether *ex parte* or not was set aside on condition. So long as the condition imposed has not been satisfied, the judgment remains on record and is capable of execution. Thus the Appellant needed to satisfy the conditions set out in Order 42 Rule 6 (2) of the Civil Procedure Rules.

10. In his affidavit the Applicant, has stated that the sums ordered to be paid are large but more, that the same were based on an *ex parte* judgment. He stated that he would suffer substantial loss if the condition in the lower court is effected. It may well be that the sum in question is not insignificant but it is not true that the condition is based on a non-existent judgment. Secondly, the sums were ordered to be deposited in an account and not paid directly to the Respondent.

11. While the impugned decision of **Kimilu PM** was made on 24/1/2017 the Appellant waited until the last day possible to file the instant Motion and the Memorandum of appeal. I agree with the Respondent's submission that the said delay has not been explained. It is worthy of note that in the lower court, the Appellant was found to have been duly, served but failed to file a defence in good time. The Respondent's complaint that the Appellant has moved in a tardy fashion may have some merit therefore.

12. On the condition for depositing security, I note that the Appellant has not evinced any willingness to offer a security before this court, pending appeal. By his affidavit and submissions, the Appellant appears to believe that he is not bound by the conditions or Order 42 Rule 6 (2) of the Civil Procedure Rules, as judgment in the lower court no longer exists. As I have said before, this is an erroneous view. The question whether the conditions imposed by the trial court under Order 10 Rule 11 of the Civil Procedure Rules, are just or not is a different matter and the subject of the appeal. By rejecting the condition for deposit in the lower court and eschewing to offer security before this court, the Appellant appears to want to have his cake and eat it all at the same time

13. Reviewing all the relevant matters, I am not satisfied that the Appellant herein has brought his Motion within the principles envisaged in Order 42 Rule 6 (1), or even Rule 6 (6) of the Civil Procedure Rules. Besides, the Respondent appears indifferent to the prejudice the Respondent may suffer from the further delay of the case. I do therefore dismiss the Motion with costs to the Respondent.

Delivered and signed at Naivasha on this 24th day of April, 2017.

In the presence of:-

Mr. Owuor for the Appellant

No Appearance for the Respondent

C/C - Barasa

C. MEOLI

JUDGE