



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC.CIVIL CASE NO.2 OF 2017

MICHAEL MUREITHI KATHENYA & MAGDALENE KENDI MUKANGU (Suing as legal representatives of the estate of

KELVIN MUNENE (DECEASED).....APPLICANT/RESPONDENTS

VERSUS

JOSEPH KINOTI M'ARIMI.....DEFENDANT /APPLICANT

RULING

By a Notice of Motion dated 18th February 2017 the applicant herein who was defendant in Nkubu SRM Civil Case No. 138 of 2014 seeks for orders of stay of execution of Judgment/Decree delivered on 18th May 2016 pending hearing and determination of HCA 27 OF 2016 on ground that the trial magistrate delivered a ruling dismissing their application for stay of execution exparte and they only learnt of the ruling when warrant of attachment was served on them.

That substantial loss and irreparable damage would be suffered if Defendant/Applicant property is attached;

That the respondent was a person of straw and would not be in a position to refund the decretal sum in the event the appeal is successful and that appeal will be rendered nugatory.

It was also the defendants ground that application was filed without inordinate delay and that he was ready and willing to furnish security pending hearing and determination of the appeal. The application was strongly opposed by Replying Affidavit of Michael Mureithi Kathenya filed on 17th February 2017 relying on the authority Thomas Muroka Muthoka & Another. Nairobi Civil Case No. 389 of 207 ingredients for grant of stay pending appeal were spelt out by Justice H.P.G Waweru.

It was submitted that the affidavit averring substantial loss would be suffered was sworn by Claims Manager Direct Line Assurance Co. Ltd instead of the defendant and therefore substantial loss had not been demonstrated by the applicant. The respondents/Plaintiffs submitted that they work at Bidco Oil Refineries in Thika and at Materi Girls secondary respectively and therefore have means of income for which they can refund the decretal sums in event that applicants appeal succeeds. It was therefore urged that this court disregards claims that respondents are man and woman of straw.

The respondents also argued that applicants had delayed inordinately and unreasonably in filing application for stay after they were initially given 30 days which lapsed.

The 2nd application for stay was dismissed for lack of merit on 23rd November, 2016 and it was only

upon being served with proclamation and warrant of attachment that they rushed to court under Certificate of Urgency. The Plaintiff/Respondents counsels argued that the order dismissing application for stay was not done ex parte as date was taking in court and as such they were fully aware of the date for ruling having been the ones who filed application under Certificate of Urgency.

It was argued that a delay of 2 months from time application in trial court was dismissed to time current application herein was being filed was inordinate. It was argued that Defendant/Applicant had not accounted for the period of 2 months. It was also argued that the applicants filed the application as an afterthought as they had not applied for copies of judgment and proceedings in the matter against which decree they are seeking stay and threshold for grant of prayers sought have not been met.

The Respondent/Plaintiff have also questioned why application has been filed in separate cause from Appeal No. 270 of 2016. The Plaintiff read mischief in the conduct of the Applicant/Defendant. It was also argued that an appeal ought to have been preferred rather than another application.

Order 42 Rule 6(i) provides for stay in case of appeal which application can be made before the court from which decree appealed from was made. If the court from which decree appeal is preferred declines to make order for stay the applicant can seek for stay orders in appellate court or appeal against the order refusing to grant stay.

However for the sake of orderliness and tracking of the lower court file it is important and necessary to file application for stay in the appeal file which didn't happen herein as there is

Miscellaneous Application No. 2 of 2017 and Appeal No. 27 of 2016 arising from same cause in the subordinate court.

The other conditions for grant of stay of execution are found under order 42 Rule 6(2) of CPR.

This court called for Nkubu civil case no. 138 of 2014 from Nkubu Law Courts from whose decree appeal and application No. 27 of 2016 and Misc. Application No. 7 of 2017 have been filed respectively and it is apparent that the appellant/applicant had not requested for copies of the proceedings in the lower court and it is not understood why a matter finalised on 18th May, 2016 and appeal filed on 16th June, 2016 has not been followed up and prosecuted. I will however, make an order that the applicant (Misc. No. 7 of 2017) and appellant in No. 27 of 2016 pays out one third of decretal sums to the Respondents and deposits two thirds of the decretal sum in interest earning account in the joint the names of the advocates on record within 21 days from date of this ruling.

The applicant also to pay the auctioneers agreed and/or taxed charges for the process undertaken in execution in the cause in the magistrates' court within 21 days of such agreement or taxation.

The applicant will also pay costs of application herein; I have seen that there is nothing in HCA No. 27 of 2016 which evidences follow up of appeal by Applicant/Defendant since appeal was filed. The appeal should be heard and determined within 90 days from date of ruling herein.

Deputy Registrar to cause the proceedings in the lower court file to be typed and process the hearing of the appeal by the visiting Judges between May and July 2017. In default of any of the above conditions the respondent is at liberty to execute without reference to the court.

Ruling Signed, Delivered and Dated this 25th of April, 2017.

HON. A.ONG'INJO

JUDGE

In the presence of;

C/A Penina

Okwany Advocate for Applicant

Otieno Advocate for Respondent

HON. A.ONG'INJO

JUDGE