



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 241 OF 2013

MUNYEKI WATER & ELECTRICITY PROJECT.....1ST APPELLANT

FRANCIS KARANJA WAINAINA.....2ND APPELLANT

KIMANI MARECU.....3RD APPELLANT

GEOFFREY JAMES GACHERU.....4TH APPELLANT

VERSUS

JOSEPH MUIGAI WANGUNYU & 214 OTHERS.....1ST RESPONDENT

KENYA POWER & LIGHTING CO. LTD.....2ND RESPONDENT

RULING

1. Judgment in the lower court was delivered on the 5th December 2013 in favour of the Respondents. Being dissatisfied the appellants filed this appeal against the whole judgment and preferred 15 grounds of appeal which may be summarised and condensed into three, that:

(1) The Judgment was against the weight of evidence tendered and pleading.

(2) The trial magistrate erred in law and fact in failing to appreciate that refund of money could only be made by the party who received it, the 215th Respondent.

(3) The trial Magistrate failed to appreciate that a claim for refund of money is special damage claim that ought to be specifically pleaded and proved.

2. For those reasons, the court has been urged to set aside the said judgment and dismiss the respondents case in the trial court with costs.

3. I have perused the court records. I have not found a copy of the judgment or decree appealed from. The Record of appeal is also yet to be filed, since the 5th December 2013 when judgment was delivered.

4. The Appellants application before me was filed on the 28th August 2014. It is premised on the provisions of **Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules.**

5. The appellants seek the following orders:

1. *Spent*

2. *Spent*

3. ***That this court be pleased to order a stay of execution of the judgment and decree in CMCC No. 355 of 2003 made on the 5th December 2013 pending hearing and determination of the Appeal.***

6. Francis Karanja Wainaina the 2nd Appellant swore the supporting affidavit. It is based upon grounds that execution of the decree would cause the applicants substantial loss and damage, and that the appeal has high probability of success. It is further stated that the application was brought without unreasonable delay as the application for stay before the trial court was delivered on the 16th July 2014.

7. The application is opposed by a replying affidavit sworn on the 14th October 2014 by one Joseph Muigai Waruguru the 1st Respondent.

Parties filed written submissions on the application.

8. The appellants submissions dated 23rd May 2016 were filed on same date while the respondents submissions are dated 4th July 2016 and filed on even date.

I have noted that the appellants are four(4) persons whereas the Respondents are two hundred and fifteen(215).

From the supporting affidavit of the application, it is shown that judgment was for a sum of Kshs.1,133,000/= with interest at court rates from date of filing the suit until payment in full.

9. I have stated earlier that a copy of the plaint, judgment or decree are not provided. It is therefore not possible for this court to reasonably consider the pleadings and whether or not the appeal has high chances of success based on the grounds of appeal done.

I have noted that the applicants have offered as security for due performance of the decree title deeds that may cover the decretal sum. I have considered the applicants submissions, and without trying to determine the merits or otherwise of the appeal, I am unable to confirm whether or not the decretal sum was paid to the 215th respondent as stated, nor am I able to peruse the pleadings without a copy of the plaint and defence filed in the trial court to ascertain whether the claim was for liquidated sum or otherwise.

10. **Under Order 42 rule 6(2) Civil Procedure Rules**

An applicant for an order of stay of execution must satisfy the court that:

a) *The application was brought without undue delay.*

b) *That the applicants will suffer substantial unless the order is granted.*

c) *That the applicant is willing to offer substantial security for the due performance of the decree, that may be binding.*

11. The application was no doubt brought without any delay. On the issue of substantive loss and damage should be order of stay be denied, I have not seen any demonstration of such loss or damage.

The judgment and decree hereof is a monetary decree, in the sum of Kshs.1,133,000/= with interest as stated by the applicants. They have not shown that they are not able to pay that money to the respondents, nor that if paid, the respondents would be unable to repay it back should the appeal be

unsuccessful.

Stating in submissions that the decretal sum was not paid to them but to the 215th respondent, without any evidence of such payment placed before the court cannot form a basis to pursuant the court to order a stay of execution. There is no demonstration by the applicants what substantial loss or prejudice they would suffer by paying the decretal sum.

12. In the case of **James Wangawa -vs Agnes naliaka Cheset (2012) e KLR, J. Gikonyo held that:**

“the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

I fully associate myself with the holding in the above case.

13. In opposing the application, the Respondents submitted that in a money decree as is in this appeal, it is not normal for an appeal to be rendered nugatory, and that no demonstration was shown of any loss to the applications should the order of stay be denied. I have noted that the respondents urge that the full decretal sum be deposited in an interest earning account pending determination of the appeal, and that offering land as security is cumbersome and in any event the applicants have not provided for the courts perusal, any such title deeds.

14. I have considered that no demonstration has been shown that the respondents would not be able to pay back the decretal sums.

In the case **National Credit Bank Ltd -vs- Aguias Francis Wasike** and another (UR), the respondents have a duty to show that they have resources to enable them pay back. This they have failed to do. See **HCA No. 427 of 2015 Stanley Karanja Wainaina -vs- Ridon Anyangu Mutubwa 2016 e KLR.**

Having carefully considered all the conditions to be satisfied under **Order 42 rule 6 Civil Procedure Rules**, I am persuaded that the appellants application lacks merit. I am minded that the respondents having not discharged their burden of proof that they would be able to repay back the decretal sum should the appeal be successful and in exercise of my discretion for the ends of fairness and justice to be seen, to be done and due regard to the overall impression and circumstances of the case and with a view not to render the pending appeal nugatory, I proceed to make the following orders:

1. That the appellants application filed on the 28th August 2014 is allowed but upon the appellants meeting the following conditions:

(a) That the appellants shall deposit the full decretal sum of Kshs.1,133,000/= in a joint interest earning account in the names of the appellants Advocates and the Respondents Advocates in a reputable bank to be agreed up by both Advocates within 45 days of this ruling.

(b) That in default, the conditional order of stay of execution shall automatically lapse.

(c) The appellants shall pay costs of this application to the respondents in view of the circumstances pertaining to the application.

Dated, Signed and Delivered this 13th Day of April 2017.

J.N. MULWA

JUDGE