



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 12 OF 2017

MOHAMED OMAR APPELLANT/APPLICANT

VERSUS

MOHAMED ABUBAKAR ALI RESPONDENT

RULING

1. Through a Chamber Summons dated 9th March, 2017 brought under Order 1A, 1B, 3 & 3A of the Civil Procedure Act, Order 42 rule 6(1) and (2) of the Civil Procedure Rules and all enabling provisions of the law. The applicant seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) That the Honourable court be pleased to stay the execution of the ruling delivered on 21st December, 2016 in CMCC (Mombasa) No. 2030 of 2013, pending the hearing and final determination of this appeal; and

(iv) That the costs of this application to await the outcome of the appeal.

2. The application is supported by the grounds on the face of it and the supporting affidavit of Mr. Mohamed Omar, the applicant, sworn on 9th March, 2017. The respondent filed a replying affidavit sworn on 21st March, 2017.

3. In his submissions, Mr. Obara, Learned Counsel for the applicant stated that the substance of the application is the award of interest by Hon. Nyakweba in a ruling delivered on 21st December, 2016 which involved the review of orders of a former Magistrate in a judgment delivered on 23rd October, 2015 wherein an award of Kshs. 1.2 Million was awarded plus costs. The Hon. Magistrate did not award interest. Counsel further submitted that the respondent filed an application for review. The court was informed that in reviewing the judgment, the said court sat on appeal. Counsel further stated that the Magistrate who determined the case addressed himself to the issue of interest and found that it was not applicable, thus the applicant should have filed an appeal, not a review.

4. Counsel submitted that on 12th January, 2017, the respondent wrote to the applicant demanding for interest in the sum of Kshs. 535,233.00 Counsel argued that this is a substantial amount to the applicant.

5. Ms. Murage, Learned Counsel for the respondent opposed the application and laid out the principles upon which orders for stay of execution may be granted. She stated that there was inordinate delay in filing the application herein since the ruling in issue was delivered on 21st December, 2016 and the application herein filed on 9th March, 2017.

6. She further stated that the applicant had not demonstrated that he will suffer substantial loss if the application is not allowed and that the burden is on the applicant to show that the respondent will not be in a position to refund the money if the applicant wins the appeal. She cited the case of **Antoine Ndiaye vs African Virtual University** [2015] eKLR to fortify her submission. Ms. Murage indicated that where a money decree is involved, one cannot talk of substantial loss and cogent evidence must be adduced to show the substantial loss that will be suffered. She relied on the case of **Kenya Shell Ltd. vs Kibiru** [1986] KLR to support her argument.

7. She further stated that if the court grants the applicant the orders sought, he should deposit in court the sum of Kshs. 785,233.00 comprising costs and interest.

8. In response to the foregoing, Mr. Obara submitted that it was not denied that Hon. Nyakweba acted as an appellate court in awarding interest.

The issue for determination is if the applicant has made out a case for grant of orders for stay of execution.

9. Order 42 rule 6 of the Civil Procedure Rules provides as follows:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty on application being made, to consider such application and to make such order thereon as may to it seem just, and any other person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such an order set aside”.

10. The conditions under which an order for stay of execution can be granted are provided in Order 42 rule 6 (2) of the Civil Procedure Rules, which states:-

“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 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.”

11. The applicant in paragraphs 3 and 4 of his affidavit deposes that he was out of the country during the month of January, 2017 and part of February, 2017 and he instructed his Advocate to file an appeal and a stay (sic). The latter was however not possible as he was away. I am satisfied that the reason that gave rise to the delay in filing the present application was as a result of the applicant’s absence from the jurisdiction of this court.

12. Counsel for the respondent submitted that the applicant has not showed how he will suffer substantial loss. There are no guidelines on what constitutes substantial loss, it varies from person to person. This element therefore is left to the good sense of the court. In repaying the sum of Kshs. 1,200,000/= which the applicant owed the respondent, he did so in two instalments as evidenced by the annexure marked as C attached to the applicant’s affidavit. Gauging the said fact, I am of the considered view that the sum of Kshs. Kshs. 535,233.00 being demanded as interest arising from the ruling of Hon. Nyakweba is a

substantial amount to the applicant and he stands to suffer substantial loss in the event that the respondent is unable to repay the same.

13. In the case of **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike and Another** Nairobi Civil Application No. 238 of 2005 (unreported) the Court of Appeal stated thus:-

“This court has stated before and it would bear repeating that while the legal duty is on an applicant to prove that an appeal would be rendered nugatory because an appellant 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 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 show what resources he has since that is a matter which is peculiarly within his knowledge”

14. The respondent did not lay any material before this court to show that he had sufficient funds at his disposal with which he would repay the applicant, if he emerged successful in the appeal. In the said circumstances, I grant the orders sought on condition that the applicant deposits the sum of Ksh. 250,000/= as security for costs within 30 days from today. Costs of this application are awarded to the applicant.

DELIVERED, DATED and SIGNED at MOMBASA on this 31st day of May, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Odongo for the appellant/applicant

Ms Njeri Chege for the respondent

Mr. Oliver Musundi - Court Assistant