



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 10 OF 2017

THE CLERK OF THE NATIONAL ASSEMBLY.....1ST APPLICANT

THE PARLIAMENTARY SERVICE COMMISSION.....2ND APPLICANT

VERSUS

KAUNDA ROBERT KEARI.....1ST RESPONDENT

HON. RICHARD NYAGAKA TONGLI.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

(An appeal from the judgment and decree of Hon. J.M. NJOROGE

(Chief Magistrate) dated and delivered on the 7th day

of February 2017 in the Original Kisii CMCC No. 483 of 2015)

RULING

1. This ruling relates to the application dated 10th March 2017 brought under Order 42 Rule 6 of the Civil Procedure Rules, Article 159 of the Constitution and Section 1A, 1B, 3A and 3B of the Civil Procedure Act. In the said application, the applicant seeks, inter alia, orders of stay of execution of the chief magistrate's judgment delivered on 7th February 2017 in Kisii CMCC No. 483 of 2015 pending the hearing of the 2nd applicant's appeal.

2. The application is premised on the grounds on the face of the application and on the affidavit of AGNES KAMONI the 3rd Applicant's Chief Constituency Liaison Officer dated 9th March, 2017 wherein she deposes that the applicants were aggrieved by the said judgment of the Chief Magistrate delivered on 7th February 2017 in which the 1st respondent was awarded the sum on Kshs, 561,000/= plus interest being arrears of rent due to him from the applicants, thereby precipitating the filing of the instant appeal.

3. The applicants contend that the respondent has already commenced execution proceedings against them as shown in the exhibits marked "AK3A and B" being copies of the decree and the warrants of execution issued by the lower court and state that unless the orders of stay of execution sought is granted, the appeal may be rendered nugatory since the 1st respondent will have executed the judgment.

4. It is the applicants' case that they have an arguable appeal before the High Court with high chances of success as the trial magistrate entered judgment against them contrary the evidence on record.

5. The 1st respondent opposed the application through the grounds of opposition dated 11th April 2017 wherein he listed the following grounds:

1. The appellants have not demonstrated that they meet the requirements of granting stay of execution well settled under Order 42 Rule (6) (2) of the Civil Procedure Rules.

2. The appellants have not demonstrated what substantial loss they may be subjected to if an order of stay of execution is not granted.

3. The appellants are only intent on frustrating a regular judgment entered into by the chief magistrate's court by putting unnecessary hurdles in the execution process thereby denying the 1st respondent the enjoyment of the fruits of the judgment.

4. The application is frivolous, vexatious and otherwise amounts to an abuse of the court process.

6. At the hearing of the application, Mr. Mwendwa learned counsel for the applicants submitted that the applicant had satisfied the conditions set under order 42 Rule 6 of the Civil Procedure Rules for granting of orders of stay of execution in view of the fact that the appeal had been filed without unreasonable delay and that substantial loss of public funds will be suffered if the stay sought was not granted. According to Mr. Mwendwa, the applicants have a constitutional obligation under Article 201 (d) of the constitution to ensure that public funds are utilized prudently and responsibly and thus, the payment of a decree in respect to an illegal claim would go contrary to the government policy.

7. Mr. Mwendwa further argued that the respondent had not shown that he was a person of means who would be capable of refunding the decretal sum should the appeal succeed.

8. Mr. Begi, learned counsel for the respondent, opposed the application by expounding on the grounds of opposition filed on 11th April 2017. He submitted that the applicants did not deserve the orders of stay of execution sought as they had neither offered any security for costs for the due performance of the decree nor demonstrated that they would suffer any substantial loss should the decretal sum be paid to the respondent.

9. Mr. Begi argued that the respondent was entitled to enjoy the fruits of his decree upon receiving a regular court judgment. He added that the instant application is both frivolous and vexatious and prayed for its dismissal with costs. He however maintained that should the said application be allowed, then the applicant should be ordered to deposit the decretal sum in a joint interest earning account held by the advocates of both parties pending the hearing and determination of the appeal.

10. I have considered the pleadings filed by the parties herein and their rival submissions on the application. I note that the application is premised on order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

"[Order 42, rule 6.] Stay in case of appeal.

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 order, and whether the 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 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 order set aside.

(2) 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.

(3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

11. In the instant case, I find that the applicants have only satisfied the above conditions of Order 42 Rule 6 in part as, while it is not contested that they have already appealed against the impugned judgment of the subordinate court and subsequently filed the instant application within reasonable time, they have not established, to the satisfaction of this court, that they will suffer substantial loss or that the appeal will be rendered nugatory if the stay sought is not granted. I say so because the impugned judgment that is the subject of the appeal was for a liquidated sum which the applicants have not shown that they will be unable to recover should their appeal succeed. I find that in the present case, the 1st respondent cannot be said to be a man of straw going by the undisputed fact that he is the owner of the rented premises on which the rent arrears awarded by the lower court accrued. From the facts of the case therefore, it is clear that the applicants will be able to recover the decretal sum, if paid to the 1st respondent, should their pending appeal succeed.

12. Be that as it may, and having regard to the circumstances of this case and the 1st respondent's advocate's submissions that they are agreeable to an order for the deposit of the decretal sum in a joint interest earning account held by the advocates for both parties, I am of the considered view that it will be in the interest of justice for both parties to allow the instant application for stay of execution pending appeal, which I hereby do, but on condition that the applicants deposit the full decretal sum awarded by the lower court, in a joint interest earning account held by the advocates for applicants herein and the 1st respondent within 30 days from the date of this ruling.

13. It is so ordered.

Dated, signed and delivered in open court this 27th day of June, 2017

HON. W. A. OKWANY

JUDGE

In the presence of:

- Mr. Wambulwa for the Appellant
- Mr. Begi for the Respondent
- Omwoyo court clerk