



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 580 OF 2016

FAITH FOUNDATION HOUSING SOCIETY LIMITED...APPELLANT/APPLICANT

- V E R S U S -

BEATRICE MUIRIGO MWAURA.....RESPONDENT/RESPONDENT

RULING

1. Beatrice Muirigo Mwaura, the respondent herein, filed an action against Faith Foundation Housing Society Ltd, the appellant herein before the Co-operative Tribunal at Nairobi. The suit was heard and in the end, judgment was entered in favour of the respondent in the sum of kshs.764,336/=. The appellant was aggrieved, consequently preferred this appeal.

2. The appellant has now taken out the motion dated 8/9/16 in which they sought for the following orders:

1. THAT the Honourable Court be and is hereby pleased to certify this application urgent and the same to proceed ex-parte in the first instance.

2. THAT the honourable court be and is hereby pleased to stay the judgment of the Cooperative Tribunal delivered on 23rd August 2016, and consequently stay the execution of the decree dated 24th August 2016 pending the hearing and determination of the claim.

3. THAT the costs of this application be borne by the respondent.

3. The motion is supported by a joint affidavit of the appellant's registered officials of Faith Foundation Housing Society Ltd, namely Jorum Kabiru Mwangi (chairman), John Mutua Mbagara (Secretary) and Joseph Mwangi Mwaura (Treasurer). When served, the respondent filed a replying affidavit of Beatrice Muirigo Mwaura to oppose the motion.

4. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion.

5. The applicant aver that the respondent may execute the decree and therefore there is need to maintain the status quo by granting an order for stay. The applicants went ahead to state that judgment was delivered without a notice to them, hence denying them the chance to seek for a stay of execution. It is also argued that the tribunal's diary is full and with no nearer date and so it is only the High Court which can stay the execution.

6. The respondent opposed the motion arguing that the application for stay was filed in bad faith with the sole intention of preventing the respondent from enjoying the fruits of her judgment. The respondent also

pointed out that the appeal does not raise any arguable points.

7. The principles to be considered in determining an application for stay are set out under Order 42 of the Civil Procedure Rules. **First**, an applicant must show the substantial loss it would suffer if the order for stay is denied. **Secondly**, the application for stay should be filed without unreasonable delay. **Thirdly**, that the court should consider the provision of security for the due performance of the decree.

8. Let me start with the second principle. This principle is that the period of delay in filing the application for stay should be reasonable. It is clear on the record that judgment was entered on 23/8/2016 and the current motion was filed on 8/9/2016. The delay having been explained, in my view, the same is excusable.

9. The first principle to be considered is the substantial loss the applicant may suffer if the order for stay is denied. The applicant avers that the respondent may execute the decree against the appellant and if the decree herein is executed, then the intended appeal will be rendered nugatory. It is also argued that if the decretal sum is paid to the respondent she will not be in a position to refund if the appeal turns out to be successful. This assertion is not controverted by the respondent, therefore I am convinced that the appellant/applicant has shown the substantial loss it would suffer if the order is denied.

10. The third principle is the provision for security for the due performance of the decree. I think a fair order here is to direct the applicant to deposit the decretal sum of 764,336/= in an interest earning account in the joint names of learned counsels and or firms of advocate within 30 days from the date hereof.

11. In the end, the order for stay is granted on condition that the appellant/applicant deposits the decretal as proposed hereinabove. Costs of the motion to abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 18th day of August, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent