



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 13 OF 2017

(An appeal from the Judgment of the Senior Principal Magistrate, Runyenjes in PMCC No. 13 of 2016 dated 28/02/2017)

LAWRENCE MUTWIRI NJAGA.....APPELLANT

VERSUS

ATANASIO MURITHI NJIRU.....RESPONDENT

R U L I N G

1. This is a ruling on an application dated 20/04/2017 seeking for orders of stay of execution of the judgment and decree in CMCC No. 13 of 2016 pending the hearing and determination of the appeal.
2. The application is supported by the affidavit of one Joseph Karanja and advocate from the firm of Kairu McCourt who are on record for the appellants. It is deposed that the applicant was dissatisfied with the judgment in particular the apportionment of liability and the quantum of damages. The decretal amount calculated at the ratio of 80% liability leaving the amount payable as Kshs.480,000/=.
3. It is claimed that the ratio of 80% was not based on evidence and that the general damages of Kshs.600,000/= was excessive. The applicant is ready to deposit security ad directed by the court.
4. The respondent in his replying affidavit opposed the application on grounds that is is not merited. It is deposed that liability was entered into consent of the parties. The judgment including quantum was acceptable to both parties who even exchanged correspondence on payment of the decretal sum. Further that the application was filed after 2 months which delay was not explained.
5. This application ought not to have been filed in the High Court on the first instance. It should have been filed in the Runyenjes Principal Magistrate Court. The counsel said from the bar that he went to Runyenjes and found the file missing. He did not explain whether he pursued the matter with the Executive Officer in that court. This explanation was unsatisfactory since there were no averments to that effect in the supporting affidavit.
6. The requirements of order 42(6) is that the application shall be filed without undue delay. If there is delay, it must be explained to the satisfaction of the court. In this application there was no attempt to explain the delay of two months. Judgment was delivered on 28/02/2017 and this application filed on 25/04/2017.
7. The applicant refers to the respondent as a man of straw but there is no evidence of his means or even his occupation in life. The applicant has not shown that the respondent is incapable of refunding the decretal amount in the event that the appeal is successful.
8. The second requirement is that the applicant must prove substantial loss. Except stating that substantial loss is likely to be suffered, there is no evidence to support that statement.
9. There is an offer of depositing security for the due performance of the decree which is the 3rd requirement. This is in order as the court may direct but will depend on the merit of the application.
10. The respondent has attached correspondence between the counsels for the parties showing that the parties were satisfied with the whole judgment. In a letter dated 9th March 2017 addressed to Mugendi Karigi & Co. Advocates for the decree holder, the firm of Kairu & McCourt for the judgment debtor it is stated in part:-

Do note that the notice of change of advocates is crucial to enable our client process payment where we request that you supply us with the same as soon as practically possible so that we pay the claim.

11. The notice of change of advocates was sent to Kairu & McCourt the same day as shown by a letter dated 9th March, 2017 addressed to the said firm by the respondent's advocate.

12. This correspondence supports the respondent's argument that both parties had accepted the judgment and that the applicant was ready to process the payment only that he did not have a copy of the notice of change of advocates. The applicant then stayed for more than one month (after the notice of change was sent to him on his request) before the filing of this application.

13. This leads me to the conclusion that the appellant had no intention of appealing against the judgment. I am convinced that this appeal may be designed to buy time to pay the decretal amount. I note that when the applicant's advocate wrote the letter of 9/03/2017, funds to satisfy the decree were available. What then happened?

14. It is my considered opinion that the conduct of the appellant is not meant to achieve the course of justice but to deprive the respondent his right of enjoying the fruits of his judgment.

15. Court should not be used for those kind of cat and mouse games between the parties. There must always be a just and fair cause to keep a decree holder waiting for his right. I say that this one is not a just cause for the court to exercise its discretion. It is indeed an abuse of the due process of the court.

16. As I had said earlier, the applicant has not satisfied the requirements under Order 42 Rule 6 of the Civil Procedure Rules.

17. I find this application unmerited and dismiss it with costs.

18. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF AUGUST, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Muriuki for Ms. Gitau for appellant

Ms. Ndorongo for Mr. Mugendi for respondent