



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 115 OF 2017

AYUB KARUGA NGENDO.....APPLICANT

VERSUS

CATHERINE WANJA NJOKA.....1ST RESPONDENT

JOSEPH GIATU KINYURU T/AINSTYLE

TOURS TRAVEL.....2ND RESPONDENT

RULING

1. The application dated 16th March, 2017 seeks orders that the execution of the judgment of the Hon. D.O. Mbeja, Senior Resident Magistrate delivered on 15th February, 2017 and the Order extracted therefrom be stayed pending the hearing and determination of the Appeal filed herein.
2. The application is predicated on the grounds stated in the application and is supported by the affidavit sworn on 16th March, 2017 and the supplementary affidavit sworn on 12th April, 2017 by the Applicant, Ayub Karuga Ngendo. It is stated that the lower court entered judgment against the Applicant for the sum of Ksh.568,900/= plus costs and interest. The Applicant is dissatisfied with the said judgment and has filed the appeal herein. The Applicant's contention is that if stay of execution is not allowed, his appeal will be rendered nugatory. It is further stated that the Applicant will suffer substantial loss as the Respondents are not capable of refunding the decretal sum. The Applicant is willing to provide security for the due performance of the decree. It is further stated that the application has been brought without undue delay and that the appeal has overwhelming chances of success.
3. The application is opposed. It is stated in the replying affidavit that the appeal has no chances of success and that the same is an afterthought as the Applicant had written to the Respondents proposing to pay the decretal sum in two equal installments and that this application is therefore a delaying tactic. That the decretal sum is Ksh.1,157,210/= and that the Respondents who are engaged in business are capable of refunding the same in the unlikely event that the appeal succeeds.
4. The application was disposed by way of written submissions. I have considered the said submissions.
5. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

“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.”

6. On substantial loss, the Applicant has contended that the Respondents are not able to refund the decretal sum and the Applicant will therefore suffer substantial loss. As stated by the Court of Appeal in the case of **Kenya Shell Limited vs. Kibiru (1986) KLR:**

“Substantial loss in its various forms, is the cornerstone of the jurisdictions for granting a stay. That is what has to be prevented.”

7. The Respondents have not availed any documents in court to support the assertion that they are able to reimburse the decretal sum. As stated by the Court of Appeal in the case of **Nairobi Civil Application 238 of 2005 (UR 144/2005) National Industrial Credit Bank Ltd. vs. Aquinas Francis Wasike & Another:-**

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent 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 respondent or the lack of them. One 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 the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

8. On the issue of delay, the appeal was filed timeously. The application at hand was filed on 16th March, 2017, a period of about one month from the date of judgment. There was no unreasonable delay.

9. The Applicant is willing to deposit half the decretal sum in court as security or as the court may order. In support of this averment it was contended in the submissions by the Applicant’s counsel that the judgment was entered jointly and severally against the Applicant and Caroline Njagi, the co-Defendant in the lower court.

10. The Respondents have exhibited a decree for the sum of Ksh.1,157,210/= issued by the lower court on 29th March, 2017. Although the Applicant’s counsel submitted that the decree was extracted without compliance with Order 21 rule 8 Civil Procedure Rules, the decree still stands and has not been set aside.

11. The Applicant has his undoubted right of appeal while the Respondents are entitled to the fruits of their judgment. The court has to balance the competing interests of both parties.

12. With the foregoing, I allow the application on condition that the Applicant do deposit half of the decretal i.e Ksh.578,605/= in a joint interested earning bank account of the counsels of both parties herein or in court within 30 days from the date hereof. The Applicant to provide security for the balance within the same period of 30 days. Costs in the cause.

Date, signed and delivered at Nairobi this 19th day of Sept., 2017

B. THURANIRA JADEN

JUDGE