



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 64 OF 2006

VIJAY KUMAR DAVALJI KANJI GOHIL.....PLAINTIFF

-VERSUS -

SURESH MOHANLAL FATANIA.....1ST DEFENDANT
SHANTILAL KARSANDAS VARIA.....2ND DEFENDANT
TREO APARTMENTS LTD.....3RD DEFENDANT
SUNILKUMAR POPATLAL DAVDA.....4TH DEFENDANT
AMEET DIPAK BHATTESSA.....5TH DEFENDANT
CHUNILAL SHANTILAL KHIMASIA.....6TH DEFENDANT
JAYANTILAL JETHA HARJI PARMAR.....7TH DEFENDANT
JAYANTILAL K. HARIA.....8TH DEFENDANT
MAHENDRA K. PATHAK.....9TH DEFENDANT

RULING NO.3

1. On 22nd March 2017 the Court dismissed the plaintiff's application which had sought the reinstatement of the suit.
2. Following the dismissal of his application, the plaintiff filed a Notice of Appeal on 24th March 2017.
3. Three days later, on 27th March 2017, the plaintiff filed an application for leave to appeal. It is that application which is the subject matter of this Ruling.
4. A second relief which the plaintiff has sought is for stay of execution, until the appeal is heard and determined.
5. When responding to the application, the 4th to 9th defendants acknowledged that it is a cardinal rule of

law that a party ought to be given a chance to ventilate his case until the highest judicial level.

6. However, those respondents also emphasized that there is a corresponding cardinal rule, that litigation must have an end, especially when the party who wishes to enjoy the right of unlimited access to justice engages in litigation which were aimed at endlessly prolonging the judicial process.

7. In this case, the suit had been dismissed in 2010. Therefore, the respondents reasoned that the court ought to reject the application for leave to appeal, as the same was being sought 7 years later.

8. In that respect, the respondents submission is not well founded, as the plaintiff was not seeking leave to appeal against the orders made in 2010.

9. The intention of the plaintiff is to appeal against the Ruling delivered on 22nd March 2017. Therefore, as the application was made after the lapse of only 5 days from the date when the court delivered the Ruling in issue, I find that the application was brought without any delay.

10. The other ground upon which the application was opposed is that the plaintiff's intended appeal does not raise any serious issues of law.

11. In the **ESTATE of RONALD AUSTINE WHITTINGHAM, SUCCESSION CAUSE No. 621 of 2010**, the applicant had failed to provide the court with the draft Memorandum of Appeal. In the circumstances, W. Musyoka J. held as follows, when interpreting the provisions of Section 50 of the Law of Succession Act;

“The condition attached to grant of leave is that the court should be satisfied that the intended appeal involves special circumstances and serious questions of law”.

12. In contrast, the case before me is not a Succession Cause. It is a case which is governed by the Civil Procedure Act and the Civil Procedure Rules.

13. In **JOSEPHINE WAMBUI WANYOIKE Vs MARGARET WANJIRA KAMAU & ANOTHER CIVIL APPEAL No. 279 of 2003**, the Court of Appeal stated as follows;

“We hasten to add that the Law of Succession Act is a self-sufficient Act of Parliament, with its own substantive law and rules of procedure. In the few instances where need to supplement the same has been identified, some specific rules have been directly imported into the Act through its Rule 63 (1)”.

14. As the case before me is not one of Probate and Administration, I find that the two authorities cited by the respondents were not applicable to this case.

15. Whilst some specific rules have been directly imported into the Law of Succession Act, none of the statutory provisions or rules of procedure which are in that statute have been imported into the Civil Procedure Act or the Civil Procedure Rules.

16. As regards the weaknesses or strengths of the intended appeal, this court declines the invitation by the respondents, to assess the chances of success.

17. I believe in the correctness of the decision which I rendered. Therefore, I cannot be expected to carry out an assessment of the said decision and then conclude that the Court of Appeal would probably find the decision to be wrong.

18. Nonetheless, although I believe that my decision was properly founded, I do not arrogate to myself the aura of infallibility.

19. The very fact that judicial systems throughout the world have structures for appeals, is an

acknowledgment that however thorough a trial court might be, it is always possible that an appeal court may or may not uphold its decision, in some instances.

20. But just because I believe in the correctness of the decisions I make does not mean that the decisions cannot give rise to serious issues of law, in the event of an appeal.

21. I find no reason in law for locking out the plaintiff from proceeding to the Court of Appeal. Indeed, as the respondents had conceded, parties ought, generally, to be allowed to proceed to challenge decisions through the process of appeal.

22. And it is now well settled that when the party was exercising its right of appeal, the court ought to take appropriate action, when requested, to try and ensure that the appeal was not rendered nugatory: That is the basis upon which the court ordinarily orders that there be a stay of execution.

23. When a court is called upon to determine whether or not an appeal would be rendered nugatory if execution was not stayed, the court has to undertake a delicate balancing act. On the one hand, the successful party ought not to be prejudiced by being deprived of the opportunity to realize the fruits of his victory, whilst on the other hand, the appellant's status or circumstances should not change so materially in a manner which rendered it irreparable even if he were to ultimately succeed on appeal.

24. Execution of a Decree or of an Order is a lawful process. Therefore, if it is to be stayed pending appeal, it should only be because the execution would otherwise occasion substantial loss to the appellant.

25. And where a court stays execution, the appellant is obliged to provide security for the due performance of the Decree.

26. In this case, execution could only be levied against the plaintiff, in respect to the costs of the suit; the said costs were assessed in the sum of Kshs. 870,711/-.

27. The plaintiff has not alluded to the financial inability of the respondents to reimburse him if the costs were paid now, and if the appeal was to finally succeed.

28. As the respondents have indicated, it is not their responsibility to demonstrate that they can reimburse the costs, if the appeal against them succeeded. But the respondents have pointed out that they own residential houses within the area from which the cause of action accrued.

29. It is common ground that the plaintiff also owns a house within the said area. Therefore, the plaintiff feels that he ought not to be required to provide security.

30. Order 42 Rule 6 (2) (b) stipulates that no order for stay of execution shall be made pending the hearing and determination of an appeal unless security is provided for the due performance of such Decree or Order as may ultimately be binding on the applicant.

31. Effectively, therefore, if the plaintiff was unable to provide security, the court would not stay the execution of the Decree or the Order.

32. In this case, I find that the plaintiff has failed to demonstrate that if execution was not stayed, he would suffer substantial loss. In the circumstances, the application for stay of execution is dismissed.

33. However, leave is granted to the plaintiff to appeal against the Ruling dated 22nd March 2017.

34. As the application is partially successful and partially unsuccessful,

I order that each party will bear his or her own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 24th day of October 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mureithi for the Plaintiff

Miss Koki for the 1st to 3rd Defendants

Miss Kiragu for Wachanga for 4th to 9th Defendants.

Mr. C. Odhiambo, Court clerk.