REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 490 OF 2016

RUNDA WATER LIMITED.....1ST APPELLANT/APPLICANT

RUNDA ASSOCIATION.....2NDAPPELLANT/APPLICANT

VERSUS

TIMOTHY JOHN NICKLIN …….....……1ST RESPONDENT

ANNE CHRISTINE NICKLIN …….....……2ND RESPONDENT

RULING

The Applicants filed a Notice of Motion dated 25th August, 2017 seeking orders for stay of execution of the ruling and Order delivered on 23rd August, 2017 in Nairobi CMCC No. 3062 of 2014 pending the hearing and determination of the Appeal. The application is brought under the provisions of sections 1A, 1B, 3A and 65 (1) (b) of the Civil Procedure Act and under Order 42 Rule 6 of the Civil Procedure Rules. When a Court is faced with an application for stay of execution, it is bound to consider whether the said application meets the threshold and requirements for granting such an application as stipulated in Order 42 rule 6. At that stage, the Court is not required to consider the merits of the Appeal.

This was the position taken by the Court in the case of **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR** where it held that, "*We cannot over emphasize that at this stage we are not required to go to the merits of the case as tempting as it may be or consider whether the issues will be successful in favour of the appellant, lest we embarrass the trial judge. We therefore find that the applicant has discharged this requirement on the balance of probabilities. We are further guided by this court's decision in CARTER & SONS LTD. V. DEPOSIT PROTECTION FUND BOARD & TWO OTHERS – Civil Appeal No. 291 of 1997, at Page 4 as follows:*

> "**. . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would result from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay**."

Order 42 Rule 6 (2) of the Civil Procedure Rules provides that,

"*(2) No order for stay of execution shall be made under subrule (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*."

Therefore, in determining this application, the Court will endeavor to find out whether the application has met the above legal principles. The Application was premised on the grounds on the face of the Notice of Motion as well as on the Supporting Affidavit of **PETER MWANGI**, the current chairman of Runda Association. A chronology of the events precedent to the application as well as the previous application are set out herein. The order sought to be stayed was delivered on 23rd August, 2017 being an order for attachment of the Applicants assets for contempt of Court. It is averred that the trial magistrate erred in making an order that was beyond his jurisdiction to punish for contempt as limited by section 10 (6) of the Magistrates Act. The applicant further depones that should a warrant be issued, the Applicant is apprehensive that it would seriously compromise the supply of water to the residents of Runda estate hence a violation of their constitutional right to clean and safe water in adequate quantities as enshrined in Article 43 of the Constitution.

The application is opposed by the Respondents who filed a Replying Affidavit dated 20th September, 2017 and sworn by **TIMOTHY JOHN NICKLIN**, the 1st Respondent herein who depones that the application is misconceived and is an abuse of the court process. The Respondent avers that the Appellants have blatantly refused to comply with the decree issued by the trial Court and throughout the proceedings of this case, the Appellants have not demonstrated what prejudice they stand to suffer by the removal of the barriers which are illegal in the first instance and that in any case, should the Appeal succeed, the barriers can be reinstated. The Respondents also depone that the Appellants have not offered any security for the due performance of the judgment and the decree issued by the trial court.

The Respondents filed written submissions dated 18th October, 2017. The Applicants did not file written submissions and the application was argued orally in Court with each party relying on its filed authorities. I have considered the Affidavits on record as well as the submissions and authorities by each party. The case of **Ramadhan Salim Vs. Evans M. Maabi T/A Murphy Auctioneers & Another Civil Appeal No. 69 of 2015** which was relied on by the Applicants during the oral submissions is not applicable at this stage. This case deals with the jurisdiction of lower court to punish for contempt of court. As I said at the beginning of this ruling, this is an application for stay of execution and this authority can only find its relevance in the merits of the Appeal.

A brief history of this case is that the lower court delivered a judgment on 30th June, 2016 in CMCC No. 3062 of 2014 issuing a permanent injunction restraining the Applicants from barricading or blocking the Respondents access to Ruaka road and a mandatory injunction directed to the Appellants to remove the barriers already erected. The Applicants filed an appeal against that judgment to this court and simultaneously they also filed an application seeking to stay execution of that decree which stay application was dismissed. After the dismissal, the Applicants did not obey the judgment to have the barriers removed. The Respondents then filed an application dated 27th April, 2017 in the lower court seeking attachment of the Applicants properties for disobedience of the judgment which application was heard and granted on 23rd August, 2017 which decision is the subject of the Appeal herein and the instant application for stay of execution.

After considering the arguments by the parties and the evidence from the Affidavits, I find that the Applicant has not explained what substantial loss they are likely to suffer if the Application is not granted. In fact, the Respondents' Counsel submitted that if the Applicants obey the lower court orders and remove the barriers they will have no business with attaching their property. In essence, this means that if the Appellants obey the lower court judgment, the Respondents will forego the attachment order and not execute it and therefore any loss which would have been orchestrated by the attachment will be circumvented.

For an order of stay of execution to be granted, the court has to be satisfied that the applicant has met the provisions of Order 42 rule 6. In the case of ***Elena D. Korir vs Kenyatta University (2012) eKLR*** where **Justice Nzioki Wamakau** had this to say:-

> **"the application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & another vs Thornton & Turpin Ltd** ***where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that "The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must be made without unreasonable delay."***

This application has not met the threshold for grant of stay of execution orders. The Applicants have not established a clear case to warrant the orders being sought. I find the application to be unmeritorious and the same is hereby dismissed.

It is so ordered.

Dated, signed and delivered at Nairobi this 29th day of November, 2017.

…….....

L. NJUGUNA

JUDGE

In the presence of

…… for the 1st Appellant/Applicant.

…….....for the 2nd Appellant/Applicant.

…….....For the 1stRespondent.

…….For the 2nd Respondent