



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 267 OF 2017

P.M MBUTHIA..... APPELLANT/APPLICANT

VERSUS

FRANCIS NJUGUNA KIMANI..... RESPONDENT

RULING

The Appellant/Applicant has moved this court by way of a Notice of Motion dated 5th day of June 2017 seeking orders for stay of execution of the Judgment and the decree dated 18th day of May 2017, issued in CMCC number 1625 of 2006, pending the hearing and determination of the Appeal and that the costs of the application be provided for.

The application is premised on the grounds set out on the body of the same and its supported by the annexed affidavit sworn by Patrick Mbuthia on 5th day of June 2017.

It is made on the grounds that Judgment in CMCC No. 1625 of 2006 was delivered on the 18/5/2017 wherein the Respondent was awarded Ksh. 402,000 plus costs of the suit. That the defendant filed an Appeal against the said decision and has now sought a stay of execution pending the hearing and determination of the same.

In the affidavit, the defendant who is the Appellant and the applicant herein, depones that he is willing to abide by this Honourable court's decision as regards security as the court may order, for the due performance of such decree or order as may ultimately be binding on him. He averred that the application has been made expeditiously and with minimum delay under the circumstances.

The application is opposed by way of a Replying affidavit sworn by Francis Njuguna Kimani on the 10th day of June 2017.

He avers that, it is a fundamental principle of law that litigation must come to an end and that the matter has been in court for a long time since the year 2006. He has further averred that the applicant has not satisfied the conditions set out under 42 Rule 6 of CPA on granting of a stay of execution pending Appeal, in that he has not deponed that he is willing to furnish security and that he has failed to demonstrate the substantial loss that he is likely to suffer if any. He has contended that, it was the duty of the applicant to establish the merits of his application under order 42 Rule 6 which he was unable to do and consequently the Application should be dismissed with costs. He has urged the court that, should it grant the application, half of the decretal sum should be paid to him while the other half should be deposited in a joint interest earning account.

In his submissions, Counsel for the applicant submitted that the application has been made within time.

The court was told that the appellant is 70 years and a pensioner and if the decretal sum is paid, he may not recover the same from the respondent in the event that the appeal is successful. On security, it was submitted that the Appellant has indicated his willingness to abide by the court's decision as regards security. He told the court that he had deposited a sum of ksh. 131,843 in the lower court and has requested the court to maintain the said amounts as security.

On his part, Counsel for the Respondent submitted that the applicant has not proved substantial loss and that no security has been offered. It was his contention that the applicant did not prove that the Respondent will not be in a position to refund the decretal sum if the Appeal succeeds.

The court has considered the application together with the submissions by the parties. Under the provisions of order 42 rule 6(1), there are three prerequisites that an applicant seeking an order for stay of execution has to satisfy as follows;

- a. The application has to be brought without delay.
- b. The applicant has to prove that he shall suffer substantial loss if the orders are not granted.
- c. 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.

I note that Judgment was delivered on the 18/5/2017 and the application herein was filed on 5/6/2017. I find that the same was filed timeously.

On the 2nd condition of substantial loss, the applicant has deponed that he may be unable to recover the decretal amount if the Appeal succeeds as the Respondent is a person of unknown means. In this regard the law is clear that once the Appellant raises reasonable doubt of the Respondent's inability to refund the decretal sum, the evidential burden shifts to the Respondent to prove that he is in a position to do so. The reasoning behind this is that the applicant is not expected to know the financial capability of the Respondent. The Respondent did not address this aspect but rather, he has submitted that it was the Applicant's duty to prove that he will not be able to reimburse the decretal sum paid to him. I find the applicant has proved that he will suffer substantial loss as a result of the Respondent's failure to discharge the evidential burden.

On security, the Applicant has deponed that he is willing to abide by any conditions that this Honourable court shall impose.

In the end, I find that the application dated 5th day of June 2017 has merits and the same is allowed on condition that half of the decretal sum is deposited in court. The Applicant submitted that a sum of ksh. 131,843 was deposited in court. The applicant do enhance the said sum to ksh. 200,000 within 30 days, failing which, the stay order shall automatically lapse.

Costs of the application shall abide the outcome of the Appeal.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 22nd Day of November, 2017.

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L. NJUGUNA

JUDGE

In the Presence of

..... For the Appellant/Applicant

..... For the Respondent