



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 55 OF 2017

GEALD IRERI HARRISON.....1ST APPELLANT/APPLICANT

FELISTA IRERI.....2ND APPELLANT/APPLICANT

DAVID MWANGI IRERI.....3RD APPELLANT/APPLICANT

VERSUS

DANSON NGARI.....RESPONDENT

R U L I N G

1. This is a ruling on two applications dated 30/10/2017 and 8/11/2017. The first application seeks for orders of stay pending appeal. The second application has two prayers seeking for the following orders:-

(a) That there be stay and a suspension of execution orders of committal made by Hon. S.K. Mutai – PM on 8th November 2017 committing the 2nd applicant to civil jail pending the hearing and determination of this application and the application dated 31st October, 2017.

(b) That the 2nd applicant be immediately released from the prison in which she has been committed in execution of the orders of Hon. S.K. Mutai – PM pending the hearing of this application and that dated 31st October, 2017

2. The court proceeds to deal with the first application for stay pending appeal. It had been argued by the respondent that this application was also spent because 2nd applicant has been committed to civil jail in execution of the decree in CMCC No. 27 of 2017. The committal to civil jail is one of the methods of execution provided for under Order 22 of the Civil Procedure Rules.

3. Despite the committal of the 2nd applicant, the decretal amount of Kshs.2,151,320/= is still owing and the respondent is at liberty to employ other ways of execution should the 2nd applicant not manage to pay the amount during the pendency of her committal.

4. The committal is only a part of the process of execution which the applicant seeks to stay. The appellant has filed this appeal under Order 42 Rule 6 which empowers the court to grant stay.

5. It is my considered opinion that the application for stay has not been spent and it is properly before this court.

6. The grounds supporting this application are that:-

(a) Judgment was delivered against the applicants on 10/10/2017 for Kshs.2,151,320/= without stay of execution granted.

(b)

7. The respondent in opposition of the two applications filed grounds of opposition in which he referred to the applications as a waste of time, lacking merit and as an attempt to frustrate the execution of the decree. This court will confine itself only to the grounds relating to the second application.

8. It is contended that the appeal has no merit and that the prayers for stay are not merited.

9. It is also argued that the applicants have come to court in bad faith. The respondent further contends that the record of appeal filed by the applicants should be struck out for being incompetent, improper and incomplete.

10. Mr. Opondo for the respondent in respect of the second application submitted that the applicants have satisfied the three main requirements of the law. The applicable law in this application is Order 42 Rule 6 of the Civil Procedure Rules.

11. The application of this nature the applicant must demonstrate the following:-

(a) That the application has been brought without delay.

(b) That the applicants will suffer substantial loss in the event that the orders are not granted.

(c) That the applicant has offered security for the due performance of the decree.

12. This application was filed seven (7) days of the delivery of judgment in CMCC No. 27 of 2017. The application was therefore brought promptly thus satisfying the first requirement.

13. The applicants argue that if execution takes place, he is likely to suffer substantial loss for the appeal may be rendered nugatory. The respondent may not be in a position to refund the decretal amount should execution take place. The 2nd applicant has already been committed to civil jail in execution of the decree. The committal to jail has already subjected the 2nd applicant to suffering. She has been committed to civil jail for a period of three months.

14. The court directed the applicants to annex proceedings of the lower court which he did. However, the proceedings for the committal to civil jail were omitted. It is not known whether the 2nd applicant was given a chance to explain herself. Although committal to civil jail is one of the ways of execution, it should be the last resultant resort after all other ways have been exhausted. The 2nd applicant who is said to have a small baby has already suffered substantial loss.

15. The applicant is ready to deposit the whole decretal amount. He has already drawn three cheques totaling to Kshs.2,151,320/=. The applicant has therefore offered security for the due performance of the decree as required by Order 42 Rule 6.

16. It was argued that the appeal has no chances of success. This was raised in one of the grounds of opposition. No affidavit was sworn by the respondent to bring this argument into perspective.

17. The applicants appeal against both liability and quantum. On liability, the applicants are aggrieved by the finding of 100% liability. It is stated that the damages were inordinately high and not acceptable to the applicants. Since no affidavit was sworn to counter these contentions, the court cannot buy the respondents argument that the appeal is hopeless and without merit.

18. The respondent argued that the record of appeal filed is defective, incompetent and incomplete. This

appeal is still in its initial stage. It has not been admitted and directions will have to be taken after admission. The time for filing the record of appeal is yet to come. The proceedings in the file were filed as a result of the court's directions and were purposed for the hearing of this application. The respondent argument is therefore misplaced in this application.

19. The application dated 8/11/2017 is premised on the earlier one dated 31/10/2017. The two applications are related and address the subject of stay pending appeal. In the event that the first application is successful, the second one also ought to be allowed.

20. The mistake the applicant's counsel made was to omit the crucial prayer for interim stay in the first application which has now landed one of his clients in civil jail. The counsel ought to have followed through the proceedings of the lower court where he would have applied for stay after judgment. I agree with the respondent's counsel that the applicant's action borders on the conduct of an indolent litigant.

21. It is my considered opinion that the two applications are merited and are hereby allowed in the following terms:-

(a) That the orders for stay pending appeal are hereby granted on condition that the applicant deposits Kshs.2,151,320/= within three (3) days of this ruling.

(b) That the orders made by Hon. S.K. Mutai on 8/11/2017 be and are hereby set aside and that the 2nd applicant be released from civil jail forthwith.

(c) That costs for this application be costs in the cause.

22. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF NOVEMBER, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Muriuki for Opondo for the applicants

Mr. Andande for Guantai for the respondent