



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO 85 OF 2017

RENE SUPERCLEAN SERVICES.....APPELLANT

VERSUS

STEPHEN OTIENDE ADIE.....1ST RESPONDENT

KENYA ALLIANCE INSURANCE

COMPANY LIMITED.....2ND RESPONDENT

RULING

1. By a notice of motion dated 6.12.17 brought under Order 42 Rule 6 and Order 51 rule 1 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Rules, the applicant/appellant pray for orders that

a. This application be certified urgent

b. That the Honourable court be pleased to order a stay execution of the decree and all consequential orders arising from *Kisumu CMCC No. 518 of 2015* pending the hearing and determination of this application interpartes

c. That the Honourable court be pleased to order a stay execution of the decree and all consequential orders arising from *Kisumu CMCC No. 518 of 2015* pending the hearing and determination of this appeal

d. Costs be in the cause

2. The application is based on the grounds among others that there is judgment against the appellant for Kshs. 3,823,840/- and that its application to commence 3rd party proceedings were dismissed exposing the appellant to execution.

3. The application is supported by an affidavit sworn on 6th December, 2017 by Mildred Nafula Wangwe who describes herself as the proprietor of the appellant in which she reiterates the grounds on the face of the application.

4. The application is opposed on the grounds set out in the 1st respondent's grounds of opposition filed on 11th December, 2017 in which it is stated that the appellant has failed to furnish security for due performance of the decree and that the application is meant to deny the 1st respondent the fruits of his judgment.

5. I have considered the application in the light of the supporting affidavit and the grounds of opposition.

6. Order 42 (6) of the Civil Procedure Rules provides:

(2) 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

b. That the application has been made without unreasonable delay; and

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. Unreasonable delay

7. The notice of motion herein was filed on 8th December, 2017 which was 9 days after the ruling sought to be stayed was delivered. It is my considered view that the application was filed within reasonable time.

ii. Substantial loss

8. There are a myriad of cases on what constitutes substantial loss. In Civil Appeal No. 186 Of 2007 Standard Assurance Co. Ltd –Vs- Alfred MumeaKomu the Court stated-

“Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore without this evidence, it is difficult to see why the respondents should be kept out of their money.”

9. Similarly in Civil Case No. 41 Of 1995 United Builders & Contractors (Africa) Limited –Vs- Standard Chartered Bank Ltd the Court stated-

“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other suits. .”

10. Likewise in Peter Ondande T/A SpreawettChemis –Vs- Josephine WangariKaranja [2006]eKLR-

“The issue for determination by this court is whether the applicant has established a case to enable this court grant him the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him.”

11. As a result therefore; I find that the applicant has not established what substantial loss it would suffer if the order of stay of execution is not granted.

iii. Security

12. The applicant urges the court to waive the requirement for deposit of security on the grounds that it paid premiums to Kenya Alliance Insurance Company Ltd against whom it seeks an indemnity. No authority on this issue was cited.

13. Security is a legal requirement under 42 (6) (2) (c) of the Civil Procedure Rules. The applicant has not satisfied the court that it is entitled to an exemption to pay security for due performance of the decree herein.

Decision

14. Although I have found the applicant has not established substantial loss and has not offered security for the due performance of the decree herein, the overriding objective of the court is to exercise latitude in its interpretation of the law so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out.

15. Section 3A of the Civil Procedure Act Cap 21 Law of Kenya provides that:

“Nothing in this Acts shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.

16. Consequently and for the reasons stated hereinabove, I find that it would be in the interest of justice to exercise my discretion in favour of the applicants.

17. The upshot of the foregoing is that the notice of motion dated 6.12.17 is considered and allowed on the following conditions:

a. The applicant provides an insurance guarantee or bank guarantee for the total decretal sum within 30 days from today’s date

b. In the alternative, the applicant pays 50% of the total decretal sum in an interest earning account in the names of both advocates within 30 days from today’s date

c. Costs shall be in the cause

DATED AND DELIVERED THIS 14th DAY OF December 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant/Applicant - Ms Ayeto holding brief Mr Otieno

1st Respondent - N/A -

2nd Respondent - N/A