



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISC. CIVIL APPLICATION NO.238 OF 2014

ESSAU KASAYA MMASI APPLICANT

VERSUS

VIOLET KHALAYI RESPONDENT

RULING

The Application

1. What is before me for determination is the Notice of Motion dated 10/12/2014 by which the applicant seeks orders:
 1. THAT this application be certified most urgent and the same be heard on priority basis.
 2. THAT the orders made by the Lower Court in Kakamega CMCC No.453 of 2006 committing the applicant to civil jail for 30 days be stayed pending the hearing of this application inter partes.
 3. THAT the applicant be released on bail pending the hearing of this application inter partes.
 4. THAT the applicant be allowed to liquidate the decretal sum by making instalments of kshs.3000/= per month till payment in full.
 5. THAT the costs of this application be provided for.
2. The application is supported by 4 grounds set out on the face thereof and is also premised on the applicant's averments contained in his affidavit sworn on 10/12/2014. In brief the applicant avers that he suffers from a serious medical condition which cannot allow him to be detained in prison and further that he is a retired person with a meager monthly pension and not able to clear the entire decretal sum in a lumpsum. The applicant prays that he be allowed to liquidate the decretal sum by monthly instalments of kshs.3000/= till payment in full.
3. The Respondent filed a replying affidavit dated 19/01/2015 in opposition to the application. The Respondent contends that the instant application is frivolous and an abuse of the due process of Court since the applicant made a similar application dated 23/10/2012 for stay of execution which application was dismissed vide this Court's ruling dated 27/02/2014. The Respondent also avers that even if the applicant is sick the Kakamega GK Prison has adequate facilities to take care of the applicant's chronic illnesses. It is also the Respondent's contention that the applicant is simply refusing to meet his obligations to her since he is a man of means being the owner of KARIOKOR GARAGE opposite Total Petrol Station in Kariokor area of Nairobi. The Respondent prays that this application be dismissed with costs to her.

Submissions

4. By agreement of Counsel recorded in Court on 11/02/2015 the instant application proceeded by way of written submissions though for sometime thereafter the parties indicated they were willing to settle the matter amicably. No agreement was however reached. The Respondent's Counsel filed the written submissions and though the applicant had his time for filing and serving of written submissions extended twice no submissions were filed by the applicant.
5. I have carefully read through and considered the applicant's written submissions and note that the decretal sum the subject of the instant and previous application is a result of an award of damages made on 20/06/2012 by the trial Court in favour of the Respondent. That though the applicant has been aware of his indebtedness to the Respondent since 20/06/2012 he has done absolutely nothing to settle it. That the applicant after being threatened with execution filed an application for stay which application was dismissed by Hon. Mr. Dulu J on 27/02/2014. No appeal has been made against the said ruling by the applicant. The Respondent argues that the instant application is not only *res judicata* but is also a mockery of justice.
6. Regarding the proposed monthly instalments of kshs.3000/= per month till payment in full the Respondent contends that such an arrangement would take up to eternity to clear considering the fact that the decretal sum now stands at kshs.634101/=. Further, that pursuant to the provisions of order 21 Rule 12 of the Civil procedure Rules (CPR) This Court is devoid of jurisdiction to grant such an order for instalment payments. Order 21 Rule 12 of the CPR provides as follows:-

“12(1) Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

12(2) After passing of any such decree, the court may on the application of the judgment-debtor and with the consent of the decree-holder or without the consent of the decree-holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by instalment on such terms as to the payment of interest, the attachment of the property of the judgment-debtor or the taking of security from him, or otherwise, as it thinks fit.”

7. From a reading of the above rule there must be sufficient reason advanced by the applicant for the Court to order instalment payments since there is no consent by the respondent herein. Under sub rule (2) of Rule 12 of the CPR, where the decree has been passed instalment payments are only possible where the decree-holder gives consent or where there is no consent by decree-holder. The Judgment-debtor must show sufficient cause to the Court before such an order can be made.
8. Finally, it is submitted by the Respondent that the applicant is truly a vexatious litigant for bringing before Court an application similar to the earlier application dismissed on 27/02/2014 and also because the applicant is blatantly refusing to clear the decretal amount even when he has the means to do so. The Respondent says that the applicant has come to Court with soiled hands and this application ought therefore to be dismissed with costs.

Analysis and Determination

9. There is no doubt that by an application dated 23/10/2012 under prayer (2) thereof the applicant sought an order “THAT, there be stay of execution of the decree in Kakamega CMCC No.453 of 2006 pending hearing and determination of the application interpartes.” By his ruling delivered on 27/02/2014 the Hon. Mr. Justice Dulu concluded that the applicant had not satisfied the laid down legal requirements for the grant of stay of execution of decree pending appeal. The application was accordingly dismissed with costs to the Respondent.
10. The legal requirements for the grant of stay of execution are thrust upon the applicant by order 42 Rule 6(2) of the CPR which provides as follows:-

“6(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 and that the application has been made without unreasonable delay;

and

h) such security as the Court orders for the due performance of such decree or order as may be ultimately binding on him has been given by the applicant

11. With the above provisions in mind, I do not think that the applicant has demonstrated to this Court what substantial loss may result to him if the stay order is not granted. By merely stating that he suffers from chronic diseases is not the same as demonstrating that there is real and not merely speculative substantial loss that he will suffer if the stay order is not granted. Nor can it be said that this application has been brought without undue delay. The ruling by Hon. Mr. Justice Dulu was made on 14/02/2014 and from that time the applicant took no action in the matter until he filed this application on 10/12/2014. The application was filed after the Respondent served the applicant with a Notice to show cause. Clearly the applicant has been indolent and wakes up only when the Respondent makes an attempt to realize the fruit of her lawfully obtained judgment. It is also noteworthy that though the applicant filed HCCA No.65 of 2012, that appeal still remains unprosecuted, which may mean that the applicant has no intention of prosecuting the appeal. It is also clear from the record that the applicant has never appealed this Court's ruling dated 14/02/2014 which in my view implies that the applicant has nothing more to say in this matter.
12. As regards the issue of offering of security the applicant has said nothing about it in his supporting affidavit. According and since the applicant has not satisfied all the three conditions set out under Order 42 Rule 6(2) of the CPR, his prayer for stay of execution must fail.
13. Secondly, the respondent submitted that the instant application is *res judicata* because of the ruling of this Court delivered on 14/02/2014. In this regard, I rely on the provisions of Section 7 of the Civil Procedure Act (CPA) Cap 21 Laws of Kenya which provides that:-

“7. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom or any of them claim litigating under the same title where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”

14. In my considered view the applicant did not need a microscope or magnifying glass to see that the issue in the instant case is the same issue that was canvassed and determined by Hon. Mr. Justice Dulu on 14/02/2014. That issue is the issue of stay of execution of decree in Kakamega CMCC No.453 of 2006. I would agree with the Respondent that the instant application is *resjudicata* and further that the applicant is a vexatious litigant who is also unwilling to meet his obligations. For the above reasons the applicant's application must fail.
15. Thirdly, I find and hold that the applicant has not shown any sufficient reason as stipulated by Order 21 Rule 12 to justify an order for instalment payment. In any event, it would take the applicant well over 211 months to pay up. What this means is that for all those months, the Respondent will be left holding a still-born decree in her hands, unable to look left or right. Such an eventuality is clearly unfair to the Respondent.

Conclusion

16. The upshot of what I have said above is that the applicants Notice of Motion dated 10/12/2014 lacks merit and the same is dismissed with costs to the Respondent.
17. Orders accordingly.

Ruling delivered, dated and signed in open Court at Kakamega this 28th day of January 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Shivega (absent) for Applicant

Miss Omar h/b for Mr. Akwala for Respondent

Mr. Lagat - Court Assistant