REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 47 OF 2014

URGENT CARGO HANDLING COMPANY LIMITED……APPELLANT

VERSUS

MAGDALINE KATHONI MWANGI…….RESPONDENT

RULING

1. The appellant was aggrieved by the decree of the lower court made on 25th March 2014. The appellant lodged a memorandum of appeal dated 22nd April 2014. The respondent had sued the appellants for negligence. The appellant contends that the quantum of damages was exorbitant. The appeal is pending.
2. On 10th September 2014, the lower court granted stay of execution of the decree on terms. The appellant was ordered to deposit the decretal sum in a joint interest earning account of both counsels within thirty days. The respondent is aggrieved by the latter order. She has presented a notice of motion dated 24th November 2014 praying for review. That is the motion before the court.
3. The motion is expressed to be brought under Order 42 Rule 6 of the Civil Procedure Rules 2010. There is a supporting affidavit sworn by the respondent on even date. The grounds are three pronged: first, that the appellant did not prove it would suffer substantial loss; secondly, that the respondent is a woman of means with landed property; and, lastly, that the motion for stay before the lower court was incompetent for want of a proper affidavit.
4. The motion is contested. There is a replying affidavit sworn on 8th April 2015 by Paul Kiriba, the legal officer of the appellant. The appellant states that the application is an abuse of court process; that the application is incompetent; that the impugned ruling was well-founded; that there has been undue laches in presenting the motion; and, that the applicant's remedy lies in an appeal against the order.
5. On 23rd September 2015, learned counsels for the appellant and respondent made brief oral submissions. I have considered the rival arguments. I have also paid heed to the records before me, the notice of motion and depositions.
6. I cannot make a final finding on the appeal at this stage. The appeal has not even been admitted. As a matter of fact, the record of appeal has not been filed. I will first deal with two objections taken by the appellant. The first relates to laches. The present motion was presented to court on 24th November 2014. The impugned ruling was delivered way back on 10th September 2014. On the face of it, there was substantial delay. However, the respondent's counsel explained that he only *received* the impugned ruling or order from the court registry on 14th November 2014. I think that is a reasonable excuse for the delay. Fundamentally, no serious prejudice has been occasioned to the appellant.
7. The second argument by the appellant is that the respondent's remedy lies in an appeal. That submission is prosaic. The fact that the appellants' motion for stay was allowed by the lower court

does not preclude the respondent from approaching this court for review. It is expressly provided in Order 42 Rule 6 (1) that *whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just. The words that follow that sentence provide that a person aggrieved by a stay granted by the lower court may move the appellate court to set aside the order. I cannot then say that the present motion is vexatious or an abuse of court process. See* Sirgoi Holdings Limited v Martha Kamunu *Eldoret, High Court Civil Appeal 26 of 2014 [2014] eKLR.*

8. I will now turn to the impugned ruling. The lower court had wide and unfettered discretion to grant stay pending appeal. Order 42 Rule 6 of the Civil Procedure Rules 2010 provides that-

> *"6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*
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> *(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."*

9. I have studied the ruling closely. The lower court was alive that the applicant needed to prove *substantial loss*. The learned trial magistrate observed that the *"respondent attempted to demonstrate that she is a person of means"*. To my mind, it can only mean the lower court was *not* fully satisfied of her capacity to refund the decretal sum. That is why it granted stay on condition that the judgment debtor deposited the decretal sum into a joint interest earning account of both counsels. I have no doubt the respondent owns Eldoret Municipality Block 21; or, that she earns rental income of Kshs 50,000. The decretal sum is substantial. The point to be made is that whether or not to grant stay was a matter of *discretion*.
10. The appellant has a pending appeal. The memorandum of appeal was filed on 22nd April 2014. Like I said, I cannot comment on the merits of the appeal at this stage. On the face of it, the appeal is *arguable*. Two of the grounds taken in the appeal are that the multiplicand of Kshs 12,000 was not supported by evidence; and, that the multiplier of 10 years was unreasonable. The rationale for stay was well explained by Brett L.J. in Wilson v Church (No. 2) 12 Ch D [1879] 454 at 458-

> *"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory"*

11. In Butt v Rent Restriction Tribunal [1982] KLR 417 at 419, Madan JA (as he then was) delivered himself thus-

> *"If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings"*

12. This court is also enjoined by article 159 of the Constitution; and, by sections 1A and 1B of the Civil Procedure Act, to do *substantial justice* to the parties. That is the court's overriding objective. See Harit Sheth Advocate v Shamas Charania Nairobi, Court of Appeal, Civil Appeal

68 of 2008 [2010] eKLR, *Stephen Boro Gitiha v Family Finance Bank & 3 others*. Nairobi, Court of Appeal, Civil Appeal 263 of 2009 (UR 183/09) [2009] eKLR, *Sirgoi Holdings Limited v Martha Kamunu Eldoret, High Court Civil Appeal 26 of 2014 [2014] eKLR. The submission by the respondent that the affidavit in support of the motion before the lower court was incompetent for being sworn by a legal officer of an insurance company is technical. It flies in the face of article 159(2)(d) of the Constitution. Fundamentally, it would call for a deeper inquiry at this stage whether there were subrogation rights entitling the deponent to swear the deposition.*

13. I cannot say the respondent is completely prejudiced by the order of stay granted by the lower court. True, the fruits of her judgment are beyond her reach or that of the beneficiaries of the deceased at the moment. But I am minded that the appellant deposited the decretal sum into a joint interest earning account on 28th August 2014 as ordered by the lower court. So much so that the interests of justice in this case would be better served by expediting the admission and hearing of the main appeal. That in my view would ensure fairness and equality of arms. *Harit Sheth Advocate v Shamas Charania* Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR. If the appellant goes into slumber, there are clear remedies open to the respondent: they include an application for dismissal of the appeal for want of prosecution.
14. I am thus disinclined to set aside the order of the lower court made on 10th September 2014. The upshot is that the notice of motion dated 24th November 2014 is dismissed. Costs shall abide the main appeal.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 19th day of January 2016.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. Isidi for Mr. Wanyonyi for the appellant instructed by Kimaru Kiplagat & Company Advocates.

Mr. Mugambi for Mr. Wambua for the respondent instructed by Wambua Kigamwa & Company Advocates.

Mr. Lesinge, Court clerk.