



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NUMBER 133 OF 2015

SUERA FLOWERS LIMITED.....APPELLANT

VERSUS

JULIA WANJIRU GICHUKI &

JOYCE MUTHONII GACHURI(suing as the Legal

Administrators of the Estate of JOHN G. KIBUE).....RESPONDENTS

RULING

1. The Appellant by its application dated 9th December 2015 seeks an order of stay of execution of the judgment and decree of the trial court delivered on the 9th November 2015 pending hearing and determination of the appeal filed hereof. The judgment is for a sum of Kshs.1,383,552/= plus costs and interest against the appellant.

In support of the application, the applicant states that the appeal has high chances of success as serious triable issues have been raised. It is ready to offer security for the due performance of the decree, and submits that the application has been brought without unreasonable delay and that if execution is allowed it will suffer substantial loss as recovery of the decretal sum from the Respondents may be difficult as the decree holder may not be able to refund the same should the appeal be successful.

It is submitted that it has complied with the conditions stated in **Order 42 Rule 6 (1) of Civil Procedure Rules** for the grant of the Orders sought.

2. In opposing the application, the Respondents filed a Replying Affidavit on the 1st March 2016. The said affidavit is not dated, signed, nor commissioned by a Commissioner for Oaths.

Under the **Oaths and Statutory Declarations Act, Chapter 15 Laws of Kenya**, it is a requirement that an affidavit must be signed by the deponent, dated and the place and date when it was taken before a Commissioner for Oaths shown. **Section 5 of the said Act** is specific that every Commissioner for Oath before whom any oath or affidavit is taken or made under the act shall state at what place and on what date the affidavit was taken. The said affidavit is therefore incompetent and inadmissible. It is expulged from the court record. That leaves the appellant's application unopposed.

3. Conditions that the court ought to consider for the grant of an order of stay of execution are stated under **Order 42 Rule 6(1)**. These are:

- (a) *that the court is satisfied that substantial loss may result to the applicant unless the order is made.*
- (b) *that the application has been brought without unreasonable delay.*
- (c) *Such security as the court orders for the due performance of the decree.*

4. The judgment of the court was delivered on the 9th November 2015. The Appeal was filed on the 19th November 2015 and this application was filed on the 21st December 2015. The court is satisfied that the application was filed without delay.

Substantial loss, is what the appellant may lose by the decree being executed before determination of the appeal, and which may render the same negatory should it be successful, if the decree holder may be unable to refund the decretal sum. The appellant ought to demonstrate the inability of the decree holder to pay the sums or situations that execution may create a state of affairs that will irreparably negate the very essence of the appeal. The court has discretion to grant the orders of stay of execution if satisfied that substantial loss may be occasioned. See **James Wangalwa & Another -vs- Agnes Naliaka Chesoto (2012) e KLR.**

In determining the above, the court has to consider whether the appeal has chances of success as a frivolous appeal may not be rendered negatory even when an order of stay is denied. The grounds of appeal as stated in the Memorandum of Appeal, in my view raises triable issues. I am satisfied that a denial of the order of stay of execution may cause substantial loss to the appellant.

5. The appellant has indicated its readiness to offer sufficient security for the due performance of the decree in terms of an Insurance Bond from its Insurers. It has not disclosed its insurers. The court is unable to grant such order without the identity of the alleged insurer. The judgment sum is Kshs.1,383,552 plus costs and interest. The parties had apportioned liability, by consent, at the ratio:25:75 in favour of the respondents. Liability is not in dispute. The above sum is 75% of the Judgment amount.

6. After careful consideration, the court shall order that the applicant do pay a 50% payment of the above decretal sum to the Respondent – that is to say, Kshs.691,776/= and the balance of Kshs.691,776/= be deposited in an interest earning bank account in the joint names of the Appellants Advocates and the Respondents Advocates, to be held as security during the pendency of the appeal, within a period of 30 days from the date of this ruling.

7. For the above reasons, the appellants application is allowed subject to compliance with the above terms, failing which the order of stay of execution shall lapse.

It is so ordered.

Dated, signed and delivered in open court this 31st day of March 2016.

JANET MULWA

JUDGE