



REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
HIGH COURT CIVIL APPEAL NO.31 OF 2015

(APPEAL ARISING FROM RULING BY HON. B. LIMO, SRM IN KERICHO CM CC NO.342 OF 2014.)

FRANCIS CHERUYOIT KEMEIAPPELLANT/APPLICANT

VRS

DAVID BIEGON KIPKOECH.....RESPONDENT

RULING

1. The Appellant/Applicant filed the appeal herein on 4th September 2015. He then filed the application dated 7th September, 2015 on 11th September 2015. This is the application which is the subject of this ruling.
2. In the said application, he seeks an order staying the judgment dated 17th December 2014 and the subsequent decree dated 29th January 2015 and further proceedings in the subordinate court in relation to Kericho CM CC No.342 of 2014. The application is supported by the grounds on the face of the application and the supporting affidavit.
3. The main ground being that the appeal has overwhelming chances of success and that the applicant will suffer substantial loss if the stay is not granted.
4. Though both counsel agreed and filed written submissions the record does not have any replying affidavit to the said application. The Respondent's counsel has in his submissions opposed the application, but he nowhere in them refers to the replying affidavit. I therefore conclude that none was ever filed. That basically means the application is not opposed.
5. Be it as it may, it behoves this court to consider the material before it, and make a decision from it. I have considered the application, supporting affidavit and the written submissions.
6. Order 42, rule 6 (2) of the Civil Procedure Rules provides as follows:

“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

(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.”

7. The matter before the subordinate court involves a frustrated sale agreement. An ex parte judgment was entered for failure by the Applicant to enter appearance and file defence.

8. He is therefore complaining that he was not given a hearing. His application to set aside the ex parte judgment was dismissed by the subordinate court hence the pending appeal.

9. He is not denying receipt of the money from the Respondent. All he wants to be given is an opportunity to explain why and how the agreement was frustrated. This will be the issue before the court that will be hearing the appeal.

10. The Ruling being challenged was delivered on 5th September 2014. He filed the application dated 7th September 2014 on 11th September 2014. I find that the application was filed without undue delay.

11. The Judgment complained of concerns money paid by the Respondent and received by the Applicant in respect of a sale agreement. The court in considering the loss that would be suffered by the applicant must also weigh it against the Respondent's interest in order to strike a balance. The balance being that the Respondent has not been refunded the money paid in the frustrated sale agreement.

12. This was well addressed in the Case of **Kenya, Tanzania, Uganda Leasing Co. Ltd V Mukenya Ndunda [2012] e KLR** by Mabeya J who stated:

“In an application for stay, there are always two competing interests that must be considered. These are that, a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted Court of Appeal should be safe guarded from his appeal being rendered nugatory. These two competing interests should always be balanced... In a bid to balance the two competing interests, the courts usually make an order for suitable security for the due performance of the decree as the parties wait for the outcome of the Appeal. I do not see why the same should not be applicable in this case.”

13. I also wish to observe that though the appeal herein was filed in September 2015, the Applicant has yet to take any step to prepare to have the Appeal admitted. The filing of this application did not in any way halt the process of the preparation of the appeal.

14. As a result of the above, I allow the applicant's Notice of Motion dated 7th September 2011. There shall be stay of execution of the decree in Kericho CM CC No.342 of 2014 pending the hearing of the Appeal herein on the following condition:

“That the Applicant deposits a sum of ksh.1,300,000/= in an interest earning account in the names of the two counsels appearing. This should be complied with within the next fourteen (14) days”.

15. Non-compliance will lead to automatic discharge of the orders of stay of execution. Costs to the Respondent.

Signed, dated and delivered this 24th day of March 2016.

H. I. ONG'UDI

JUDGE