REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 41 OF 2015

KENNEDY KIPLAGAT.....1ST APPELLANT

JACKSON ARUSEI.....2ND APPELLANT

VERSUS

EMILY CHEBITOK.....RESPONDENT

(Being an application for stay of the ruling and order of B. Mosiria, Principal

Magistrate, in Kapsabet PMCC No. 137 of 2013 delivered on 12th March 2015)

RULING

1. The appellant is aggrieved by the order of the lower court made on 12th March 2015. The appellants had brought a suit claiming rights to an access road through the property known as Nandi/ Ndurio/92. On 14th October 2014, the lower court upheld an objection by the respondent and struck out the suit. Being aggrieved, the appellants filed a motion for review. It was equally dismissed on 12th March 2015.

2. That precipitated this appeal. The memorandum of appeal was filed on 26th March 2015. In the meantime, the appellant presented a notice of motion dated 13th July 2015 praying for stay of execution of the impugned order. It is expressed to be brought under sections 3A and 63 (e) of the Civil Procedure Act; and, Orders 42 and 51 of the Civil Procedure Rules 2010. The application is supported by a deposition sworn by the 1st appellant on even date.

3. The appellants had lodged a similar application for stay in the lower court. It was also struck out on 8th July 2015. The deponent avers that the appellants had no notice of the ruling, a fact contested by the respondent. The respondent has now obtained a decree for costs of Kshs 48,475. The appellants are apprehensive of execution. In particular, they aver that the respondent has obtained warrants of arrest. They contend that their liberty is at stake. Lastly, the appellants' case is that their appeal has a high chance of success; that they stand to suffer substantial loss; and, that unless the order of stay is granted, the appeal will be rendered nugatory.

4. The motion is contested. The respondent filed a replying affidavit on 17th July 2015. She avers that the date of the ruling of 8th July was taken by consent in open court. The application for stay was dismissed. No appeal has been filed against that order. She states that the warrants of arrest issued by the lower court are not related to the rulings of 12th March 2015 or 8th July 2015 but based on the dismissal of the

primary suit on 14th October 2014. There is again no appeal against that order. The respondent's case is that the present motion has no footing; and, that the main appeal little or no chance of success. To buttress her argument, she avers that the primary suit was struck out because the appellants had not obtained letters of administration; and, that the land known as Nandi/ Ndurio/92 is still registered in the name of the deceased. An official search and death certificate are annexed.

5. There is a rejoinder contained in a supplementary affidavit sworn on 18th August 2015. The appellants emphasize that they brought the suit as *owners* of *adjoining* land: Nandi/ Ndurio/890; and, Nandi/ Ndurio/893. They claim they were not purporting to be administrators of the estate of the deceased. They also contend that since the respondent had filed a succession cause at Kapsabet being cause number 91 of 2014 to the estate of the deceased, she was properly sued; and, that the death of the deceased was immaterial.

6. Both parties have filed written submissions. Those by the appellants were filed on 27th October 2015; those by the respondent on 17th November 2015. On 31st May 2016, learned counsel for both parties confirmed they were relying entirely on those submissions. I have considered the rival arguments. I have also paid heed to the records before me, the notice of motion, the pleadings, and depositions.

7. I am alive that the appeal in this matter is pending. I will thus *refrain* from commenting on the *merits* of the appeal. I note in passing that the submissions by the respondent dig deep into the merits of the appeal. That will be the true province of the appellate court. At the present stage, all that I am called upon to determine is whether the appellants have met the threshold for grant of a stay pending appeal.

8. Sections 3A and 63 of the Civil Procedure Act give the court wide *discretion* to grant interlocutory orders to prevent the ends of justice from being defeated. By dint of Order 42 of the Civil Procedure Rules 2010, the court also has *power* to grant stay of execution pending appeal. Order 42 Rule 6 provides as follows-

> *"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.*
>
> *(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. In *Butt v Rent Restriction Tribunal* [1982] KLR 417, Madan JA (as he then was), cited with approval the views of Brett L.J. in *Wilson v Church* (No 2) 12 Ch D [1879] 454 at 459-

> *"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"*

10. Justice Madan delivered himself thus in the *Butt* case (Supra) at page 419,

> *"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"

11. Again the court will grant a stay if special circumstances of the case dictate so. See *Attorney General v Emerson and others* 24 QBD [1889] 56 at page 59. In the *Butt* decision (Supra) at page 420, the court found that since there was a large amount of rent in dispute between the parties, it was a "special circumstance" that gave the applicant an undoubted right of appeal. Those general principles were restated in *Madhupaper International Limited v Kerr* [1985] KLR 840 at page 846.

12. This court is now enjoined by article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act to do substantial justice to the parties. That is the overriding objective. *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, Civ. Appl. 263 of 2009 (UR 183/09) [2009] eKLR.

13. The present motion was presented to court on 13th July 2015. The impugned ruling was delivered on 12th March 2015. Although there seems to be a delay of nearly *four months,* I note that the appellants had presented a similar action in the lower court. The appellants were entitled to do that by dint of Order 42 Rule 6. The latter application was only dismissed on 8th July 2015. The delay here is thus for only *seven days*. I thus find the present motion was brought without undue delay.

14. The next key question is whether the appellants have demonstrated *substantial loss*. The impugned order dismissed an application for *review* of the order striking out the appellants' suit. The main suit was struck out way back on 14th October 2014. It is the dismissal of the main suit that contained an order for costs to the respondent. Those costs have been assessed at Kshs 48,475 as per the warrants marked *EM2*. Those are the costs being pursued by attachment of the person. Under section 38 of the Civil Procedure Act; and, Order 22 Rules 32 to 34 of the Civil Procedure Rules, the decree holder has a right to enforce payment by arrest of the judgment debtors.

15. As a general rule, the execution of a *money decree* does not constitute *substantial loss*. See *Kenya Shell v Benjamin Karuga* [1982-88] 1 KAR 1018, *Jaribu Credit Traders Ltd v Mumias Sugar Company Ltd* High Court, Nairobi, Commercial Case 465 of 2009 [2014] eKLR, *Sirgoi Holdings Limited v Martha Kamunu Eldoret, High Court Civil Appeal 26 of 2014 [2014] eKLR.* The amount of costs in this case is Kshs 48,475. I cannot say it is a substantial sum. See *Butt v Rent Restriction Tribunal* [1982] KLR 417. As a matter of fact, the appellants state that they have deposited the sum into court as security for the interim order. Granted those reasons, I am *not* satisfied that the risk of being put into civil jail in execution of the *money decree* constitutes *substantial loss* as known in Order 42 of the Civil Procedure Rules.

16. I am also fortified in that finding because there is no appeal filed against the striking out of the main suit in the lower court. The main suit was struck out way back on *14th October 2014*. Like I have stated, it is the dismissal of the main suit that contained an order for costs to the respondent. The present appeal is against the order made on *12th March 2015*. That order dismissed the appellants' motion for *review* of the order of *14th October 2014*. I am then unable to hold that failure to stay the order of *12th March 2015* will render this appeal nugatory. If the present appeal *succeeds*, and if it transpires that the respondent was *not* entitled to her costs, there is an obvious remedy. I did not hear the appellants' to say that the respondent would not be in a position to restitute. See *Kenya Shell v Benjamin Karuga* [1982-88] 1 KAR 1018.

17. The appellants have offered security for due performance of the order. The offer is found in ground (e) in the body of the motion; and, paragraph 10 of the supporting affidavit. Order 42 Rule 6 (2) (b) provides that *no* order for stay of execution shall be made *unless* 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. The appellants state that they have paid into court the sum of Kshs 48,475 as security for the interim order of stay. But as I have stated, I am not satisfied that the appellants will suffer *substantial loss*; or, that the appeal will be rendered *nugatory*. In the premises, the motion for stay is on a legal quicksand.

18. For all those reasons, I am not satisfied that the appellant has demonstrated *sufficient cause* to grant an *order of stay* pending appeal. The upshot is that the appellant's notice of motion dated 13th July 2015 is devoid of merit. It is hereby dismissed. Costs shall abide the main appeal.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 23rd day of June 2016

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. Magut for the appellants instructed by Magut & Sang Associates.

No appearance for the respondent.

Mr. J. Kemboi, Court Clerk.