



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. 19 OF 2016

(Being an appeal from a Judgment of the CM'S Court Naivasha by S. Muchungi (RM) in Civil Case No. 741 of 2009)

ANTHONY NJIRWA.....1ST APPELLANT

KENYA SCHOOL OF LAW.....2ND APPELLANT

VERSUS

MARTHA NGONYO WAITHAKA.....RESPONDENT

RULING

1. The Applicant was the unsuccessful Defendant in the Chief Magistrate's Civil Case Number 741 of 2009. Judgment was delivered on 11th March 2016. Aggrieved by the judgment, the Applicant filed on appeal to this court on 11/4/2016, and contemporaneously brought a Motion seeking stay of execution pending appeal. The application is expressed to be brought under Order 42 Rule 6 (1) of the Civil Procedure Rules, primarily.

2. Grounds on the face of the application are, *inter alia*, that:

“a) The Applicants herein are aggrieved by the judgment of the Honourable Court delivered on 11th March, 2016 and have filed an appeal thereto.

b) The Applicants were granted a 30 day stay of execution of the judgment and decree of the Honourable Court (Hon. S. Muchungi) from the date of the judgment being 11th March, 2016.

c) The Applicant will suffer substantial loss and irreparable damage if the execution of the judgment and decree is not stayed.

d) The appeal is meritorious and raised several issues for determination as is succinctly detailed in the annexed copy of the Memorandum of Appeal.

e) The Applicants are willing to offer security, as shall be directed by the Honourable Court, as condition for stay pending determination of the appeal.”

3. The grounds are further fleshed out in the supporting affidavit sworn by Professor L. O. Lumumba the C.E.O. of the Applicant. Through a Replying affidavit filed on 29/4/2016 the Respondent [Plaintiff in lower court] opposed the appeal.

4. In her affidavit the Respondent asserts her capacity to refund the decretal sum stating that she is employed as a nurse; that the Applicant has not demonstrated substantial loss; and that the application has no merit and should be dismissed.

5. She however included a deposition, seemingly in the alternative, to the effect that the Applicant should be ordered to deposit the entire decretal sum into court.

6. Parties agreed to dispose of the application by way of written submissions. The submissions for the most part reiterate the positions taken in the respective affidavits of the parties. As regards the consideration involved in the grant of stay pending appeal, parties are agreed.

7. Order 42 Rule 6 (2) of the Civil Procedure Rules provides as follows:

“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.”

8. No doubt the Applicants have come to court without delay and have offered security. The sticking point in the matter is whether substantial loss has been demonstrated. **Plat, Ag. J.A.** (as he then was) stated in **Kenya Shell Ltd -Vs- Benjamin Karuga Kibiru and Another (1986) eKLR** that:-

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms; is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondents should be kept out of their money.”

9. These principles underpin most of the decisions cited by the Applicant in support of the application. The judgment sum awarded to the Respondent in the lower court is slightly over Kshs. 300,000/= excluding costs. Without offering any grounds for the fear, the Applicant maintains that as a private individual, the Respondent may be unable to repay any sums paid over in the event that the appeal succeeds. The Respondent has asserted, also without producing any proof, that she is a nurse employed in Government facility.

10. As **Kasango J**, observed in **Kenya Orient Co. Ltd –Vs- Paul Mathenge Gichuki & Others [2014] eKLR:-**

“.....the burden of proof that the Respondent can refund the decretal sum if the appeal succeeds shifts to the Respondent the moment the Appellant states that it is unaware of [the] Respondent’s resources.”

11. The mere fact of inability to pay is not the only consideration, but also, any delay or difficulty accompanying such payment. It may well be that the Respondent in her position as a nurse may not have readily disposable income, to repay upfront, the sums in question. On the other hand, she is entitled to security for the performance of the decree upon the appeal terminating in her favour.

12. The question whether the appeal filed has a likelihood of success is not a consideration for the grant of an order for stay in the High Court. However, the court is conscious that the Applicant has an undoubted right of appeal which should not be hindered. I find the words stated in **Nduhiu Gitahi and Another –Vs- Anna Wambui Warugongo [1988] 2 KAR**, citing the decision of **Sir John Danaldson M. R. in Rosengrens –Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198** to be apt:

“We are faced with a situation where a judgment has been given. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff.....

It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal.....”

13. That too is the import of the passage cited by the Applicant in **James Wangalwa & Another –Vs- Agnes Naliaka Cheseto [2012] eKLR**. Hence, balancing the interests of the two parties before me, I would allow the prayer for stay pending appeal, on condition that the Applicant does, within 7 days, deposit the entire decrrial sum into court. Costs will abide the outcome of the appeal.

Delivered and signed at Naivasha this **29th** day of **July, 2016**.

In the presence of:

For the Appellant N/A

For the Respondent Mr. Waigwa

Court Assistant Barasa

C. W. MEOLI

JUDGE