



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 199 OF 2015

JUDITH NGALI KAMURA.....APPELLANT

VERSUS

JOHN NZOMO MUTISO.....RESPONDENT

RULING

The Application

The application before the court is a Notice of Motion dated 2nd February 2016, filed by the Appellant under the provisions of Order 42 Rule 6 of the Civil Procedure Rules. The Appellant is seeking orders that there be a stay of execution of the judgment delivered on 4th November 2015 in **Machakos CMCC No. 297 of 2007 – John Nzomo vs Judith Ngali Kamura & Another**, pending the hearing and determination of the appeal filed herein.

The Appellant's grounds are set out on the face of the Notice of Motion and in a supporting affidavit sworn on 2nd February 2016 by the Appellant. The main ground is that the Appellant is aggrieved with the lower court's judgment delivered on 4th November 2015, in which she was held liable despite documentary evidence that motor vehicle registration number KAL 243 D was exclusively owned by another party, and stands to suffer substantial loss if execution proceeds against her. The Appellant stated that her appeal has overwhelming chances of success, and the Respondent may not be able to refund her the judgment sum in the event of success of her appeal. Lastly, the Appellant averred that she is ready and willing to abide by any orders as to security as may be directed by this court. The Appellant annexed a copy of her Memorandum of Appeal.

The Response

The Respondent opposed the Appellant's application in a Replying Affidavit she swore on dated 19th February 2016, wherein it was urged that the Appellant's application is an abuse of the court process and is intended to deny him the fruits of his lawfully obtained judgment. Further, that there has been a delay in filing the application, after the 30 days of stay granted by the lower Court lapsed on 4th December 2015.

The Respondent contended that the Appellant has not fulfilled the required mandatory conditions in order to be granted the orders sought, and he averred that he is a man of means and employed as a professional driver, and thus able to refund the judgment amount should the Appellant's appeal succeed. He attached a copy of his driving licence and PSV licence in support of this averment. It was also alleged by the

Respondent that the Appellant will not suffer any irreparable loss or harm if the stay of execution of the judgment is declined.

The Issues and Determination

I have read and carefully considered the pleadings filed. The issue before the Court is whether the execution of the judgment of the trial Court should be stayed. Stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules which 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.”

For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:

(a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;

(b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and

(c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment, while at the same time balancing the rights of the parties.

The Court invited submissions on the issue of stay of execution from the parties, and L.N Ngolya & Company Advocates, the Appellant’s learned counsel, filed written submissions dated 2nd March 2016. It was urged therein that the Appellant had met the requirements of Order 42 Rule 6 of the Civil Procedure Rules. It was submitted that the loss the Appellant stands to suffer is an amount of Kshs 102, 700/= without costs and interest, and that the Respondent had not provided any evidence that he was in gainful employment. It was also submitted that the instant application was filed without unreasonable delay as the judgment being appealed from was pronounced on 4th November 2015 while the appeal was lodged on 3rd December 2015 and the current application filed on 8th February 2016.

Annie W. Thoronjo & Co Advocates, the learned counsel for the Respondent, filed written submissions dated 23rd May 2016, wherein it was contended that the cause of action herein arose out of a road traffic accident that took place on 14th September 2005, and the Respondent will be prejudiced as he has been awaiting finalization of this matter for over ten years. It was reiterated that the Respondent is in gainful

employment as a PSV driver and will be able to refund the decretal sum of Kshs 102,000/= in case the appeal succeeds. Lastly, it was submitted that the Appellant had failed to meet the mandatory requirements of Order 42 Rule 6 of the Civil Procedure Rules, and particularly on the extension of time, and the decisions in **Kenyatta vs Karenju (1984) KLR 375** and **Wasike vs Swala (1984) KLR 591** were cited in this respect.

As regards whether the stay of execution should issue, I note that the decision in the lower Court was delivered on 4th November 2015 and a 30- day stay of execution granted by the lower Court which lapsed on 4th December 2015. The current application was filed on 2nd February 2016. The delay in filing the application was therefore slightly over two months, and in the light of the stay granted by the lower court was not inordinate. The decisions cited by the Respondent deal with extension of time for filing an appeal out of time, and are inapplicable to the circumstances of this application as the Memorandum of Appeal herein was filed on 3rd December 2015 within time

On the fulfillment of the second condition, the Appellant needs to show what specific loss or prejudice she will suffer if she pays the decretal sum. The Appellant has in this respect stated that the Respondent will not be able to refund her the amount of Kshs 102,000/= in the event that her appeal succeeds. The Respondent on the other hand stated that he is in a position to do so as he is in gainful employment. I agree with the Appellant in this respect that the annexure of a driving licence is not proof of gainful employment, and there is thus a risk of the Appellant not being able to recover back the decretal sum in the event her appeal succeeds.

Lastly, on the third condition, the Appellant did affirm that that she is willing to furnish security on such terms as shall be set by the Court.

The order that I accordingly issue arising from the foregoing is that the Appellant's Notice of Motion dated 2nd February 2016 is allowed on the terms that there shall be a stay of execution of the judgment in **Machakos CMCC No. 297 of 2007 – John Nzomo vs Judith Ngali Kamura & Another**, pending the hearing and determination of this appeal, only on condition that the Appellant shall deposit in Court one half (½) of the decretal sum of Kshs 102,000/= within 30 days of the date of this ruling, failing which the stay orders herein shall stand vacated.

The costs of the Appellant's Notice of Motion shall follow the appeal.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 26th day of July, 2016.

P. NYAMWEYA

JUDGE