



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 130 OF 2016

NANCY WANJIRA. APPELLANT

VERSUS

CATHERINE NJERI WANGARI. 1ST RESPONDENT

ERICK OCHARI. 2ND RESPONDENT

RULING

1. The Applicant filed the application dated 21st June, 2016 wherein she has sought the following orders:

- a) That this application be certified urgent, service be dispensed with thereof and the same be heard ex parte in the first instance.
- b) That this honourable court be pleased to order a stay of execution of the Judgment/Decree issued by this Honourable Court on the 24th February, 2016 by the Honourable M. Chesang (Mrs.) Resident Magistrate pending the hearing and determination of this application.
- c) That this Honourable Court be pleased to stay the Execution of the Judgment/Decree obtained herein pending the full hearing and determination of the Appellant/Applicant's Nairobi Civil Appeal No. 130 of 2016.
- d) That the application be heard inter parties on such date and time as this Honourable Court may direct.
- e) That the costs of this application abide the outcome of the Appeal.

2. In Response to the application, the Respondents filed their respective replying affidavits. When the matter came up for inter parties hearing on 28th July, 2016, the counsels representing the parties entered a consent to dispose off the application by way of written submissions.

3. In her submissions, the Applicant argued that she has met the conditions required for the stay to be granted as laid out under Order 42 Rule 6. She argued that if stay is not granted, the appeal, which is arguable, will be rendered nugatory as a result of which she will suffer substantial loss. She added that, the judgment sum in itself is a substantial amount which the Respondents may not pay back if the appeal succeeds, especially given that they have not proven their financial capability. She further contended that the burden of proof squarely lies with the Respondents to show that they are in a position to refund the decretal sum. On the aspect of filing the application without unreasonable delay, she claimed that

judgment in the trial court was delivered on 24th February, 2016, the appeal was filed on 21st March, 2016 and the application was filed on 29th March, 2016. She asserted that she is willing to offer security of her share of the decretal sum which should be deposited in court as security. She concluded that she has a good and arguable appeal that has high chances of success.

4. On her part, the 1st Respondent submitted that the Applicant has not fulfilled the conditions warranting a grant of stay of execution. She argued that the applicant has not demonstrated how she would suffer substantial loss if execution is allowed. She stated that the applicant has only made general statements and has not shown how she will be prejudiced. She claimed that there is no threat of execution since she has not extracted or served the Applicant with a decree. The 1st Respondent averred that contrary to the claims by the Applicant that the sum is substantial, the same is not true as the amount is roughly Ksh.62,050/- She submitted that the appeal is a blatant attempt by the Applicant to frustrate the Decree Holder and delay the course of justice. She further claimed that she is not a person of straw and that she is capable of refunding the entire decretal sum and further it's not the duty of Respondent to furnish any evidence regarding her financial standing. She asserted that the Applicant failed to demonstrate how the appeal will be rendered nugatory or how she will suffer irreparable loss. She urged the court to grant a stay of execution on conditions that the Appellant releases at least ½ of the decretal sum awarded and that the other ½ be deposited in a joint interest earning account in joint names of the Advocates on record and finally that the Appellant prosecutes the appeal herein within the next 6 months failure to which the 1st Respondent should be allowed to list the appeal before a judge for dismissal.

5. The 2nd Respondent in his submissions argued that the applicant has not demonstrated that she will suffer substantial loss since mere financial loss to warrant a grant of orders of stay of execution. He argued that since he has already paid the half of the decretal sum, he is in a very precarious position. He further stated that the Applicant's application was filed after unreasonable delay. He added that the intended appeal does not raise weighty issues and is frivolous as a result of which it should be dismissed.

6. The Applicant is seeking for orders of stay of execution under the provisions of Order 42 Rule 6(2). This provision provides for conditions to be satisfied before a court can grant the orders. The first condition is that the court will only grant orders for stay of execution if it is satisfied that substantial loss may result. The second condition is that the applicant must have brought the application without unreasonable delay and must offer and be willing to give security that the court orders.

7. In the present case, the applicant argues that she will suffer substantial loss. To demonstrate that aspect of substantial loss, she merely claims that the appeal will be rendered nugatory. She has further demonstrated substantial loss by merely claiming that the payments of the decretal sum of Ksh.62,050/- being the half of the decretal sum payable to the 1st Respondent is a substantial amount. Courts have held over and over again that, a party claiming to suffer substantial loss ought to demonstrate what loss they would incur and such loss ought to be substantial. It is not enough for a party to claim that he or she will suffer substantial loss. I am guided by the case of **Machira t/a Machira & Co. Advocates Vs East African Standard (No. 2) 2002) KLR 63**, where the court held that: -

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay.”

8. On the issue of the appeal being rendered nugatory, the Court of Appeal in the case of **Kenya Shell Limited Vs Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982 – 1988) I KAR 1018**: held that: -

“It is usually a good rule to see if Order 41 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 stay.”

9. In the end, the applicant has not demonstrated to the satisfaction of the court that she will suffer substantial loss or that the 1st Respondent will not be in a position to refund the decretal sum if her appeal is successful. As such, the orders of stay of execution should not issue. The application is hereby dismissed with costs to the Respondents.

Dated, signed and delivered at Nairobi this 29th day of September, 2016.

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L NJUGUNA

JUDGE

In the presence

..... ***for the appellant***

..... ***for the respondents***