



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. 28 OF 2016

(Being an appeal from a Judgment of the CM'S Court Naivasha by P. Gesora (CM) in Civil Case No. 61 of 2012)

JOSIAH MUTISYA NGUU.....APPELLANT

-VERSUS-

CLEMENCE WUGANGA MWAKIDEU.....1ST RESPONDENT

PAUL MIRINGU NDUNGU.....2ND RESPONDENT

RULING

1. The Appellant herein, aggrieved by the judgment of Gesora PM in Naivasha CMCC 61 of 2012 filed an appeal to this court on 19th April 2016. Contemporaneously, he filed a Notice of Motion under Order 42 Rule 6 and 9 of the Civil Procedure Rules, inter alia, seeking stay of execution. For purposes of this ruling the relevant prayer is number 3, which seeks:

“3. A stay of execution of the Judgment and Decree in Naivasha Chief Magistrate’s Court Civil Suit No. 61 of 2012, Clemence Wuganga Mwakideli – Versus – Josiah Mutisya Nguu & 2 Others, and all consequential orders therefrom, be granted pending hearing and final determination of this Appeal.”

2. In support of the Motion, the Appellant relied on the Supporting and Further Affidavits both which were sworn by Jane Rose Gitonga a Legal Manager at First Assurance Co. Ltd the Appellant’s insurers. The gist of the said affidavits is that the lower court’s award is too high and that execution against the Appellant will be carried out unless stayed by this court. That the Appellant stands to suffer substantial loss and the appeal thereby rendered nugatory, if the decretal sum is paid over because, the Respondent has no means to repay the same should the Appellant’s appeal succeed.

3. The Respondent for her part swore a Replying Affidavit. She contends that the Appellant’s application is intended to defeat justice by delaying payment, thus denying her the rightful fruits of her judgment. Recounting her injuries, she deposes that the award of the lower court was too low. The Respondent appeals to the court to compel the payment of half of the decretal sum to her, to cater for her further treatment expenses and her personal provisions.

4. The application was argued through written submissions. Emphasising the conditions in Order 42 Rule 6 (2) of the Civil Procedure Rules, the Appellant’s advocate argued that the Respondent has admitted that she has no financial means and that she is therefore not capable of refunding the decretal sum, should the appeal be successful. Thus the Appellant will suffer substantial loss, and the results of the appeal

rendered nugatory, if he pays over the decretal sum.

5. In support of this argument the Appellant cited several authorities, including **Lochab Trasport Ltd – Vs- Teresia Wangari & Anor [2015] eKLR**; **East Africa Portland Cement Compnay Limited –Vs- Superior Homes (Kenya) Ltd [2014] eKLR**; and **Mukuma –Vs- Abuoga [1988] eKLR**.

6. The Appellant further argued on the basis of the above authorities that, it matters not whether a decree is monetary or not; substantial loss is what is prevented where there is an undoubted right of appeal. It is the Appellant's position that the present application was brought timeously and further, the Appellant pledges to comply with any conditions that the court may impose in respect of security for the future performance of the decree.

7. However, in response to the Respondents appeal for the release of part of the decretal sum, the Appellant reiterated the admitted poor financial status of the Respondent. The Appellant cited a High Court decision **Mohammed Said Chute -Vs- Sororo Gufa Ibrae [2009] eKLR** in support of the position taken. Other arguments taken up by the Appellant relate to the question whether the appeal is arguable. That is not a condition for the grant of stay of execution in this court.

8. Similarly, the gravamen of the Respondent's submissions relates to evidential matters as regards the viability of the appeal. The Respondent argues further that the application for stay has been brought in bad faith for the sole purpose of delaying the settlement of the decree. That the Respondent has no source of income and the court should direct payment of half the decretal sum and costs to the Respondent pending the outcome of the appeal.

9. Evidently, the parties, by their affidavits and submissions devoted much effort on the question whether the award in the impugned judgment was justified. While the award itself is no doubt substantial the merits of the award must await the hearing of the appeal.

10. For the purposes of the present application, the court needs to satisfy itself that the Applicant has brought his case within the consideration set out under Order 42 Rule 6 (2) (a) and (b) of the Civil Procedure Rules to the effect that:-

“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.”

11. There is no dispute that application was filed timeously. Moreover, the Applicant has already deposited a sum of Shs 500,000/= into court as ordered at the *ex parte* stage by this court. The Applicant expresses willingness to furnish further security for the performance of the decree, as may be ordered by this court.

12. It seems to me therefore that, the sole question to be answered is whether the Applicant has demonstrated that there is likelihood of suffering substantial loss if the stay sought is denied. The Applicant asserts, and the Respondent admits, that the Respondent is currently without any source of income. Thus the Applicant argues that if any monies are paid out, the same may not be recoverable if the appeal outcome is in the Applicant's favour. And therefore, the appeal would have been rendered nugatory.

13. As observed by the Court of Appeal in **East African Portland Company Limited –Vs- Superior Homes (Kenya) Limited [2014] eKLR**:-

“.....it has been said that the Court as a general rule ought to exercise its best discretion in a

way so as to prevent the appeal, if successful from being nugatory.....when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory.....” See also *Mukoma -Vs- Abuoga* [1988] KLR 645.

14. The Court of Appeal had earlier observed (**Platt, Ag. J.A.**) 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.”

15. Regarding the nature of the decree appealed from, the same court stated in the *East African Portland Cement Company Limited* case (*supra*) that:

“.....we would like to point out that once these conditions (for granting stay) are satisfied, the court will normally grant an order for stay of execution without making any distinction between money and other decrees.”

16. In view of the foregoing, it is apparent that the Respondent may not be capable of refunding the decretal sum if paid out. And subsequently, that the Applicant’s appeal would be rendered nugatory in the event that it succeeds. It is also true, as pointed out by the Respondent that the appeal filed herein primarily challenges quantum and not liability. However, it would be difficult, without the benefit of hearing parties for this court to decide on the amount of the damages awarded the sum to which the Respondent is properly entitled, and thus order payment thereof.

17. Hence the request for payment of half of the decretal sum or any lesser sum to the Respondent cannot be justified at this stage. That is why an order for furnishing security is always more appropriate in such cases. However, the court must make an order for reasonable security so as not to render the right of appeal a mirage.

18. The words stated in *Nduhiu Gitahi and Another -Vs- Anna Wambui Warugongo* [1988] 2 KAR, citing the decision of *Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited* [1984] 3 ALLER 198 are 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.....”

That too is the import of part of the court’s observations in *James Wangalwa & Another -Vs- Agnes Naliaka Cheseto* [2012] eKLR.

19. In the circumstances of this case, I will allow the application for stay of execution pending appeal, on condition that within 20 days of today’s date, the Applicant deposits a further sum of Shs. 1 million. This further sum together with the initial deposit of Shs. 500,000/= (total 1.5 million) is to be deposited into an interest earning account in a financial institution to be agreed upon by the parties’ advocates and in their joint names. In default, execution shall proceed. The costs of the application will abide by the outcome of the appeal.

Delivered and signed at Naivasha on this 12th day of October, 2016.

In the presence of:-

For the Applicant : Mr. Kinyanjui

For the Respondents : N/A

Court Clerk : Barasa

C. MEOLI

JUDGE