



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 490 OF 2016

1. RUNDA WATER LIMITED.....1ST APPELLANT

2. RUNDA ASSOCIATION.....2ND APPELLANT

VERSUS

1. TIMOTHY JOHN NICKLIN.....1ST RESPONDENT

2. ANNE CHRISTINE NICKLIN.....2ND RESPONDENT

R U L I N G

1. The Appellants herein have filed a notice of motion dated 25th July, 2016 seeking stay of execution of the judgment delivered in Milimani Commercial Court in CMCC No. 3062 pending hearing and determination of this appeal.

2. The grounds upon which the motion is premised in that the trial magistrate entered judgment to the effect that the barrier erected on the road known as Ruaka road situated within Runda Estate in Nairobi was unlawful. That during the trial, the magistrate had not heard the evidence of the parties and he refused to carry out a site visit at Runda Estate to view the barrier. That the magistrate failed to consider that the Appellants had been granted approval by the Kenya Urban Roads Authority and Nairobi County Council to erect a barrier within Runda Estate. That there is an imminent risk that if the orders sought are not granted, the Respondents will proceed to extract the decree and execute against the Appellants by having the barrier removed.

3. The 1st Respondent swore a replying affidavit on 15th August, 2016 in opposition to this motion. He contended that the deponent of the supporting affidavit never participated in the proceedings at the trial by either attending court or visiting the site hence he lacks the capacity to depone to the matters which are not within his own knowledge. That the trial magistrate had limited time to write the judgment and since she was proceeding on transfer she acted procedurally by reallocating the matter to another magistrate. That the initial site visit was conducted by the trial court at its own instance and that no application was made by the Appellant for site visit. That when the Appellants applied that Mr. Orenge does visit the site, the magistrate indicated that there was no need to visit a second time since a visit had been made by Hon. M/s Chesang. That the Appellants never appealed against the decision disallowing oral application for a second site visit. That this motion contravenes the provisions of the law since it should have been made before the trial court first. That the Appellants have not demonstrated what prejudice they stand to suffer by the removal of the barrier and that the issues of insecurity can be addressed in other ways which are within the law.

4. In his further affidavit, Sanjeev Sharma deposed that the matters in his supporting affidavit were

matters of fact and were within his knowledge by virtue of being an office bearer of the 1st Appellant. That the supporting affidavit was merely to show that the Appellants have an arguable appeal and that the Appellant would suffer prejudice if the stay orders be denied. He stated that an interim stay of execution for a period of 30 days from 30th June, 2016 had already been granted when the judgment was delivered.

5. The court has considered the submissions by both parties and the application at hand. The substantive law governing the relief of stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules. The court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:

a) The application is brought without undue delay;

b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and

c) 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.

6. The first prerequisite is not in contention since the judgment appealed against was delivered on 30th June, 2016 and this application brought on 25th July, 2016. It is apparent that there was no delay in bringing the application herein.

7. In deciding the second limb, I am guided by the Court of Appeal holding in ***Kenya Shell Limited v. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988)*** KAR 1018 where it was stated 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 jurisdiction for granting stay”

The Appellant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the core of the Appellant as the successful party in the appeal. See ***Absalom Dova vs. Tarbo Transporters [2013] eKLR*** where it was held that:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination”.

8. On the 2nd prerequisite the Applicant is required to satisfy the court that he shall suffer substantial loss if execution is not granted. According to the Appellants there is imminent risk that if the orders are not granted, the Respondents will proceed to extract the decree and execute the same by having the barrier removed. In addition, the Applicants would also be prejudiced by the removal of the barriers as the barrier and the security guards attached to it play a vital role in maintaining security within the estate.

9. On the other hand, the Respondents contend that the barriers have been erected illegally on a public road and that the Appellants have not demonstrated what prejudice they stand to suffer by the removal of the barriers. That the issue of insecurity can be addressed by the Appellants in other ways within the law and which do not infringe on the Respondents constitutional rights to freedom of movement. The Respondents have also submitted that the Respondents have not offered any security as required under Order 42 Rule 6(1).

10. The Appellants main ground in support of the application is that they have an arguable appeal with triable issues of fact. Their submissions mainly revolve around this ground and several authorities have been quoted in support of the same. In my humble view, the main grounds in support of an application for stay of execution pending appeal are as laid down under Order 42 Rule 6(1) and especially considering that the appeal herein is from subordinate court to the High Court.

11. However, the court has taken into account the submissions with regard to whether the appeal is arguable or not. At this point in time, this court should not delve into the merits of the appeal as doing so would embarrass the court that will hear the appeal. The court has not had the benefit of reading the proceedings of the lower court or judgment that was delivered by the learned magistrate but going by the submissions of the parties in that regard, I am of the considered view that even if the appeal was to succeed, the same cannot be rendered nugatory if a stay is not granted. As pointed out by the Respondent, and in event that the Appellants are successful, they will erect another barrier. This, therefore, means that they will not suffer any loss that cannot be compensated by way of damages. The balance of convenience in this case tilts more in favour of the Respondents than the Appellants.

12. In the upshot, it is the finding by this Honourable Court that the application dated 26th day of July, 2016 lacks merits and it is hereby dismissed with costs.

Dated, signed and delivered at Nairobi this 17th day of November, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... *for the Appellant*

..... *for the Respondent*