



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 275 OF 2016

EDWARD NJENGA KINYAGIA.....PLAINTIFF

V E R S U S

TIMOTHY KAMANDE.....1ST DEFENDANT

SAMUEL T. MBUTHIA.....2ND DEFENDANT

RULING

1) Timothy Kamande, the Applicant herein, took out the motion dated 6th June 2016 in which it prayed for the following orders *inter alia*:-

- 1. That this application be certified as urgent and heard exparte in the first instance;***
- 2. That the Appellant having filed an Appeal on 23rd May 2016 against the Ruling delivered on 22nd April 2016 by the Honourable Resident Magistrate G. Onsaringo in Thika CMCC No. 1124 of 2005 leave be granted for the stay pending hearing and determination of the Appeal;***
- 3. That there be a stay of execution of the decree issued herein pending the hearing and determination of the Appeal;***
- 4. That the Judgment, Ruling and Decree issued and all other consequential orders made herein be stayed;***
- 5. That costs of this application abide with the result of the Appeal or the dealt with as justice of the case shall seem to require.***

2) The motion is supported by the affidavit of Timothy Kamande when served, Edward Njenga Kinyagia the Respondent herein, filed the replying affidavit he swore to resist the motion.

When the motion came up for interparites hearing parties recorded a consent order to have the motion disposed of by written submissions. It is apparent from the above outlined prayers that the Applicant is seeking for two main orders. First is an order for leave to file an appeal out of time. Secondly, is an order for stay of execution pending appeal.

3) I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the application. I have also taken into account the rival submissions.

Before considering the prayer for stay pending appeal, let me first determine the substance of the application for leave to appeal out of time. Under the proviso to Section 79G of the Civil Procedure Act, an appeal may be admitted out of time if the Applicant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.

4) In the application before this court, the Applicant has stated that he came to know of the existence of the judgment after the time to appeal had lapsed. This averment has not been controverted by the Respondent. I find the aforesaid reason to be plausible and sufficient. Consequently I grant the applicant leave of 10 days from the date of this ruling to file an appeal out of time.

5) When determining an application for stay of execution pending appeal, the principles to be considered are well settled. It suffices to consider the principles stated under Order 42 Rule 2(2) of the Civil Procedure Rules. The first principle is that an Applicant must show that he/she would suffer substantial loss if the order for stay is denied.

Secondly, the application for stay must be filed without unreasonable delay.

Thirdly, that the court must take into account the kind of security to be provided for the due performance of the decree.

6) The first question to ask is whether or not the Applicant will suffer substantial loss. It is the submission of the applicant that if the Respondent is paid the decretal sum of Ksh.1,462,920/= the respondent will not be in a position to repay if the appeal succeeds.

7) The Respondent did not deem it fit to respond to this assertion. In my view the decretal sum appears to be a colossal amount, therefore it will be a big loss if the intended Appellant will be unable to get a refund in case the appeal is successful. In my view, that is a substantial loss.

8) The second principle to be considered is whether the application for stay of execution was timeously filed. The record shows that immediately the Applicant learnt of the existence of the judgment, he immediately instructed his advocate to file this motion. I find that the motion was timeously filed.

9) The third principle to be considered is the question for the provision of security for the due performance of the decree. In this court, the Applicant has promised to abide by any orders of this court.

10) In the end, the motion is allowed. For the avoidance of doubt the following orders are granted:-

i. The Applicant is granted leave to appeal within 10 days from the date of this ruling;

ii. The Applicant is granted an order for stay of execution of the decree pending appeal on condition that the Applicant deposits the decretal sum of Ksh.1,462,920/= in an interest earning account in the joint names of the advocates and or firms of advocates within 30 days;

iii. In default of condition (ii) above, the motion shall be deemed as having been dismissed;

iv. costs of the motion to abide the outcome of the intended appeal.

Dated, signed and delivered in open court this 20th day of December, 2016.

J. K. SERGON

JUDGE

In the presence of:

.....for the Applicant

..... for the Respondent