



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL APPEAL NO. 119 OF 2015

JANE MWONGELI KISENGE.....APPELLANT

VERSUS

WILLIAM MUTISYA MUINDI.....RESPONDENT

RULING

The Application

The application before the court for ruling is a Notice of Motion dated 22nd July 2015, filed by the Appellant under the provisions of Order 42 Rule 6(1) and Order 51 of the Civil Procedure Rules, and sections 3A and 63(e) of the Civil Procedure Act. This Court gave directions that the said application be canvassed by way of affidavits and written submissions.

The Appellant is seeking orders that there be a stay of execution of the judgment delivered 19th June, 2015 and all consequential orders arising therefrom, 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 22nd July 2015 by the Appellant. The Appellant stated that on 19th June 2015 the Senior Resident Magistrate delivered a judgment in Machakos CMCC 718 of 2014 in favour of the Respondent herein. The Appellant explained that the lower court suit was about a soft loan of Kshs. 140,000/= she was given by the Respondent, and which was to be paid back with an interest of Kshs. 60,000/, and that she duly honoured the agreement by paying a total sum of Kshs . 200,000/= thus leaving no outstanding balance. Further, that the Respondent thereafter started harassing and threatening the Appellant in an effort to extort money, which resulted in the Appellant paying a further sum of Kshs 200,000/= under duress . Therefore, that the judgement of the lower court had an error on the face of it, and is founded on insufficient evidence as it legalized an illegal contract that had been formed under duress exerted upon her by the Respondent.

P.M. Mutuku & Company Advocates, the learned counsel for the Appellant, filed written submissions on the Application dated 19th July 2016. The foregoing facts were reiterated therein, and it was urged that Respondent has unjustly enriched himself, and that the appeal stands to be defeated and rendered nugatory should stay of execution fail to be granted as prayed.

The Response

The Respondent opposed the Appellant's application in a Replying Affidavit sworn by Bernard M. Kitindio, the Respondent's Advocate, on 22nd February 2016. The deponent detailed out the facts of the lower court case, and stated that on 19/06/2015 judgment was entered against the Appellant for special damages for the sum of Kshs.130, 000/=, being an unpaid debt arising from a friendly loan advanced to her but which she failed to settle as per the terms of an agreement. Further, that at the hearing, the Appellant admitted to the existence of the said agreement made between her and the Respondent, and she also admitted to signing it. She however claimed that she signed it under duress, and it is apparent that this is a mere ploy by the Appellant to deprive the Respondent of the balance of Kshs. 130,000/= that rightfully belongs to him.

It was also averred that the Appellant herein has filed two appeals being Machakos High Court case no. 119 of 2015 and Machakos HCCA 121 of 2015, which actions amount to duplicity and the same should be struck out with costs as it amounts to delay of justice and consequently denial of justice to the Respondent .

Kitindio Musembi & Company Advocates, the Respondents' Advocate, also filed submissions dated 21st October 2016, wherein it was urged that there is no error apparent on the face of the judgment delivered by the trial court hence the appeal stands no chance of succeeding, and that the Appellant therefore stands to suffer no loss if orders sought are not granted. On the other hand that if the orders sought are granted, the Respondent stands to suffer great loss and harm by being denied enjoyment of what rightfully belongs to him.

It was also submitted that if this Court is inclined to grant the orders sought, the Appellant should be directed to pay the decretal sum to the Respondent's advocate or deposit it with the court as security. Further, that the respondent is a man of means and in the unlikely event that this appeal succeeds he will be willing to reimburse the same.

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 in terms of the right to enjoyment of a judgment by the successful litigant, and the right to appeal by the unsuccessful litigant.

As regards whether the stay of execution should issue in the instant application, I note that the decision in the lower Court was delivered on 19th June 2015 and the application herein was filed on 22nd July 2015, after a period of one month. There was thus no inordinate delay in filing the application.

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. It is my opinion that the Appellant has not pleaded any such loss and her only concern is that the Respondent will be unjustly enriched. In addition, the Appellant did not indicate that she is willing and able to furnish security for satisfaction of the decree in the event that his appeal does not succeed. I also note in this regard that the Appellant did concede that she had an agreement with the Respondent for the provision of a soft loan and her dispute is as to the terms of the said agreement.

Accordingly, the orders that commend themselves to me arising from the foregoing is that the Appellant's Notice of Motion dated 18th May 2016 is allowed on the following terms:

1. There shall be a stay of execution of the judgment delivered on 19th June 2015 in Machakos CMCC 718 of 2014 and all consequential orders arising therefrom, pending the hearing and determination of the Appellant's appeal filed herein, only on condition that the Appellant shall deposit the decretal sum in an interest earning account in the joint names of the Appellant's and Respondents' Advocates on record within 30 days of the date of this ruling, failing which the stay orders herein shall stand vacated.

2. 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 20th day of December, 2016.

P. NYAMWEYA

JUDGE