



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CIVIL APPEAL NO. 57 OF 2016

(Being an appeal from a Judgment of the SRM'S Court Engineer Civil Case No.32 of 2015)

JOHN MWANGI KIIRU..... APPELLANT

-VERSUS-

SALOME NJERI MWANGI..... RESPONDENT

RULING

1. In the celebrated decision of **Kenya Shell Ltd -Vs- Benjamin Karuga Kibiru and Another (1986) eKLR Platt, Ag. J.A.** (as he then was) emphasizing the importance of establishing substantial loss in an application for stay pending appeal stated 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.”

2. Order 42 Rule 6 (2) (formerly Order XLI Rule 4) also gives primary to timeousness application and the giving of security by the Applicant.

3. In the application before me, brought about a month since the lapse of the 30-day stay after judgment (delivered 10/8/2016), the Applicant contends that he will suffer substantial loss if stay is not granted, as the Respondent has no means of refunding the decretal sum if the appeal succeeds. The Applicant has indicated readiness to give security and points to the deposit of half of the decretal sum pursuant to the conditional order of stay by this court.

4. The Respondents argue that the application does not meet the conditions in Order 42 Rule 6 (2) of the Civil Procedure Rules that govern the grant of stay pending appeal and that the application was not lodged in a timeous manner. The parties' submissions took cue from the filed affidavit and grounds of opposition.

5. Considering the material before me, I take the following view of the matter. Order 42 Rule 6 (2) of the Civil Procedure Rules sets out the condition governing the grant of stay pending appeal as follows:

“(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.”

6. In the matter before me, I am not persuaded that the Applicant was tardy in bringing the application. The initial stay granted after judgment having lapsed on 18/9/2016, the Applicant took less than a month to bring the present application. The delay cannot be said to be inordinate.

7. Regarding the question of substantial loss, as stated in **CA No. NAI 238 of 2005 (UR) National Industrial Credit Bank Ltd –Vs- Aquinas Francis Wasike & Another** as cited by Kasango J in **Swapan Sadha Bose –Vs- Ketan S. Somaia & 3 Others [2004] eKLR** the burden shifts upon the Respondent to show ability to refund the decretal sum once the Applicant has established doubt regarding his ability. In this case, the Applicant deponed by way of affidavit regarding the inability of the Respondent to pay up decretal sum if the appeal succeeds.

8. For her part, the Respondent did not file an affidavit or in any way demonstrate the means available to her. Therefore she has not discharged the burden shifted upon her.

9. In **Nation Newspapers Limited –Vs- Peter Barasa Rabando [2007] eKLR** the Court of Appeal considering the competing right of the Applicant and Respondent stated that:

“In the circumstances, we need to consider and balance the interests of the parties, and their respective positions, and safeguard the same. The applicant intends to exercise its undoubted right of appeal, and in the event it were eventually to succeed it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the respondent has a decree in his favour, and he should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree.

In those circumstances, we are minded to grant a conditional stay. We grant a stay conditional on the applicant depositing in an interest bearing account in the joint names of counsel on record for the parties, the whole of the decretal sum. The deposit shall be made within 15 days of the date hereof, in a reputable commercial bank to be agreed upon between counsel. Upon satisfaction of that condition, execution of the decree in *Nakuru High Court Civil Case No. 505 of 1998* shall be stayed pending the determination of the intended appeal or further order of this Court. Costs of this motion shall be in the appeal.”

10. The Applicant, herein has an undoubted right of appeal and has demonstrated willingness to deposit security for the performance of the decree. That would serve to secure the Respondent’s position in the event the appeal fails. In the circumstances, I am persuaded that this is a proper case for the grant of an interim stay order pending appeal.

11. The entire decretal sum which will include sums already deposited in court will be deposited into an interest earning account in the joint names of the parties’ advocates within 21 days of today’s date, failing in which the stay orders will automatically lapse.

Delivered and signed at Naivasha on this 20th day of **December, 2016**.

In the presence of:-

Mr. Obino holding brief for Mr. Muli for the Applicant

Mr. Gichuki holding brief for Mr. Macharia for the Respondents

C/C : Barasa

C. MEOLI

JUDGE