



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL 21 OF 2014

JOHN KITONGA MUSEMBI.....APPELLANT

VERSUS

ANNE MBETE MULU.....RESPONDENT

RULING

Before me is a Notice of Motion dated 25th January 2015 filed by the applicant John Kitonga Musembi through his counsel Musyoka & Muigai Advocate. The application was brought under section 1A, 1B, 3A of the Civil Procedure Act Cap. 21 as well as Order 42 Rule 4 of the Civil Procedure Rules. Prayer r 1 and 2 have already been spent. The prayers I am required to deal with a prayer 3 and 4, which are as follows:-

1. (Spent)
2. (Spent)
3. There will be a stay of execution of the judgment and decree of the subordinate court in Mwingi SRM CC No. 34 of 2014 Hannah Mbete Mulu Vs. John Kitonga Musembi dated and delivered on 10th December 2014 pending the hearing and determination of the appeal herein.
4. That cost of this application be in the appeal.

The application has grounds on the face of the notice of Motion. The first ground is that the appellant lodged appeal against the subordinate courts judgment which was arguable with very high chances of succeeding. Secondly that substantial and irreparable loss would be occasioned to the appellant/applicant unless execution through the said judgment and decree is stayed by this court. Thirdly that the appeal would be rendered nugatory unless execution of the said judgment and decree was stayed. Fourthly the appellant was willing to abide by the terms and conditions set by the court in granting the stay. Fifthly that the application had been made without undue delay.

The application was filed with a supporting affidavit sworn by the applicant on 28th January 2015. It was deponed therein that after delivery of judgment the appellant lodged an appeal on 18th December 2014 which had overwhelming chances of success. That the appellant was ready to abide by any order on security for costs at this court would wish to make. It was further deponed that the respondent was about to execute the judgment in the lower court since the applicant had been served with a taxation notice and a bill of costs. Further that the decial amount as substantial and was likely to suffer immense hardship if he was called upon to pay the amount before the appeal was determined as the respondents means were unknown.

Before the application was served the court granted interim stay. After service the respondent through counsel Nyamu and Nyamu Advocates filed a replying affidavit it sworn on 10th march 2015

opposing the application. It was deponed in the affidavit interalia that the applicant wanted to obtain stay through the back door. That this being a monetary decree the applicant had not demonstrated irreparable loss to the standard required by law for the stay to be granted. That the applicant was deliberately trying to avert justice and deny the respondent the fruits of her judgment as he had not deposited any security in court to obtain stay. It was also deponed that the respondent was not a woman of straw having previously offered credit to the appellant.

Parties counsel by consent filed written submissions to the application. On the hearing date Mr. Mungai for the appellant highlighted the submissions in the absence of Mr. Mwalimu for the respondent. Mr. Mwalimu was said to be on his way to court. Mr. Mungai submitted that the decree was for 356,000/=. That the stay was in respect of the decree and not costs. Counsel submitted that they had filed the application within a month of the delivery of judgment and thus there was no delay in bringing the application. Counsel emphasized that the amount in question was substantial especially when interest was added. Counsel submitted that the applicant was ready to abide by any order of the court on costs. Counsel submitted further that the grant of stay of execution by the court is an exercise of judicial discretion. Since the amount was substantial stay, if granted would be a meaningful step. counsel relied on the case of *Josphine Moraa Vs. Ken Sagin and others [2010] eKLR.*

After Mr. Kinyua left, Mr. Mwalimu appeared in court and Ms. Mumbo submitted that she was holding brief for the applicant and that they had no objection to Mr. Mwalimu filing written submissions before the ruling date. The court thus ordered that counsel for the respondent do file and serve written submissions. The said submissions were filed on 7th May 2015. counsel for the respondent relied on case of *Kenya Commerical Bank Ltd Vs. Sun City Properties Limited and 5 others [2012] eKLR.* Counsel also relied on the case of Republic Vs. The commissioner for investigations and enforcement exparte Wananchi group limited [2014] eKLR.

I have considered the application and submissions on both sides. This court has discretion under Order 42 Rule 6 of the Civil Procedure Rules to grant stay of execution of judgment or decree. Rule 6 (2) is relevant and it provides as follows:-

6 (2) “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; b. such security as the court orders for the due performance of such decree or order as may ultimately be binding by him as given by the applicant”.

The matter herein relates to money decree. The judgment of the court has not been annexed to the documents filed herein. The applicant in his affidavit has not disclosed the decretory amount. He has annexed however a notice of taxation which indicates that the amount of judgment was 356,000/= together with costs. This amount has been referred to by the respondents counsel. Both sides seem to agree that the decretory amount is 356,000/= together with costs and interest.

Was the application filed without undue delay. From the record it shows that the judgment was given on 10th December 2014. This application was dated 28th January 2015. It was filed on 10th February 2015. This application was filed after the applicant became aware that taxation of the bill of costs of the respondent was intended. The notice of succession was dated 12th January 2015. In his affidavit the appellant says that judgment was delivered on 13th may 2014, and that he lodged an appeal on 18th December 2014. he does not state what delayed him from the date of judgment to the date he filed the application on 10th February 2015. He appears to have filed the appeal and waited until he was served with a notice of taxation and then came to this court to file the present application. In my view the applicant has not subscribed the requirement for filing the application without delay. He should have explained or at least attempted to explain the reason that prevented him from filing this application in the month of December or early January. His failure to do so means lack of disclosure of important information that would have assisted this court in considering his application.

The law also requires that an applicant has to demonstrate that he will suffer substantial loss if the

application is not granted. The applicant has not indicated what substantial loss he will suffer. The amount being substantial by itself is not a reason for stay of execution. The applicant should have shown what injustice he would suffer if execution was not stayed. He has not said that the magistrate for example awarded an amount which was not based on any evidence tendered on the trial or that the respondent is not capable of repaying the amount. The applicant has been economical with words. He is not coming up openly to pay what his complaint is. This court cannot formulate his complaint or his difficulties. I thus find that the applicant has not demonstrated that he will suffer substantial loss of the stay is not granted.

The third requirement is that the applicant would be required to offer security. He has not done so. In effect he also appears to be taking this court for a ride. The burden was in him to suggest that he would be willing to offer security. He does not appear to have said anything on offering security for the due performance or obligation of any party hereof as per the judgment. In this regard I fully agree with what was held by the court in the case of ***KCB Ltd Vs. Sun City Property Ltd.***

In my view, the applicant has failed to discharge his burden of supporting his application for stay of execution. I thus find no merits in the application. I dismiss the application with costs to the respondent. The interim orders herein before granted are hereby vacated.

Dated and delivered at Garissa this 25th day of May, 2015

GEORGE DULU

JUDGE