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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 10 OF 2015

(An appeal from the Judgment of the Senior Resident Magistrate, Embu in CMCC No. 263 of 2013 dated 26/2/2015)

ZACHARY N. NJERU.....APPELLANT/APPLICANT

VERSUS

FELICITAS WAMBUI GATHARA.....RESPONDENT

R U L I N G

This is a ruling in an application brought under Order 42 Rule 6 of the Civil Procedure Rules seeking for orders for stay of execution on orders issued on 26/2/2015 by Hon. A.G. MUNENE Senior Resident Magistrate in Embu CMCC No. 263 of 2013. The application is grounded in the affidavit of Zachary N. Njeru.

Messrs Mugambi Njeru and Advocate appeared for the applicant/Appellant while Messrs Eddie Njiru & Company appeared for the respondent.

The facts leading to this application is that the respondent sued the applicant in Embu CMCC No. 263 of 2013 in which case the court entered judgment in favour of the respondent for Kshs.192,400/=. The applicant has now appealed against the said judgment and in preservation of the status quo he now seeks stay of execution.

The grounds supporting the application are that the applicant has an arguable appeal and that he is threatened with execution of the judgment. He argues that if execution proceeds, his appeal will be rendered nugatory. He depones that the learned magistrate ordered his defence struck out and entered judgment against him for KShs.192,400/= which amount was disputed. He believes that his defence raised triable issues and that he ought to have been given a chance to be heard. He states that he is ready and willing to deposit any security in court or to abide by any condition the court will give.

The application was opposed by the respondent relying on her grounds of opposition filed in court on the 28/4/2015. She states that the applicant todate had failed, refused and/or neglected to comply with the conditions that were set out by the trial court for grant of stay and in particular condition 2 of the court order dated 31/7/2014. He has therefore come to court with unclean hands and is not entitled to the orders sought.

The respondent further argues that the ruling dated 26/2/2015 against which the applicant has lodged this appeal is not appealable without seeking leave of the trial court as provided by Section 75 of the Civil Procedure Act and Rule 2 and 3 of the Civil Procedure Rules. The application is brought in bad faith and lacks merit and is

calculated to delay the fair and expeditious conclusion of the suit.

The application does not meet the threshold set out under Order 42 Rule 6(2) to warrant the grant of stay. The applicant has not satisfied the court that he has suffered or is likely to suffer substantial loss. He has not offered any security for the due performance of the decree as maybe bidding by him. The respondent urges the court to dismiss the application.

The law applicable in this application is contained in Section 75 of the Act and Order 42 Rule 6.

Section 75 provides:-

1. *An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted -*
 - (a) *An order superseding an arbitration where the award has not been completed within the period allowed by the court;*
 - (b) *An order on an award stated in the form of a special case;*
 - (c) *An order modifying or correcting an award.*
 - (d) *An order staying or refusing to stay a suit where there is an agreement to refer to arbitration;*
 - (e) *An order filing or refusing to file an award in an arbitration without the intervention of the court;*
 - (f) *An order under Section 64;*
 - (g) *An order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;*
 - (h) *An order under rules from which an appeal is expressly allowed by rules.*
2. *No appeal shall lie from any order passed in an appeal under this section.*

Order 42 Rule 6(1) provides:-

No appeal or second appeal shall operate as a stay of execution of 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 out.

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; 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.*

On perusal of the documents annexed to this application, it is noted that the applicant has not included the proceedings of the lower court and the ruling delivered on 26/2/2015. Considering the nature of the application, it was important to include all the relevant documents that the court may require to determine this application. The respondent has raised issues concerning non-compliance by the applicant of some orders made by the trial court. This issue forms one of the grounds of opposition relied on by the respondent. The applicant did not file submissions in this file in answer to the issues raised by the respondent. It maybe rightly assumed that the allegations of non-compliance are true.

The applicant has annexed the order of the court made on 4/3/2015 in which the following orders were made.

1. *That the defence filed on 13th August 2014 is hereby struck out.*
2. *That judgment is hereby entered or KShs.192,400/= including KShs.83,000/=.*
3. *That costs and interests of the suit are further awarded.*

The statement of defence dated 13/8/2014 is annexed to this application.

Paragraph 3 states as follows:-

“The defendant denies the contents of paragraph 3,4, & 5 of the plaint and the particulars thereof in toto and avers that if any amount was received which is denied was only KShs.152,400/= and not Kshs.192,400/=.

Paragraph 4 states:-

“The defendant further avers that if he owes the plaintiff any amount of money which is denied, he only owe her KShs.83,000/= as he paid her KShs.70,000/= via m-pesa on 19th October 2013 M-PESA NO. EC66AQ239.”

On careful reading of the statement of defence, it appears that the applicant expressly admitted owing the respondent only KShs.83,000/=. The trial magistrate entered judgment against the applicant for KShs.192,400/= in disregard of the fact that only a part of it was admitted. The denial by the applicant that he owed the applicant all the amount claimed was a triable issue required to be tried. However the failure to annex the ruling of the trial court leaves this court with limited material to use in determining this application.

The requirement set out in Order 42 Rule 6(2) are that the applicant must show by way of credible evidence that he is likely to suffer substantial loss. Due to the fact that he had denied that he owed the respondent a substantial amount of the claim against which judgment was entered, would translate into suffering substantial loss in the event of execution.

In his supporting affidavit the applicant has stated that he is willing to deposit any security to the court or abide by any condition the court will give. This means that the applicant is ready to tender security for the judgment entered in favour of the respondent.

It is my considered opinion that the applicant has satisfied the court that he has an arguable appeal which would be rendered nugatory should the respondent execute the judgment of the trial court.

I find this application merited and it is allowed with costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF JUNE, 2015.

F. MUCHEMI

JUDGE

In the absence of the parties