



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 238 OF 2015

CYNTHIA ACHIENG MARERE.....APPELLANT

VERSUS

ATHANAS SHIBWOM ASIAVUGWA.....RESPONDENT

RULING

1. The Appellant filed the motion dated 4th June, 2015 seeking stay of execution pending hearing and determination of appeal. The application is brought under section 3A of the Civil Procedure Act and Order 22 rule 22 (1), Order 46 Rule 6(1) &(2) and Order 51 rule 1 of the Civil Procedure Rules, 2010.
2. The motion is supported by the grounds set out on the body of the application and the supporting affidavit of Stanley Mwandoe Righa who is the advocate having conduct of this matter for the Appellant. He stated that there is a real danger of execution which if undertaken, the Appellant's appeal will be rendered nugatory and shall occasion irreparable loss. He stated that the application herein has been brought without undue delay and expressed the Appellant's willingness to abide by the orders the court might impose. Mr. Mwandoe also expressed that the appeal raises triable issues.
3. In response to the application, the Respondent filed grounds of opposition dated 1st July, 2015. The grounds were that; the application is incompetent, misconceived and otherwise an abuse of court process and the Respondent shall at the first instance apply for its dismissal; that the application is meant to defeat the overriding objective of the court as per the provisions of Sections 1A and 1B of the Civil Procedure Act; that the affidavit in support of the application is incompetent and oppressive and the Respondent shall at the first instance apply for the same to be struck out; that the Appellant has not satisfied the conditions set down under Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 and in particular on substantial loss; that the Appellant has not satisfied the conditions set out in the case of **Kenya Shell Limited v. Karuga & Another (1982-1988) 1 KAR 1018**; that the Appellant has not shown how the intended appeal (if any) will be rendered nugatory if the orders sought of stay are not granted; that the Appellant has not shown that the appeal has high chances of success if at all; that the Respondent stands to suffer prejudice if this application is granted; that the application is not merited and is made in bad faith and is only meant to deny the Respondent the enjoyment of the fruits of the judgment and decree; that the appeal is only on quantum of damages as consent judgment was recorded on liability in any event and that the Respondent is not a man of straw and can repay any amounts if the appeal succeeds.
4. I have considered the depositions by parties herein and the submissions tendered thereto. The decision of **Peter Ondande t/a Spreawett Chemis v. Josephine Wangari Karanja [2006]eKLR** is a guide to the principles for dealing with an application for stay of execution pending appeal. It was held in the said case that:-

“The issue for determination by this court is whether the applicant has established a case to

enable this court grant him the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him.”

5. For this application to succeed, the Applicant must therefore satisfy the conditions set out under Order 42 Rule 6 of the Civil Procedure Rules, 2010 thus:-

- i. That the application has been brought timeously;
- ii. That if the stay orders are not granted she will suffer substantial loss; and
- iii. She must give security of costs.

6. The application for stay was filed on 8th June, 2015 while the judgment was delivered on 14th May, 2015. That is 42 days after the delivery of judgment. Clearly, this application was filed outside the prescribed time. However, in determining the issue of delay, the courts' concern is not how much time has lapsed after the prescribed time, rather whether or not even with the delay justice can be done. See **Utalii Transport Company Limited & 3 Others v. NIC Bank Limited & Another [2014] eKLR** where he stated as follows:-

“Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court’s mind on the delay, caution is advised for courts not to take the word ‘inordinate’ in its dictionary meaning, but in the sense of excessive as compared to normality.” (emphasis own)

7. Fortified by the pronouncement in **Utalii Transport Company Limited** (supra), it is my considered view that the delay herein is unlikely to prejudice the Respondent in a manner that cannot be compensated with costs.

8. On the issue of loss, it was the Appellant's statement that there is a real danger of execution which if undertaken, shall occasion the Appellant substantial loss since the appeal shall be rendered nugatory. The Respondent did not contend that it has no intention of commencing execution. If execution is undertaken then for sure the appeal hearing will be an exercise in futility and shall be rendered nugatory which shall amount to loss on the part of the Appellant. The Appellant also offered security. From the foregoing disposition, I find that the Appellant has satisfied the requirements set out under Order 42 Rule 6 of the Civil Procedure Rules.

9. In view of the foregoing, I am inclined to allow the application herein in the following terms:-

- a. I hereby grant orders staying execution of the judgment delivered on 14th May, 2014 and decree there from pending hearing and determination of the intended appeal.
- b. The Appellant is ordered to deposit the decretal sum in a joint interest earning account in the joint names of the firms of advocates of the parties herein within the next 45 days from this date failure to which execution to issue.
- c. Costs shall be in the cause.

Dated, Signed and Delivered in open court this 30th day of July, 2015.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant.

..... for the 2nd Respondent.