



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NUMBER 78 OF 2014

1. KENYA POWER & LIGHTING CO. LTD.....1ST APPLICANT

2. PHILIP MACHANDA ORINA.....2ND APPLICANT

VERSUS

1. DOROTHY WANJIRA WAINAINA & JAMES KAHORA GICHUCHE

(Suing as the legal Representative/Administrators

of the Estates of JOHN WAINAINA GICHUCHE)

2. JAMES KAHORA GICHUCHE.....RESPONDENTS

RULING

1. By a Notice of Motion dated 31st July 2014 the appellants sought an order of stay of execution of the trial courts judgment and decree pending hearing of the appeal filed herewith. The judgment is for a sum of Kshs.2,642,485/= with costs and interest.

The trial court dismissed an application for stay of execution leading to this application which was filed without delay.

2. In support of the application an affidavit was filed on the 31st July 2014 sworn by R. Nyagami Nyambane, an Advocate representing the appellants and puts forth grounds in support, among them that the appeal has good chances of success, that the appellant is ready to offer security for the due performance of the decree should the appeal not be successful, that no substantial loss shall be occasioned to the respondents. Mr. Mahinda Advocate argued the application for the appellants.

He submitted that the appellants are ready to deposit a substantial sum as security or offer a bank guarantee. It was his submission that if the sum of Kshs.1,883,700/= awarded to the 1st Respondents as administrators of the Estate of the late John Wainaina Gichuche is released to them before the appeal is determined, should it be successful they would not be able to refund the same as their capability to do so was not demonstrated and that would lead to the appellants suffering loss and damage.

3. For the 2nd Respondent, though his financial ability to refund a sum of Ksh.658,785/= was demonstrated, it was his submission that paying out the same to him would result to double payment as his insurer had also paid him thus leading to an unjust enrichment, and further that he too being a beneficiary of the estate would not be legally bound to refund the share paid to him.

Mr. Mahinda Advocate relied on several authorities, **Nakuru HCCC No.457 of 1999 – Sally Nyakio Thuo -vs- Douglass Ojwang & Another and Nakuru HCCA No.190 of 2007 Zakayo Maina Waweru -vs- Nakuru Modern Feeds Ltd (2012) e KLR.**

4. The application was opposed and a Replying Affidavit in opposition sworn by James Kahora Gichuche the 2nd Respondent and filed on the 25th August 2014. On his part, he states that he is a man of means and would have no difficulty refunding the decretal sum if the appeal succeeds.

Mr. Kisila Advocate for the Respondents urged that the trial court having denied an order of stay of execution this court ought not grant the same save if it is demonstrated that the trial court considered an irrelevant fact or material as envisaged under **order 42 Rule 6(2) Civil Procedure Code**. It is his submission that the appellant did not satisfy the court of substantial loss as no evidence by affidavit was adduced of the loss the appellant may suffer, and relied on several cases – **HCCC No.1629 of 2000 – I.T. Inamdar and 2 Others -vs- Postal Corporation of Kenya,**

Faisal Amin Janmohamed t/a Dunyia Forwarders -vs- Shamir Trading company Limited (2014) e KLR and Kenya Shell Limited -vs- Benjamin Karuga & another C.A Civil Application Number NAI 197 of 1986.

It was his submission that the conditions for an order or stay to be granted were not met by the Applicant and urged the court to dismiss the application with costs.

5. The court has considered the opposing submissions, and affidavits by both parties. In considering an application for stay of execution pending hearing of an appeal, the court has to consider

- (1) whether the applicant is likely to suffer substantial loss if stay is not granted;
- (2) whether the application was made without undue timetiously.
- (3) whether the applicant has offered sufficient security, if any, for the due performance of the decree. See **Order 42 Rule 6(2) of the Civil Procedure Rules.**

It is my finding that the application was filed without delay. The applicants have offered to deposit a substantial sum of the decretal sum into a fixed deposit account. The appellant has also demonstrated by affidavit that the 1st Respondent being the Estate may not be able to refund the substantial sum of Kshs.1,883,700/= plus costs should it be paid out to the administrators and distributed to the beneficiaries as no such evidence was shown that each of the beneficiaries was financially able, except the 2nd respondent. It is also noted that the Grant of Letters of Administration have not been confirmed and therefore no distribution can be done. As to the 2nd Respondent, he had demonstrated his financial ability to refund the sum of Kshs.658,785/= should the appeal be successful.

6. In the case **Sally Nyakio thuo -vs- Douglas Ojwang and Another (Supra)**, faced with a similar application, Justice Musinga, agreed that if the decretal sum is paid out to the estate and distributed to the beneficiaries, it would not be easy to recover the same if the appeal is successful.

In the case **Faisal Amin Jan Mohamed t/a Dunyia Forwarders (Supra)**, Justice Visram denied the applicants an order of stay of execution pending an appeal as the applicants did not demonstrate any evidence what substantial loss they would suffer under **Order 41 Rule 6 of the Civil Procedure Rules**. See also **Christopher W. Kagotho -vs- Francis Maina Kambi & Others (2014) KLR.**

7. Having stated as above, this court, in exercise of its discretion, and taking into account the circumstances of the matter as expounded above, the court finds allowing the application, albeit partially, would be in the best interest of the parties, due regard having been taken to the legal provisions of **Order 42 Rule 6, 7 of the Civil Procedure Rules, 2010.**

8. Consequently, the application dated 31st July 2014 is allowed, partially in the following terms:

1. That an order of stay of execution pending the hearing and determination of the appeal against the award of Kshs.658,785/= to the 2nd Respondent is denied. The said sum is to be paid to the 1st Respondent within 30 days of this ruling.

2. There shall be a stay of execution against the award of the trial court of Ksh.1,883,700/= plus costs awarded to the 1st Respondents pending the hearing and determination of the appeal.

3. That the sum of Kshs.1,883,700/= shall be deposited in a fixed joint account in the names of the Advocates for the parties, in a reasonably stable bank to be agreed, within 30 days of this ruling.

4. Costs of this application shall be costs in the cause.

Dated, signed and delivered in open court this 29th day of October 2015

JANET MULWA

JUDGE