



REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 84 OF 2005

JANENDRA RAICHAND SHAH

VIRCHAND MULJI MALDE

RATILAL GHELA SAMAT.....PLAINTIFFS

-Versus-

MISTRY VALJI NARAN..... DEFENDANT

RULING

1. The Plaintiffs filed this suit against the Defendant on 12th May 2005 claiming that they were the registered owners of all the piece of land known as **Mombasa/Block 811/4** (“the suit property”) between 28th June 1985 and November 2004 which they later sold to Vantage Road Transporters Limited. In the suit, the Plaintiffs claimed for mesne profits, general damages for trespass, loss of user of the suit property and interest on the same. Judgment was entered in their favour by Tuiyott, J. on 12th August 2014 for a sum of Kshs. 7,500,000/= with interest. The Defendant not being satisfied lodged a notice of appeal against the said judgment.

2. The Defendant has filed a Notice of Motion dated 26th May 2015 seeking stay of execution of the decree herein pending hearing and determination of his appeal to the Court of Appeal. The Application is supported by the Affidavit of Mistry Valji sworn on 26th May 2015. The Defendant contends that the Plaintiffs' Bill of Costs was taxed on 15th May 2015 at Kshs. 1,177,225/= and after the taxation there is now a real danger that the Plaintiffs may proceed with execution. He deposed that this application was filed timeously immediately the taxation was concluded.

3. It is the Defendant’s argument that his Appeal against the judgment/decreed has overwhelming chances of success because the suit was filed out of time. Further the Defendant contends that one of the Plaintiffs is dead and his estate has not been enjoined in this suit and therefore should execution proceed and the decretal sum paid to the Plaintiffs, the Defendant may not be able to recover the same from the Plaintiffs.

4. The Defendant continued that since Vintage Road Transporters Limited who had bought the property from the Plaintiffs had evicted him from the suit property in 2005 he suffered “incomplete” (sic) loss of his property and any execution in these proceedings will put him in great a lot of hardships. The Defendant stated that he is willing to provide any reasonable security the court may order. The Plaintiff/Respondents opposed the Application through the Replying Affidavit of Janendra R. Shah, the Plaintiff sworn on 17th July 2015. Mr Shah deposed that the Defendant's allegation that there is a good appeal with overwhelming chances of success is merely speculative because there is nothing placed

before court in terms of an appeal or a proposed appeal. He denied on behalf of his co-plaintiffs that the application was filed timeously arguing that judgment was delivered on 12th August 2014 and this application filed on 26th May 2015, a delay of over 9 months.

5. According to the Plaintiffs, the allegation that one of the Plaintiffs is dead and his estate has not been enjoined to this suit is false as the alleged dead Plaintiff is not named. It is deposed that the 2nd Plaintiff who died had the executrix of his estate made a party to this suit by consent of the parties recorded on 7th February 2012. The Plaintiffs stated further that there is no evidence adduced to prove that they are not able to refund the decretal sum in the event the appeal succeeds. In any event all the Plaintiffs are men of means with substantial resources and are able to refund the decretal sum. On provision of security, the Plaintiffs contended that the said ground is a peripheral one that is only considered after the Applicant has satisfied the other grounds of granting stay pending appeal.

6. The relief of stay of execution pending appeal is provided for by Order 42 Rule 6 of the Civil Procedure Rules, 2010 which provides as follows:

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

(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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

7. Whether to order stay of execution pending appeal or not is a matter of the court's discretion which must be exercised judicially upon defined principles of law. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. Order 42 Rule 6 of the Civil Procedure Rules gives guidelines for the court to consider in exercise of this discretion; that:

i. The application is brought without undue delay;

ii. The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and

iii. 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.

8. The Plaintiffs contend that there was delay in filing the application because it was brought nine months after judgment. The Defendant explains that there was no need to file the application before taxation because execution cannot take place before taxation of costs. I agree with the Defendant that execution was not imminent until the costs were ascertained. Since taxation took place on 15th May 2015 and the Application for stay was filed on 26th May 2015, 9 days later, I find the delay was not unreasonable.

9. Substantial loss has been described as the cornerstone of an application for stay pending appeal. In the case of **Antoine Ndiaye V African Virtual University [2015] eKLR**, Gikonyo, J. quoted with approval the Court of Appeal in **Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988)1 KAR 1018** where the Court of Appeal stated that:

“It is usually a good rule to see if Order 42 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 jurisdiction for granting stay”

10. The Applicant must show that he will be totally ruined if execution proceeds and that there are no prospects of recovering his money should the appeal succeed. I have considered the Defendant's Affidavit in support of his application. He does not state what substantial loss he will suffer other than a complaint that he is yet to recover from the loss he suffered when he was evicted by Vintage Road Transporters Limited. Further, the issue of eviction by Vintage Road Transporters Limited is a totally different issue altogether and has no bearing on the execution process herein. The Defendant has admitted so by disclosing that he sued for the wrongful eviction. In a nutshell, the Defendant has not proved what substantial loss he will suffer.

11. The subject of proof of loss was restated in the case of **MACHIRA T/A MACHIRA & CO. ADVOCATES VS. EAST AFRICAN STANDARD (NO 2) (2002) KLR 63**, it was held that:

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”

12. I would dismiss this application for the reason above. However, given that it is admitted that there is a notice of appeal lodge which under order 42 is consider as an appeal, it is prudent that the Applicant is not denied the opportunity to exercise his right of appeal. On account of an appeal filed, I do hereby grant a conditional stay of execution. The stay is granted on condition that the Applicant pays to the Respondents/Plaintiffs half of the decretal sum and half of the taxed costs within 30 days of the date of this ruling. I have put this condition because the Defendant has not denied the averment by the Plaintiffs that they are of means. Secondly, it is only fair that the Plaintiffs get to enjoy the fruits of their judgment within reasonable time.

13. On costs, I order that the the costs of this application abide the outcome of the pending appeal.

RULING DATED & DELIVERED at MOMBASA This 16th Day of December 2015

A. OMOLLO

JUDGE