



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 160 OF 2015

MALILI RANCH LTDAPPELLANT

VERSUS

BENJAMIN KYALO MUTHOKA.....RESPONDENT

RULING

The Application

The application before the court for determination is a Notice of Motion dated 14th October 2015 filed by the Appellant under the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules, and section 3A and 79G of the Civil Procedure Act. The Appellant is seeking orders that there be a stay of execution of the attachment of the its property until the appeal is heard and determined.

The Appellant's application is premised on the grounds that it property has been proclaimed by Eastern Kenya Auctioneers and is in danger of being removed for sale by public auction, and that the Appellant will suffer substantial loss if the attachment is effected as its appeal will be rendered nugatory. The Appellant in a supporting affidavit sworn on 14th October 2015 by David Ndolo Ngilai, the Chairman of Directors of the Appellant, stated that the Appellant and Respondent by consent withdrew a suit in Machakos CMCC No/ 413 of 2008, and that the costs were to be paid to the Respondent upon agreement. However, that the costs were taxed by the Court and a Certificate of Costs issued on 24th September 2015 without the knowledge of the Appellant. Further, that warrants of attachment were issued to auctioneers who visited the Appellant's offices and proclaimed its property on 25th September 2015. The Appellant is disputing the alleged exorbitant amount of costs awarded by the Court.

The Response

The Respondent opposed the Appellant's application in a replying affidavit sworn on 2nd November 2015, wherein he stated that the procedure to challenge assessment of costs is not by way of appeal but by filing a reference, and that the Appellant's Advocate were involved in the processing of costs, as the draft decree and certificate of costs were sent to his office and he did not respond to the same. The letter forwarding the said decree was attached by the Respondent, and it was averred that in the absence of any challenge by the said Advocate the only other alternative was for the decree to be approved.

The Respondent stated that the Appellant had not met the requirements of Order 42 Rule 6 of the Civil Procedure Rules, and that the Appellant should deposit the sum of Kshs 160,655/= in Court if its application is found to have merit.

The Issues and Determination

The parties canvassed the Appellant's application by way of written submissions, which they adopted wholly at the hearing of the application. The Appellant's Advocates, R.M. Matata Advocates filed submissions dated 30th November 2015, while the Respondent's Advocates, Manthi Masika & Company Advocates filed submissions dated 23rd November 2015.

I have read and carefully considered the pleadings and submissions filed. The issue to be determined is whether the attachment of the Appellant's property should be stayed pending the hearing of this appeal. Before I consider this issue, I will address the preliminary issue raised as to whether this appeal is properly before this Court on account of the appeal being from an order of assessment of costs, or whether the Appellant ought to have filed a reference or a review.

The Appellant made lengthy submissions on this issue. However, this is an issue on which this Court cannot make a finding at this stage, before it has perused the record of the trial Court to appreciate the nature of the orders that the Appellant is appealing against. The lower court record has not been brought up, and once this is done the Respondent shall be at liberty to apply for the necessary orders if need be.

Coming back to the issue before the Court, it is the position that stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules, which provides as follows:

“6.(1) 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.”

For a stay of execution to be granted, an applicant must satisfy the conditions stated in rule 6 (2) to the effect that:

(a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;

(b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and

(c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

In the present application, the main argument by the Applicant is that its appeal is arguable, and that as such the Court should grant a stay of execution without conditions. Further that the Appellant is in a position to pay costs if its appeal is not successful. The Respondent on the other hand submitted that the Appellant has not shown whether the appeal has any probability of success; it has not demonstrated that it is capable of paying the costs that were awarded by the lower court either by statement of account; and that it should deposit the sum of the costs in court to await the outcome of the appeal. Lastly, it argued by the Respondent that no irreparable harm shall be suffered by the Appellant, as the decree herein is a money decree that can be refunded if the appeal succeeds.

This Court notes as regards the fulfillment of the first condition for grant of a stay, that the ruling of the lower court being appealed from was made on 24th September 2015, and the appeal and application herein were filed on 13th October 2015. It is my view that the Appellant's application was in the circumstances brought timeously and there was no unreasonable delay in doing so.

On the fulfillment of the second condition, the Appellant did not set out in his affidavit in support what substantial loss he would suffer if stay was not granted, beyond stating that its appeal would be rendered nugatory. The requirement is for an applicant to show the specific loss that he or she is going to suffer in this regard, which was not done by the Appellant. In **Antoine Ndiaye vs African Virtual University (2015) e KLR** Gikonyo J. stated as regards this condition that the Applicant must show he will be totally ruined in relation to the Appeal if he pays over the decretal sum to the Respondent. I note in this regard that the Appellant concedes that it was agreed that it would pay the Respondent his costs, and the only contest is as to the amount.

Lastly, the Appellant did not depone that it was ready to give any security, and consequently did not meet the third requirement for stay of execution. I however note that the Respondent may not be opposed to a stay of execution, if the Appellant deposits the entire decretal amount in court Court pending the hearing and determination of the intended appeal. Accordingly, the orders that commend themselves to me are that the Appellant's Notice of Motion dated 14th October 2015 is allowed only in the following terms:

1. There shall be a stay of execution of the attachment of the Appellant's property pending the hearing and determination of this appeal on condition that Appellant shall deposit the decretal sum of Kshs 160,655/= in Court within thirty (30) days of the date of this ruling, failing which the stay orders herein shall stand vacated.
2. The costs of the Appellant's Notice of Motion shall follow the appeal.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 8th day of December, 2015.

P. NYAMWEYA

JUDGE