



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 656 OF 2012

CALISTUS ANTHONY AKELLO. APPLICANT/APPELLANT

VERSUS

JOHN GITAU NGINYA. 1ST RESPONDENT

MARY NJERU NGINYA. 2ND RESPONDENT

R U L I N G

The application before the court is the Notice of Motion by the Appellant dated 14th December, 2012. It mainly seeks a stay of execution pending the final determination of this appeal. The grounds upon which the application is based are mainly the following: -

- a. That if execution is allowed to take place and the decretal sum of Ksh.1,101,478/- is paid to the Respondents, the latter will not be able to refund the same incase the appeal succeeds, thereby occasioning a substantial loss upon the Appellant.
- b. The Appeal is meritorious and raises several legal issues for determination.
- c. The Applicant has offered three pieces of land therein particularized whose value covers the decretal sum.
- d. This application was filed timeously and without undue delay.

The application is opposed on the ground that the applicant has not demonstrated that the Respondents are made of straw as the burden of proof of that fact lay on the Applicant. Secondly, that the Appellant also failed to prove the likely substantial loss that will before the Appellant.

I have carefully perused and considered the arguments advanced from both sides. It is not in doubt that the application was filed timeously and without undue delay as the judgment appealed from was delivered on 23rd November, 2012 and the appeal was lodged on 3rd December, 2012, while this application was itself lodged on 17th December, 2012.

It is not also denied that the Applicant has offered a security in form of three pieces of land in respect of which valuation reports have been attached and have not been in any way challenged. Their value covers the decretal sum although how easily realizable they are, has not been stated, an issue the court will soon revert to herein.

Thirdly, I have examined the grounds of appeal and although they mainly challenge the lower court

findings of fact, they also somehow challenge the legal conclusions made by the lower court.

The main issue to be determined by the court, therefore, is whether or not execution, if allowed to happen, will cause to the applicant, a substantial loss and thus render the appeal nugatory.

Granting an order of stay of execution is an exercise of balancing two opposing, almost equal interests. On the one hand we have an aggrieved judgment debtor whose right to appeal is constitutional and should not be hastily and unreasonably be hampered; on the other hand we have a decree-holder who has a no-less constitutional and proprietary right in his judgment which equally should not be easily or hastily interfered with or prevented from realization. In this respect, I would like to quote Sir John Donaldson Mr. in **Rosengrens Vs Safe Deposit Centre Ltd [1984] 3All ER 198**: -

“We are faced with a situation where a judgment has been given. It is subject to appeal. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the defendant while giving no legitimate advantage to the Plaintiffs ... it is our duty to hold the right even-handedly without prejudicing the issue pending the appeal...”

It is clear from the above quote that the issue of substantial loss is cornerstone to the exercise of the courts discretion. Such exercise however, has to balance with the recognition and protection of the proprietary interest in the decree-holders interest.

As earlier stated, the applicant did not in clear terms demonstrate that the Respondents are made of straw and cannot, therefore, refund the decretal sum if paid to them. However and for the sake of justice, the court will accept the situation as alleged by the Appellant and will grant a stay on conditions which will as well protect and assure the Respondents of the decretal sum without need to start a fresh process of execution by sale of the offered security. The Appellant/Applicant has not said at any stage that he cannot immediately raise the decretal sum of Khs.1,101,478/- in cash although he offered the three pieces of land as security. The court accordingly, and in the interest of justice of both parties, has decided that the suitable security in this particular case is cash which will be put in a bank interest-earning account until the appeal is determined. At that point in time, the decree-holder if the appeal fails, will receive the ready funds; similarly the Appellant if he succeeds in the appeal will receive back his money with interest.

The end result accordingly, is that this application for stay of execution succeeds on terms as follows: -

ORDERS

- 1. There shall be a stay of execution of the decree in Nairobi Milimani CMCC No. 7931 of 2005 pending the final determination of this appeal on condition that the Applicant/Appellant shall within 60 days of this date, deposit in the Nairobi High Court KCB Saving interest-earning advocates joint account the sum of Ksh.1,101,478/-.**
- 2. In default by the Appellant of the condition in (1) above, the stay of execution order therein stated shall automatically stand exhausted and discharged.**
- 3. Costs will in the appeal.**

Dated and delivered at Nairobi this 20th day of February 2014.

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D A ONYANCHA

JUDGE