



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

CIVIL SUIT NO. 468 OF 2013

KENYA POST OFFICE SAVINGS BANK ... APPELLANT/APPLICANT

VERSUS

ANTHONY SHIVEKA ALIELO. 1ST RESPONDENT

THE HON. ATTORNEY GENERAL2ND RESPONDENT

(Being an appeal from the entire judgment and decree of the Chief Magistrate's Court at Milimani Commercial Courts at Nairobi (the Honourable Obulutsa) dated 22nd august, 2013 in CMCC no. 13495 of 2005, with Anthony Shiveka Alielo being the plaintiff and Kenya Post Office Savings Bank and the Honourable Attorney General as the defendants.)

RULING

The appellant applicant hereinafter referred to as the applicant has filed a notice of motion dated 9th September 2013 brought under Order 42 Rule 6 of the Civil Procedure Rules, 2010 and Section 1A, 1B and 3A of the Civil Procedure Act CAP 21, laws of Kenya and all enabling provisions of the law, seeking the following orders;

1. Spent.
2. That there be a temporary stay of execution of the judgment and decree of the subordinate court issued on 22nd August 2013 pending the hearing and determination of this application inter partes.
3. That there be a stay of execution of the judgment delivered on 22nd August and consequential decree pending the hearing and final determination of the appeal filed herein by the appellant against the said judgment.
4. That the costs of this application be provided for. The application is based on the following grounds;
 - i. The applicant has preferred an appeal to this honourable court being HCCA No. 468 of 2013 which appeal has high chances of success.
 - ii. The applicant will suffer substantial loss and irreparable damage if execution is levied.
 - iii. The 1st respondent may not be able to reconstitute the decretal sum if paid to him thus rendering the appeal nugatory as on his own admission the 1st respondent is not in any full time gainful employment.
 - iv. The appellant is willing and is in a position to abide by any order for the furnishing of security as may be made by this honourable court.

v. The application is made timeously without any undue delay.

The application is supported by the affidavit of Mercy N. K. Mbijwe the applicant's Company Secretary dated the 9th September 2013. She deposes as follows that judgment was entered for the 1st respondent in CMCC 13495 of 2005 and the applicant was ordered to pay a sum of Kenya Shillings Three Million Six Hundred and Twenty Three Thousand Six Hundred and Twenty (Kshs.3,623,620/=) together with costs and interest; that the applicant being aggrieved with the judgment and has instructed its advocates to appeal against the said judgment as it is against the law and the interest of justice and has filed HCCA No. 468 of 2013, which appeal has high chances of success; that it is reasonably apprehensive that in the event that stay is not granted, the 1st respondent may proceed with execution of the decree and hence further prejudice the applicant's interest before the determination of the appeal and this is evident in a letter sent to the applicant's advocates by the 1st respondent's advocates threatening to execute without further reference to the applicant; that the applicant stands to suffer substantial loss if the stay is not granted as the decree will be executed rendering the appeal nugatory; that the 1st respondent did testify at the trial in the lower court that he has no secure and permanent source of income and if he is paid the amount in execution of the decree the applicant will not be able to recover the same thus rendering the appeal nugatory; that the applicant is able and willing to abide by any such orders as to security for due performance of any decree as may ultimately be binding on it and as may be ordered by this honourable court.

The application was opposed. The 1st Respondent Antony Shiveka Alielo filed a replying affidavit dated the 18th of September 2013, he deposes as follows; that the lower court on 22nd August 2013 delivered its judgment after hearing the parties and awarded him a total of Kshs. 3,623,620/- plus costs and interest at court rates; that immediately after the delivery of the judgment the appellant's advocate applied for stay of execution of the decree of which his advocate on record opposed the same and the honourable court granted a stay for five days pending filing of a formal application for stay of execution and payment of the 1st respondent's cost of Kshs. 7500/- which had been ordered by trial court on 13th May, 2013 but the appellant has refused to pay in compliance with the court orders and in breach of the respondent's professional undertaking to pay the same on 15th May 2013; that the appellant instead of filing a formal application for stay of execution before the lower court for stay of execution and complying with payment of costs of Kshs. 7,500/- which has been outstanding since 15th May, 2013, chose to file the current application without disclosing all material facts; that the appellant/applicant have no right of audience before the honourable court as it has contemptuously failed to obey the honourable court's orders; that the appellant/applicant has filed this application with a view of delaying the 1st respondent from enjoying the fruits of the judgment by lower court; that the cause of action in the suit before the lower court relates to the events which took place in the year 2000 which is well over 13 years ago and any further delay would be prejudicial to his interests and rights; that the appellant/applicant has not come to this honourable court with clean hands and as such do not deserve the orders sought; that he has been advised by his advocates on record that the decree in this case is a money decree which can be ascertained and paid and the appellant/applicant has not demonstrated how it will suffer irreparable loss since money can be quantified and refunded should the applicant's appeal be successful; that the appellant/applicant has not demonstrated or shown how and in what way the appeal will be rendered nugatory should the stay of execution be refused; that the appellant /applicant has not shown that it has an arguable appeal on the face of the facts in this case and that the appellant/applicant has substantial means to satisfy the decretal sum.

Mr. Abuya for the applicant reiterated the contents of the applicant's affidavit and urged this court to grant prayer (c) and (d) of the application dated the 9th September, 2013. Mr. Nyabena for the respondent too reiterated the contents of the 1st respondent's affidavit and submitted further that, there are parallel proceedings in the lower court and the High Court, that if the court is inclined to grant the stay then it should be on condition to protect the respondent and that the applicant should deposit half the decretal amount in Court and the other half in a joint interest earning account. In reply Mr. Abuya stated that the respondent has failed to show the delay on their part, that they have come to court with clean hands and that there are no parallel proceedings, that should the respondent succeed he will get costs.

I have carefully considered the contents of the affidavits filed by the parties and the oral submissions made in court. There is no dispute that there is a judgment of Kshs. 3,623,620/- against the applicant in the lower court. The court in considering whether to grant a stay of execution is guided by the mandatory provisions of Order 42 Rules 6 of the Civil Procedure Rules. I note that judgment in CMCC 13945 of 2005 was delivered on the 22nd of August 2013. The appellant applicant filed its memorandum of appeal on the 30th of August 2013 and the application on the 9th of September 2013. There was no delay on the part of the applicant in filing the appeal and application for stay.

On the issue of substantial loss the applicant argues that it will suffer loss if the respondent proceeds to execute and is paid the said sum awarded as the respondent may not be able to reconstitute the decretal sum, that the respondent has no secure source of income and it will not be able to recover the sum thus the appeal will be rendered nugatory. This has been countered by the respondent by narrating the history of the case in the lower court and stating that the applicant has not shown the loss it will suffer. I do appreciate the length of time that the lower court case took, but the applicant has raised a valid point that in the event the respondent is paid the decretal sum he might not be able to pay. The respondent has not demonstrated that he would be able to refund the sum of Kshs. 3,623,620/-, indeed if he is paid and he is unable to repay the sum then the appeal will be rendered nugatory, in the event the appeal succeeds.

I have also read the memorandum of appeal filed. It raises issues on the 1st respondent liability, the award given on general damages and the respondent's entitlement on his claim for unlawful dismissal. These are just a few grounds, though I note that they will be considered by the court when the appeal will be heard. Finally the applicant is ready to abide by any orders on security that the court will give. I therefore find that the applicant has demonstrated that he is entitled to a stay of execution order pending appeal and I grant the following orders that;

- i. There will be a stay of execution of the judgment delivered on the 22nd of August 2013 and the consequential decree pending the hearing of the appeal filed.
- ii. The applicant shall deposit Kshs. One million five hundred Thousand Shillings (Kshs. 1.5 million) in court within 21 days from the date of this ruling, in default the stay order shall vacate forthwith and execution may proceed.
- iii. Once the money is deposited in court the parties through their advocates' shall transfer the money into a joint interest earning account to be opened in the names of the advocates.
- iv. The applicant shall also pay costs of Kshs. 7,500/- , being costs ordered by the lower court within 21 days from the date of this ruling.
- v. The applicant shall also ensure that the appeal is heard within the year 2014.
- vi. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 20th day of February 2014.

R.E.OUGO

JUDGE

In the presence of;

.....For the Appellant/ Applicant

.....For the Respondent

.....Court Clerk