



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL APPEAL NO. 2 OF 2013

(AN APPLICATION FOR VARIATION OF TERMS OF INTERIM STAY OF EXECUTION)

DAVID KIVUTI GATIMU.....APPELLANT

V E R S U S

SIMON KIRUI GATHUNA.....RESPONDENT

R U L I N G

1. The appeal herein is against the decree of the lower court passed on 3rd December 2012 in *Nairobi CMCC No. 984 of 2007*. In that case the Appellant was the defendant while the Respondent was the plaintiff. The Respondent had sued the Appellant for special and general damages arising out of malicious prosecution. The lower court passed judgment in favour of the Respondent; it awarded him damages. The present appeal was filed on 4th January 2013.
2. On 11th February 2013 the Appellant filed notice of motion dated 8th February 2013 seeking the main order of stay of execution of decree of the lower court pending disposal of the appeal. The application was opposed by the Respondent and has yet to be prosecuted. But upon the application conditional interim stay of execution was granted on 13th February 2013. The condition was that the Appellant deposits the decretal sum (for purposes of the order rounded off at KShs 600,000/00) in court within 14 days of the order, and in default the stay of execution to lapse. The Appellant did not meet the condition and the interim stay lapsed.
3. The Appellant then filed notice of motion dated 18th February 2013 for variation of the terms of the interim stay granted on 13th February 2013. That application as well as the main application for stay of execution (notice of motion dated 8th February 2013) were fixed for hearing on 6th November 2012. In the meantime the Respondent had proceeded to execution as he was entitled to do, there no longer being in place any stay of execution. The Appellant then filed his 3rd application by notice of motion dated 5th September 2013. He sought an order to restrain the auctioneer from attaching the goods that he had already proclaimed.

4. The present ruling concerns only the notice of **motion dated 18th February 2013** by the Appellant seeking variation of the condition for stay granted on 13th February 2013. The variation sought is that instead of depositing in court cash KShs 600,000/00, he be allowed to give a bank guarantee in that sum within 14 days of the order being made.

5. In his grounds for the application as well as in his affidavit sworn in support the Appellant has in effect argued his appeal. The present application is not the place for arguments on the merits or otherwise of the appeal; that must await hearing of the appeal itself. As of now the Respondent has a decree for money in his favour amounting to about KShs 600,000/00. The court granted interim stay of execution of that decree upon the reasonable condition that the decretal sum be deposited in court.

6. In his grounds for the application the Appellant seems to complain that he had only six days to raise the KShs 600,000/00, yet the order of 13th February 2013 clearly gave him 14 days to raise the deposit. At the same time he complains that he is in financial difficulties and that that is why he seeks to provide a bank guarantee for the KShs 600,000/00.

7. As pointed out by the learned counsel for the Respondent, bank guarantees are normally backed by necessary funds deposited with the bank. If the Respondent has KShs 600,000/00 to deposit with his bankers in order for them to guarantee for him payment for KShs 600,000/00, he might as well deposit that sum in court.

8. In his grounds for the application as well as the supporting affidavit, and also by his learned counsel's submissions, the Appellant has made the passionate plea that he has never gotten justice in his dispute with the Respondent. But I wish to reiterate here that we are not dealing with the merits of his appeal at this stage. We are dealing only with the simple issue of conditional interim stay of execution pending hearing and disposal of the main application for stay which is yet to be prosecuted.

9. Having read the supporting affidavit as well as the replying affidavit (filed on 26th February 2013), and having considered the submissions of learned counsel appearing, I find no merit in the present application and I will refuse it with costs to the Respondent. However, and in the interest of justice, I will extend time for the Appellant to deposit in court the KShs 600,000/00 **by 21 days from the date of delivery of this ruling**. In default the Respondent may proceed with the execution that he had already commenced. For the avoidance of doubt, the Appellant shall pay any auctioneer's charges already incurred. Those will be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF MARCH 2014

H.P.G. WAWERU

JUDGE

DELIVERED THIS 17TH DAY OF MARCH 2014