



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
MISC. APPLICATION NO. 270 OF 2012

ALI ISSA ADAM.....APPLICANT/RESPONDENT

VERSUS

JULIUS KINYUA NGUNJIRI..... RESPONDENT/APPLICANT

R U L I N G

This is the Notice of Motion dated 03/4/2013 filed under Order 42 Rule 6(1) & (2) of the Civil Procedure Rules, Section 1A, 1B & 3A of the Civil Procedure Act. The applicant seeks an order of stay for execution of the Ruling and Order delivered on 19/3/2013 pending the hearing and determination of the appeal to be filed in the Court of Appeal. He has cited the following grounds:-

1. ***The Respondent intends to appeal against the Ruling and Order made on 19th March 2013.***
2. ***The Respondent has already filed a Notice of Appeal before this Honourable Court.***
3. ***The said Appeal is arguable and has a high chance of success.***

The application is also supported by the applicant's own affidavit sworn on 03/4/2013 confirming the filing of a Notice of Appeal. The same has been opposed by the Respondent vide his Replying Affidavit sworn on 10/5/2013 who terms the application and appeal as a delaying tactic. He has in the affidavit given the chronology of events since his filing of the Originating Summons and issuance of the orders.

The counsel for both parties agreed to file written submissions. Mr. Mungai Kalande for the Applicant in his Notice of Motion has asked the Court to note that the Order being appealed against was made ex parte and the Court did decline to give the applicant a chance to be heard before complying with the order. This order had aggrieved him and he has appealed against it. He says his right to fair hearing was denied. He has well set down the principles to be applied when the Court is considering such an application. He referred to ***Milimani HCCC NO. 106/2002 – KENYA OIL CO. LTD VS WESTMONT (K) LTD.*** He referred to other cases and asks the Court to grant the prayer sought and not ask the applicant to deposit security.

A.A. Mazurui for the Respondent in his submissions has given a summary of the happenings in this file. He submits that the Applicant has failed to demonstrate that he will suffer substantial loss if stay of execution is not granted. He referred to the cases of:-

1. ***TERESIA KIMANI VS GITHERE INVESTMENTS LTD. HCC APPEAL NO. 944/2003.***
2. ***KENYA SHELL LTD VS KARUGA [1982-88] 1 KAR***

The happenings in this file are not disputed. Besides the notice of appeal filed in Court on 28th March 2013, there is nothing to confirm the filing of the appeal. Even the proceedings have not been typed.

For the Court to order a stay of execution there must be:-

- I. Sufficient cause (Appeal should not be rendered nugatory).
- II. Substantial loss
- III.No unreasonable delay
- IV.security.

The applicant has explained that the business talked about by the respondent is unknown to him and that is why he could not comply with the Court Order. His complaint is that the Court denied him a chance to explain all this. The record is available showing his conduct after service of the pleadings and after appearance in Court. He has a right to appeal to the Court of Appeal for that Court's opinion and this Court would not stop him from exercising that right.

The Court in **Bungoma HC MISC. APPLICATION NO. 42/2001 JAMES WANGALWA & ANOTHER VS AGNES NALIAKA CHESETO** stated thus:-

“The right of appeal is a constitutional right that actualizes the right to access to justice, protection and benefit of the law, whose essential substance, encapsulates that the appeal should not be rendered nugatory, for anything that renders the appeal nugatory impinges on the very right of appeal.”

At paragraph 10 of the supporting affidavit the applicant states:-

“That I am apprehensive should the Applicant proceed to enforce and execute the Order before the appeal is heard and determined by the Court of Appeal then the appeal will be rendered nugatory thereby causing me to suffer loss and damage if execution is allowed to proceed herein”.

He has not shown which order will be executed against him to cause him loss, rendering the appeal nugatory. The applicant has no one to blame for his misfortunes. After failing to appear in Court after being served he appeared with an advocate who had not regularized his papers. This Court gave counsel time to regularize his papers.

The next time he appeared he did not wish to explain why he could not avail the Accounts requested for by the Court. Instead he filed an application to set that order aside. Its this court's refusal to hear him before compliance with the Court order that he is appealing against.

This is a mater that has not even proceeded to hearing therefore there is no decree to be executed. The applicant is apprehensive that if the order is not stayed he may suffer loss in that the order will be executed against him. Infact there is already an application pending to have him committed for failure to comply with the order to produce the accounts as ordered by the Court. Since he is aggrieved by that order, it would be only fair and just that he gets the opinion of the Court of Appeal on this.

The result of contempt of proceeding if proved would lead to an imprisonment term hence a substantial loss. I therefore find the principle of substantial loss proved as was laid down in **TERESIA KIMANI VS GITHERE INVESTMENT LTD (SUPRA) and KENYA SHELL LTD VS KARUGA (SUPRA), KENYA OIL CO. LTD. HCCC NO. 106/2002 (Milimani)**. The applicant did not however show his readiness to deposit any securities. The application was filed without unreasonable delay.

As I have mentioned that this is an interlocutory application and its important that the appeal is fast tracked so that this Court is accordingly guided on how to proceed. I therefore allow the application for stay of execution of the decision of 19/3/2013 on condition that the applicant deposits as security for costs Shs.30,000/= within 14 days from today.

Cost in cause.

DELIVERED, DATED AND SIGNED AT EMBU THIS 4TH DAY OF APRIL 2014.

H.I. ONG'UDI

J U D G E

In the presence of:-

Ms. Wairimu for Mr. Mungai for Respondent/Applicant

Applicant

Respondent

Njue CC