



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CIVIL APPEAL NO. 53 OF 2013

ONDIKO INVESTMENT

WANDERA GEORGE BINK APPELLANTS

VERSUS

AGNES WELUGHA NZAI MENZA RESPONDENT

RULING

1. On 27th May, 2014 the applicants approached the court under certificate of urgency seeking stay of execution in the first instance exparte and thereafter pending appeal. The court granted stay of execution conditional upon the applicant depositing a sum of shs. 300,000/- within 7 days. On the date scheduled for the inter partes hearing of the application (19th June, 2014) it turned out that the appellant had not complied with the order for deposit. On the request by the applicant the court extended the period for deposit by a further seven days.
2. The application was heard on 10th July, 2014 by which date no deposit had been made. The applicant argued that the applicant would suffer substantial loss if stay was not granted as the respondent was unlikely to refund any monies paid in satisfaction of the decree. Counsel stated that the applicant was still willing to deposit the decretal sum.
3. Counsel for the respondent took issue with the fact that the applicant had also made a similar application which was dismissed in the Lower Court and argued that their recourse lay in appealing against that ruling rather than filing the present application. She argued that the duty to prove substantial loss lay with the applicant and emphasized that the applicant had failed to comply with the order for deposit. She relied on her replying affidavit. The said affidavit urges some issues which properly belong to the appeal besides advancing legal arguments. That is unacceptable in an affidavit.
4. This application is brought under Order 42 rule 6(1) of the Civil Procedure Rules which states as follows:

“Stay in case of appeal.

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.”

5. On plain reading of the rule the objections raised by the respondent to the applicant’s second application for stay, following dismissal of the first by the Lower Court, is not sustainable. The application is properly before the court.

6. As regards the merits of the application, the applicant asserted that he will suffer, or Direct Line Assurance Company whose officer swore the supporting affidavit, will suffer substantial loss as the respondent may be unable to make a refund if the appeal succeeds. No attempt was made to lay a basis for this allegation.

7. The conditions for the grant of stay pending appeal as are set to in Order 42 rule 6(2) of the Civil Procedure Rules as follows:

“(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.”

The applicant has not brought its motion within any of these conditions. Indeed even the motion itself was brought two months after the dismissal of the Lower Court application for stay. Secondly, the applicant having failed to deposit the sums ordered in the first instance cannot be taken seriously when it makes a pledge to deposit security.

The application has no merit and is dismissed with costs.

Delivered and signed at Malindi this 25th day of **July, 2014** in the presence of Miss Cheptanui for the applicant, respondent absent.

C. W. Meoli

JUDGE