



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 111 OF 2014

CHRISTINE WAMBUI PLAINTIFF

VERSUS

MANOAH YUKA KABARIA & 3 OTHERS..... DEFENDANT

RULING

By an application brought by way of Notice of Motion dated 25th June 2014, supported by the affidavit of Christine Wambui, the appellant/applicant Christine Wambui seeks from this Court orders of stay of execution of judgment and decree passed against her in Milimani Chief Magistrate's Court Civil Case No. 6370 of 2010 on 23rd December 2010 and the subsequent order declining to set aside exparte judgment and all consequential orders as ordered by Hon. A. Lorot Ag Senior Principal Magistrate on 28th February 2014.

The application herein is not opposed by the respondents who were duly served to appear in court and defend the same. The decree in question is for the sum of Ksh. 1,241,756.00 plus costs and interest. The applicant herein filed this appeal upon the Subordinate Court refusing to grant her orders seeking to set aside exparte judgment which gave rise to the decree.

She complains that she was denied an opportunity to be heard to defend the suit and she contends that she was never served with summons to enter appearance to enable her defend the claim which she denies owing the respondents. She further submits through her advocate that at the material time and place and when and where it is alleged that she was served with summons to enter appearance, she had already left employment in May 2010 hence she denies ever being served by one Dominic Muinde, the process server who swore an affidavit of service.

In addition, she pointed out that in any event, the affidavit of service does not even indicate whether she was personally known to the process server at the material time of the alleged serve, and whether does he state that she was identified to him by a person known to him or otherwise. Further, it does not state whether she was served in person or through her agent or servant.

She further submitted that she has timeously lodged her appeal herein and the application for stay and that the said appeal has overwhelming chances of success. She contends that if stay of execution of decree is not granted, she stands to suffer irreparable loss as she has been unemployed since 2010 and the security she provided was offered by her friend. She submitted that she just had a baby last month and if execution is levied against her personal household effects, she will suffer not only financial, but emotional and psychological torture.

I have carefully considered the appellant's application for stay of execution of decree in Milimani Chief Magistrate's Court Civil No. 6370 of 2010.

An order of stay of execution pending appeal will be granted where the court is satisfied that substantial loss may result to the appellant/applicant, if the order is not made, and the application for stay has been brought without delay. The applicant must also demonstrate willingness and readiness to abide by any order as to security for costs. This is what is envisaged under the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules.

The appellant/applicant herein has challenged the Subordinate Court's judgment and order refusing to set aside the judgment and decree which was passed against her without according to her an opportunity to defend the suit. She denies owing the money claimed, which was a liquidated sum. She only learnt of the existence of the suit and decree against her when she was arrested and committed to civil jail.

The applicant submits that she is not in a position to raise the decretal amount pending the hearing and determination of the appeal herein as she is unemployed, and that her appeal has overwhelming chances of success since she was merely an employee of the 4th defendant in the lower Court when the alleged transaction took place and that if stay is not granted, then her appeal shall be rendered nugatory. It is such fear, if genuine that must be weighed against the respondent's right to enjoy the fruits of the judgment given in his favour by the court below, which dismissed her application to set aside the judgment and decree passed against the appellant and three others.

The appellant has challenged the said judgment and her counsel sought to demonstrate that she has an arguable appeal. This Court has stated in numerous authorities that in considering an application for stay of execution pending appeal, the applicant is not required to prove that he or she has an arguable appeal. See **Nakuru HCC 241/98 Martha Njeri Wanyoike & 3 Others – Vs – Peter Machewa Mwangi & 5 Others.**

Under Order 42 rule 6 (2) (a) of the Civil Procedure Rules, for a court to grant a stay of execution pending appeal, it has to be satisfied that substantial loss may result to the applicant unless the order is made and that an application has been made without unreasonable delay.

The instant application was lodged in Court on 25th June, 2014 after filing the Memorandum of Appeal on 27th March 2014. The ruling being challenged was delivered on 28th February 2014. The application was therefore filed four months after the ruling was delivered. When the applicant appeared before Hon. Justice Hatari Waweru on 25th June 2014 at 2.35 pm under certificate of urgency, he declined to make any interim orders of stay and ordered her to effect service upon the respondents and return for inter partes hearing on 2nd July 2014. On the latter date, the applicant was in court having effected service and she was granted a hearing of 29th September 2014. The Court also granted her an interim order of stay of execution until the hearing date upon her depositing security in the lower court.

The claim subject matter of the decree arises from a failed transaction where the respondent is alleged to have lost his money to the appellant and others who claimed that they could import a tractor on his behalf but vanished with the money. It is a liquidated sum. The appellant claims that she was not given an opportunity to defend the suit against her as she was never served with summons to enter appearance. That is a matter to be determined on merit during the hearing of the main appeal.

In my view, an obligation to pay a decretal sum cannot amount to substantial loss. If paid, it has not been alleged that the appellant will be unable to recover it from the respondent/plaintiff in the lower court or that she will have undue difficulty in such recovery, in the event that the appeal herein succeeds. She claims that she has no money to pay as she is unemployed. This Court is not presiding over a bankruptcy case hence, I find that argument not plausible.

However, the cardinal principle of law and as enshrined in our Constitution is the right to a hearing to ventilate one's grievances before a Court of law. That right, in my view should not be curtailed. Albeit

the applicant has not explained why she did not expeditiously file her application for stay pending appeal following the ruling delivered in February 2014, I find that in view of her explanation that she is unemployed and had a baby only a month ago sufficient explanation for the delay of four months.

Under Subrule 2 (1) of Order 42 Rule 6, the applicant is obligated to furnish security as the Court may order for the due performance of such decree or order as may ultimately be binding on her.

For the reasons that the application was filed without undue delay and the appellant is willing to deposit security in Court, I allow her application and grant her stay of execution pending hearing and determination of the appeal on condition that she furnishes security equivalent to the decretal sum in Court within 14 days from the date hereof. In default, the orders of stay granted herein shall lapse.

Dated, signed and delivered at Nairobi this 23rd Day of October, 2014.

R.E. ABURILI

JUDGE