



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.504 OF 2013

FLORENCE MUYAKA APPELLANT

VERSUS

KYUNA INVESTMENTS LIMITED

BILLY AMENDI t/a BILLY AMENDI & CO ADVOCATES

**CITY COUNCIL OF NAIROBI
RESPONDENTS**

RULING

The appellant/applicant in this appeal, Florence Muyaka aka Florence Menea Muyundo is seeking for stay of execution of decree issued in Milimani CMCC 5012 of 2012 pending hearing and determination of the appeal herein. The application by way of notice of motion dated 24th September 2013 is brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and all the other enabling laws. It is supported by the affidavit sworn by the applicant Florence Muyaka.

The application seeks to stay execution of judgment of decree issued on 22nd October 2012 following judgment in default and on account that the advocates representing the appellant/applicant were not properly on record and hence, an application to set aside the said default judgment was dismissed on that ground on 9th September 2013.

The applicant contends that if the stay sought is not granted, she stands to suffer substantial loss and that the appeal as filed has a reasonable chance of success and if execution is allowed to proceed, the appeal will be rendered nugatory.

The application is supported by the affidavit of Florence Muyaka who deposes that on 17th July 2013, she filed an application in the lower court seeking for orders that

1. **The firm of Wandabwa & Co Advocates be allowed to come on record on her behalf**
2. **Stay of execution of decree issued on 7th November 2012 pending hearing and determination of the application**
3. **That judgment entered on 22nd October 2012 be set aside.**

She further deposes that the said application was dismissed on the grounds that the firm of Wandabwa &

Co Advocates which filed the application was not properly on record; there was nothing to show compliance with Order 9 Rule 9 of the Civil Procedure Rules and that the application was not served on the advocate previously on record.

Further, that the record showed that initially, the firm of Burton Isindu & Co. Advocates filed a memorandum of appearance on her behalf and subsequently the firm of Midikira & Co Advocates filed a notice of change of advocates.

Later, by a consent signed between Midikira & Co and Wandabwa & Co Advocates, the latter were allowed to come on record on her behalf. She contends that the application seeking to allow her advocate to come on record was duly served on all other advocates who were on record including Burton Isindu & Co Advocates hence, the consent entered into between Midikira & Co Advocates was valid. She reiterates that she has a good defence to the claim in the lower court and that her appeal has overwhelming chances of success and unless stay is granted, the appeal shall be rendered nugatory.

The respondent did not file any replying affidavit to oppose the application herein.

However, when the matter came before me on 18th November 2014 for hearing, Mr. Mwangi advocate for the respondent who arrived when the application was being argued sought leave of court to respond to points of law only and he was allowed to do so.

The application was orally argued, with Mr. Mmaitisi advocate representing the appellant. He submitted, reiterating the contents of the notice of motion and the supporting affidavit that the appellant was innocent and should not be punished for mistakes committed by an advocate who came on record without an appropriate order or consent and that she only realized that there was judgment against her when her goods were attached by auctioneers. Further that as she had not been served with any summons to enter appearance, the ruling dismissing her application to set aside exparte judgment on account of her advocate being improperly on record denied her an opportunity to be heard, which is a constitutional right. Further, that she stands to suffer irreparably if the stay is not granted pending appeal as she has struggled to raise the security as deposited in court. She claims she has a good defence as shown by a draft annexed and that she blames the 2nd respondent who was her advocate who misled her into believing that rates had been paid to the City Council hence she concluded the agreement with the respondent in good faith and hence the appeal will be rendered nugatory if stay is declined.

Mr. Mwangi opposed the application on behalf of the 1st respondent and submitted that the appellant/applicant had not satisfied the conditions laid down for granting the stay pending appeal. That she had not proved to the satisfaction of the court that if stay is not granted, the substances of the appeal will be defeated and that no prejudice was disclosed as likely to be suffered if stay is not granted. Further, that the applicant had been enriched unfairly by holding onto the monies received to the tune of over 50 million. He urged the court to disallow the application for stay.

Mr. Mmaitisi responded that the applicant was more than willing to have the decretal sum as deposited in court deposited into a joint earning interest account to be operated by both advocates for the parties.

I have carefully considered the appellant/applicant's application for stay of execution of decree in the lower court pending hearing and final determination of this appeal. I have also considered the submissions by both counsels for the parties to the application and examined the documents attached to the record herein and the entire record as filed touching on the dispute.

The genesis of the dispute herein is that on 10th August 2011 the applicant herein agreed to sell and did sell to the 1st respondents a parcel of land with all its developments to wit LR No. 209/7829 Kyuna Estate, Mugumo Crescent, Nairobi at an agreed purchase of Sh. 54,000,000/- which was paid in full to the applicant.

That the transaction was concluded when the applicant through her advocate Billy Amena Amendi

obtained and submitted all documents to the 1st respondent's advocates which documents included a rates clearance certificate issued by the City Council of Nairobi, that when the 1st respondent commenced processing of transfer of title, they discovered that the rates purportedly cleared by the applicant had in fact, not been cleared and that they were compelled to pay Sh. 4,519,093 to the Nairobi City Council to avoid risking losing out on the sold/purchased property valued at Sh. 60,000,000 paid out to the applicant.

The 1st respondent then sued the applicant, her advocate and the City Council of Nairobi for misrepresentation and recovery of Sh. 4,519,093 together with interest and costs of the suit.

What emerges though faintly from the scanty record herein is that judgment was entered against the applicant herein in favour of the 1st respondent and when execution commenced, she set the process of setting aside the said judgment in default and got embroiled in a legal battle involving mainly lawyers purporting to represent her and failing to comply with order 9 of the Civil Procedure Rules leading to the dismissal of her applications to set aside judgment in default hence this appeal.

That is the brief background of this matter.

The law governing stay of execution of decree pending appeal is Order 42 Rule 6 of the Civil Procedure Rules. For the success of an application under the said provisions, the applicant must satisfy or meet all the tenets or requirements of Order 42 Rule 6 of the Civil Procedure Rules. Failure to satisfy any of the tenets stipulated in that rule is fatal to the application. Accordingly, whereas the applicant may have an arguable appeal, and whereas the application may have been brought without undue delay or that the applicant is willing to deposit security for costs of the appeal, that is not all. As was held in **Carter & Sons Ltd – Vs – Deposit Protection Fund Board and 2 Others CA 291/97** that:

“a mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay.”

The court went further and stated that;

“The applicant must establish a sufficient cause; secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly, the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

In the application before me, it should be noted that the applicant has first and foremost, offered security for costs. The application was also made timeously.

Regrettably, the applicant has not demonstrated what loss if any will be suffered, leave alone substantial loss, if the stay sought will not be granted. The only way of showing or demonstrating or establishing substantial loss is by showing that if the decretal sum is paid to the 1st respondent, or that if execution is carried out, this being a monetary decree, in the event that the appeal succeeds, the respondent would not be in a position to pay or reimburse, as he/they are persons of no means. Here, no such allegations have been made against the 1st respondent by the appellant. This is the same 1st respondent that purchased the appellant's property worth Sh. 60 million and paid out at once Sh. 54,000,000/- to the 1st respondent and went further and paid the rates which were due to the 3rd respondent after it became clear that it had been misled into believing that the said rates had been cleared only to learn otherwise.

Such that albeit the appellant has offered security by depositing the whole decretal sum in court, and although she seeks this court's discretion for stay, pleading that she raised the security under very difficult conditions and by instalments, the fact that the appellant/applicant has not demonstrated any substantial loss that would ensue if stay is not granted, which condition is one of the four mandatory tenets under Order 42 Rule 6. 2 (a) and which requirement is precedent to the grant of stay of execution pending appeal, means that the court cannot grant such stay.

This court's discretion under Order 42 Rule 6 is not unfettered by the preamble to subrule 2 which

commences with the words:-

“No order for stay of execution shall be made under sub rule 1 unless ...”

Then followed by the requirements.

In other words, the court’s discretion under Order 42 Rule 6 is fettered and failure to satisfy all of the requirements therein ousts the jurisdiction of the court from granting the prayers sought. Furthermore, the circumstances of this case are such that what is claimed is what was received by the applicant.

As I conclude, I emphasize that the appellant has therefore not satisfied the court that she stands to suffer irreparably if stay sought is not granted or that the appeal herein if successful shall be rendered nugatory.

I hasten to add that from the annexures submitted by the appellant, upon receipt of the purchase price, she went on a spending spree and as part of the money was incurred in purchasing assets which she could easily dispose of to raise the decretal sum. In this case, it is the court’s view that it is the 1st respondent who stands to be prejudiced if stay is granted. They paid out over sh. 54 million to the appellant. The appellant can also be indemnified, as she alleges, by the 2nd respondent whom she alleges misled her into believing that all rates had been cleared by the 3rd respondent, which allegation in my view does not exonerate her as the seller and recipient of the purchase price from compensating the 1st respondent for the extra money incurred in paying the rates due to the 3rd respondent to facilitate a transfer of the purchased property. The upshot of all this is that I decline to grant the prayers sought in the application and direct that the decretal sum plus costs as deposited in court by the appellant herein be released to the 1st respondent forthwith. The court does not find any good reason why the amount as awarded should be kept away from the 1st respondent who paid it out to facilitate transfer of the purchased property. Should the appeal herein succeed, in any event, the 1st respondent, it has not been demonstrated that it will be unable to reimburse the same. The application is therefore dismissed.

Costs of this application shall be in the appeal.

Orders accordingly.

Dated, signed and delivered at Nairobi this 16th Day of December, 2014.

R.E. ABURILI

JUDGE