



REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 303 of 1999

DAVID WANJOHI KAMAU.....1ST PLAINTIFF
GERALD MAINA KAGWANJA.....2ND PLAINTIFF
VERSUS
JANE W. GACHIENGO.....
.....DEFENDANT

RULING

By the notice of motion dated 26/3/2012, the defendant/applicant seeks an order of stay of the decree dated 14/6/2006 pending the hearing of Civil Appeal 98/2008. The application is premised on grounds found in the body of the application and the supporting affidavit of Jane W. Gachiengo, the administrator of the estate of Gachiengo Gichuki. Seth Wathigo Advocates also filed submissions in support of the application. The application was opposed and Gerald Maina Kagwanja swore an affidavit dated 17/4/2012 and submissions were filed by the firm of Mutonyi Mbiyu and Co. Advocates on 12/9/2012

In her affidavit, the applicant deposed that after judgment was entered on 14/6/2006, she instructed her advocate to file an appeal and a notice of appeal was duly filed on 22/6/2006. She thereafter applied for copies of the decree and proceedings; that the record of appeal has been lodged and appeal registered as Civil Appeal 98/08; that the respondents have never threatened to execute and hence her belief that they were willing to await the outcome of the appeal. However, the respondents have now taken out a notice to show cause seeking payment of a substantial amount including interest and that if the execution proceeds, the appeal will be rendered nugatory and that recovery of the money from the respondent is not guaranteed; that since the appeal is ready for hearing, it is only fair that the court grants stay of the execution because the appeal raises serious issues of fact and law.

In his reply, the respondent deposed that the court in its judgment ordered that the two properties, the subject of this suit be valued by both parties, the applicant be at liberty to buy the respondent's share but if unable, the same be sold and proceeds be shared; further the applicant was to pay a sum of Kshs.940,000/- and all the rents received be shared equally amongst the parties, but that the applicant refused to comply with the court order. The respondent went ahead to value the properties in October 2008, he moved to have the party and party costs taxed on 24/9/2009, he paid further court fees of Kshs.64,000/- on 16/1/2012; that in October 2011, he learned of the applicant's attempt to dispose of the property following which he lodged a caveat on the two titles. In March 2012, the applicant applied to have the caveats removed and the Land Registrar wrote to the respondent on 7/3/2012 notifying him of the application unless there was objection. The objection was heard on 23/3/2012. It is his view that the applicant wants to defeat the judgment by disposing of the farm; that the applicant has not demonstrated that she will suffer any substantial loss unless the order of stay is granted. The respondent deposes that he is a man of means and exhibited titles to his properties worth over Kshs.10 million.

This application is brought under **Order 42 Rule 6** of the **Civil Procedure Rules** which sets the threshold for the grant of an order of stay of execution. In the exercise of its discretion under the said order the

court has to consider the following:-

1. **whether the application was made without undue delay;**
2. **whether substantial loss will result unless the order is granted;**
3. **whether the applicant has offered security for the due performance of the decree as may be binding on him;**
4. **whether there is sufficient cause for the stay.**

The applicant has urged this court that this appeal will be rendered nugatory unless the court grants the order of stay. Whether or not an appeal will be rendered nugatory is not a precondition under **Order 42 Rule 6** of the **Civil Procedure Rules**. Whether an appeal will be rendered nugatory is a precondition under **Rule 5(2)(b)** of the **Court of Appeal of Rules** and does not apply to this court. Under **Order 42 Rule 6**, one only needs to demonstrate that substantial loss will result if an order of stay is not granted.

The applicant's counsel submitted that the court ordered that the applicant had the option to purchase the disputed plot from the respondents and alternatively, the same be sold and proceeds be shared. The applicant was to pay the respondent Kshs.188,000/- and a further Kshs.940,000/- to each plaintiff. The deponent has demonstrated that he is not a man of straw and is able to repay the decretal sum in the event the appellant succeeds on appeal. The respondent exhibited copies of titles of his properties. That has not been controverted. So that even if the money was paid to the respondent, no loss will be suffered by the applicant. As respects the immovable property, the applicant was given an option of purchasing the property. She has not attempted to show that she is unable to purchase it and it would be put up for sale. The applicant is still the registered owner of the land and there are caveats registered against the land by the respondents. The respondent has demonstrated that the applicant has attempted to have the caveat removed. The question is why would she do when she has not succeeded on appeal? I do agree with the respondent's submissions that granting the applicant an order of stay may be tantamount to giving the applicant a ticket to defeat the decree of this court.

Delay: This application for stay has been brought after a period of about 6 years. So far, the applicant has not bothered to give any explanation why she never moved the court to seek stay for such a long period. **Order 42 Rule 6(1)** of the **Civil Procedure Rules** clearly states that upon the filing of appeal or for that matter a notice of appeal, does not amount to a stay. It is only after the application for execution was filed that the applicant was jolted from slumber and quietly filed this application yet she has not attempted to settle any part of the decree. The court will not aid the indolent. In this case, the applicant has been indolent and has not shown any reason why the court should exercise its discretion in her favour.

Security: The applicant has not made any offer of security. The judgment was both a money decree and for immovable property. There was no offer of a security for due performance of the decree.

Does the applicant have sufficient cause to warrant the grant of an order of stay? The applicant filed a notice of appeal in which the applicant raises six (6) grounds of appeal which challenge the court's findings. It is not for this court to sit on appeal of the judgment by a court of concurrent jurisdiction. It is however, sufficient to point out that the applicant has an automatic right of appeal and in such instance, the court only to consider whether the applicant has an arguable appeal taking care that it does not delve into considering the merits of the appeal. Having filed the notice of appeal so soon after the judgment i.e. 12 days later, it seemed the applicant was keen on challenging the decision of this court but the applicant slackened and did nothing thereafter.

This is a discretionary remedy and this court looks at all the circumstances of the case. The respondent has alleged that during the pendency of this appeal, the applicant has actually tried to sell the suit land which prompted the respondent to place a caveat on the title. These allegations were not controverted. The court cannot shut its eyes to such conduct by an applicant of a discretionary remedy. He who comes to equity must come with clean hands. It seems the applicant's hands are not exactly clean,

considering the above conduct and the delay. The court finds no good ground or sufficient cause to grant the order sought. The application is dismissed with the applicant bearing the costs.

DATED and DELIVERED this 28th day of March, 2013.

R.P.V. WENDOH
JUDGE

PRESENT:

Ms Wachira for defendant/applicant

Ms Koira for respondents

Kennedy – Court Clerk