



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Civil Appeal 241 of 2010**

**GUSII MWALIMU SACCO LIMITED ..... APPELLANT**

**AND**

**ALFRED GEKE ..... RESPONDENT**

***(Being an appeal from the judgment of the Honourable Chief Magistrate Mr. Gicheru,***

***dated 4<sup>th</sup> November, 2010 in the original Kisii CMCC No.336 of 2007)***

**RULING**

1. The appellant filed the instant Notice of Motion dated 5<sup>th</sup> February 2013 seeking an order for stay of proceedings and/or stay of execution of the partial decree in Kisii CMCC No.336 of 2007 pending the hearing and determination of this appeal. The appellant also prays that the costs of this application be provided for.
2. The application is premised on the grounds that the appellant has finally been able to file Record of Appeal; that the Respondent has initiated proceedings for execution of the initial decree and that if the said execution is allowed to proceed, the appeal herein shall be rendered nugatory. The appellant also contends that it was not possible to file the instant application any earlier because the respondent irregularly initiated proceedings in execution of the partial decree, a move that was supported by the Chief Magistrate's court on 28<sup>th</sup> January 2013. The appellant avers that it is in the interests of justice to grant this application as the respondent will not suffer any prejudice by the issuance of such orders.
3. The application is opposed vide the Replying Affidavit sworn by Alfred Geke, the respondent herein, on 19<sup>th</sup> February 2013. He avers that the applicant herein is determined to deny him the fruits of a judgment validly obtained; that the applicant has failed to supply the Respondent with pay slips and that in any event, the applicant has not been candid because while there was pending before the subordinate court a notice to show cause why the applicant should not pay the decretal amount, this application was filed. The respondent contends that this application is clearly an abuse of the court process, same lacks merit and should be dismissed with costs.
4. When the application came up for hearing on 20<sup>th</sup> February 2013, counsel agreed to expunge paragraphs 5, 6, 7, 8, 11 and 15 of the Replying Affidavit of Alfred Geke sworn on 19<sup>th</sup> February 2013. Counsel for the applicant submitted that since the lower court order does not contain a specific amount to be paid, the applicant's appeal on this ground has high chances of success. Counsel also

submitted that the appeal also has high chances of success for reason that there was no finding by the trial court as to whether the respondent had been dismissed by the applicant, despite the fact that all relevant documents pertaining to the respondent's employment with the applicant were availed to the trial court. As to the delay in filing the instant application, counsel submitted that the application could not have been filed earlier because the typed proceedings took long to finalize and further that the court file was not traced until September 2012 after the Respondent had already obtained warrants of attachment and sale of the applicant's goods. Counsel submitted that the delay was not deliberate on the part of the applicant.

5. In response to the application, it was submitted that it is not true as alleged by the applicant that quantum of damages payable was not determined by the trial court. Reference was made to annexures marked **AG-1(a)** and **AG-1(b)** being the Notice of Motion dated 7<sup>th</sup> January 2011 brought on behalf of the respondent herein and the Grounds of Objection dated 4<sup>th</sup> October 2011 filed on behalf of the appellant/applicant herein.

6. Further, counsel for Respondent submitted that the grounds upon which the instant application is premised are not what is provided for under **Order 42 rule 6 (2)** of the **Civil Procedure Rules, 2010**. Counsel submitted that the applicant has not fulfilled the following requirements of **Order 42 rule 6 (2)**. The rule provides that in order to be granted the order sought, it is imperative that:-

***(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.***

7. What counsel for the respondent was saying is that the applicant must satisfy all the 3 conditions stipulated under **Order 42 rule 6 (2)** before the court can grant the orders sought. In other words, applicant must demonstrate that it will suffer substantial loss if the order sought is not granted; that it has brought the application without unreasonable delay and that security for the due performance of the decree has been furnished. Counsel also submitted that the applicant has not complied with the above stated conditions.

8. In reply, Mr. Mogikoyo for the applicant, submitted that since there is only a partial decree, and a notice to show cause, the issue of furnishing security does not arise, and that it would be unfair on the part of this court to make an order for security to be furnished by the applicant, but that the applicant would be ready to comply with such an order if the court so orders.

9. On the question of substantial loss, counsel submitted that the grounds on the face of the certificate of urgency clearly show that the applicant is likely to suffer substantial loss if the order for stay is not granted. Concerning allegations of inordinate delay, counsel submitted that cogent reasons have been given by the applicant for the apparent delay one of the reasons being that the court file went missing. Counsel asked court to consider this application without undue regard to technicalities.

10. The court has now taken a close look at the pleadings, all the submissions and the law. The issue that arises for determination is whether the applicant has satisfied all the conditions as stipulated by **Order 42 rule 6 (2)** of the **Civil Procedure Rules** and if not whether the court should consider such failure as a mere technicality to be excused under **Article 159 (2) (d)** of the **Constitution, 2010**.

11. In my considered view, I do not think that the applicant has met the threshold for the granting of the order sought. Clearly, the arguments put forth by counsel for the applicant, save for the reply, are not arguments in support of an application for stay before this court. This court is governed by the provisions of **Order 42 rule 6 (2)** of the **Civil Procedure Rules, 2010**, in determining whether the order sought is merited. In the instant case, the applicant has not demonstrated the nature of the substantial loss that it is likely to suffer if the stay order is not granted. It is not enough to say that there will be substantial loss, it is important that the nature and extent of the loss be given. Counsel submitted that the certificate of

urgency shows the loss to be suffered. The applicant says on the face of the certificate of urgency dated 8<sup>th</sup> February 2013 that if the proceedings are not stayed, the Respondent will proceed with execution, something that has the potential of rendering the appeal nugatory. Unfortunately, there is nothing in the supporting affidavit to show that if the respondent received the amounts ordered, he would not be able to refund the same if the appeal succeeds.

12. In the circumstances, I find that the first condition has not been met. The second condition has also not been met because there are no documents such as letters written to the Deputy Registrar requesting for certified copies of proceedings and judgment, nor is there a letter from the Deputy Registrar confirming that there was a delay in having certified copies of proceedings and judgment typed, nor is there evidence showing that the file went missing until September 2012. I also find that the condition for security has not been met. It is counsel who submitted from the bar that the applicant would be willing to comply with any order this court may make as to costs.

13. A final point for consideration is whether, despite the fact that the applicant has not met the conditions for the granting of the order sought, this court should proceed to grant the same anyway pursuant to the provisions of **Article 159 (2) (d) of the Constitution**. In my considered view, what is required of the applicant under **Order 42 rule 6 (2) of the Constitution** is not a mere technicality. These are substantive requirements in view of the fact that the respondent has a validly obtained judgment. It also appears to me that the applicant has not come before this court with clean hands. When this matter was before the lower court for the NTSC, the applicant applied for adjournment to prepare for same but instead of proceeding as such, the applicant brought this application. I have reached the conclusion that the applicant lacked bona fides for bringing this application for stay of proceedings.

14. In the case of **Boniface Waweru Mbiyu –vs- Mary Njeri & another [2005] e KLR**, Hon. J.B Ojwang J (as he then was) decried discourtesy and lack of bona fides by the applicant therein in obtaining an adjournment. The court said:-

**“Firstly, legitimate questions have been raised regarding the bona fides**

**of the application, and I think, counsel for the plaintiff has not responded to these sufficiently. Even as he was seeking adjournment for something like a fortnight, to enable him to make a presentation at the Chief Magistrate’s Court, he was at the Chief Magistrate’s court, he was applying to this court to remove his case from the Chief Magistrate’s court and to have it heard in the High Court. For this clear discourtesy to the Chief Magistrate’s court, counsel’s only justification was that, after all, the High Court had unlimited jurisdiction and was duly empowered to hear this case.”**

15. I entirely agree with my learned colleague that discourtesy and mala fides on the part of litigants are matters that should be discouraged. The applicant in this case is guilty of discourtesy and mala fides and has, by such discourtesy and mala fides deprived itself of the orders sought.

16. Accordingly, the Notice of Motion dated 5<sup>th</sup> February 2013 is dismissed with costs to the Respondent.

17. It is so ordered.

**Dated and delivered at Kisii this 21<sup>st</sup> day of March, 2013**

**RUTH NEKOYE SITATI**  
**JUDGE.**

In the presence of:

Mr. G.M. Nyambati for O. Mogikoyo for Applicant/Appellant

Mr. O.M. Otieno for Bosire for Respondent

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE.**

***HCCA (KISII) NO. 241 OF 2010***