



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 36 of 2011

THOMAS CHAKUA APPELLANT/APPLICANT

AND

BRIAN ONDIEKI (minor) Next Friend

and mother **JOYCE NYAMISA RESPONDENT**

RULING

1. The application before the court is the one dated 12.10.2012 brought by the Defendant under **order 22 rule 22** and **order 42 rule (6) (1)** of the **Civil Procedure Rules**. He seeks for interim stay or execution of a decree passed in Keroka SRMCC No 124 of 2007 pending the hearing and determination of this application inter parties and also pending the hearing and determination of the appeal.
2. The application is premised upon the ground that the appellant being dissatisfied with the judgment of the trial court has appealed against the said decision and if execution is carried out the appeal will be rendered nugatory and he will suffer irreparable loss and damage.
3. The application is supported by the affidavit of the applicant, THOMAS CHAKUA who states that being dissatisfied with the decision of the Honourable court in KEROKA SRMCC No 124 of 2007 he filed an appeal which appeal has very good chances of succeeding. A copy of the Memorandum of Appeal is annexed and shown to this court. He also states that the appeal would be rendered nugatory if stay of execution is not granted and if the judgment of the lower court is allowed to be executed it would destroy the substratum of his appeal. He states that the respondent is a person of no means and should the appeal succeed he will be unable to effect a refund. He also states that he should be granted the stay pending his appeal on terms deemed just by the court. The applicant contends that this is a proper and good case for this court to grant the order sought herein as the respondent has already filed a notice to show cause why the applicant should not be committed to civil jail.
4. The application is opposed vide a replying affidavit sworn by JOYCE NYAMIISA on 18th October 2012 in which she states that the applicant brought a similar application in the lower court which application was dismissed as if did not meet the mandatory requirements.
5. She further states that in the present application the applicant is seeking orders similar to those sought in the lower court and that in any event, the applicant has not satisfied the conditions precedent to the granting of the orders sought and therefore

the court ought not to allow the same.

6. Parties agreed to canvass the application by way of written submission which I have had a chance of going through. In his submissions the applicant maintains that the appeal will be rendered nugatory if the application for stay is not granted as prayed. He further submits that the respondent herein being a minor has no means of paying back any monies that may be paid to him in case the appeal succeeds. The appeal according to him has been filed without delay. He has relied on the case of **BUTT –vs- RENT RESTRICTION TRIBUNAL CIVIL APPLICATION NO NAI 16 OF 1979** and **MAGWAGWA F.C.S LTD –VS- JASHON OKARI NYATARO KISII H.C MISC. APPLICATION NO. 149 OF 2009**. These two authorities set out the principles or guidelines upon which an application for stay of execution should be considered.

7. The applicant further submits that since his appeal has been filed, it is only fair and just that the orders sought be granted. He is also ready and willing to abide by any conditions this honourable court may impose in exercising its discretion in granting the orders sought.

8. In her submissions the respondent maintains that the applicant has failed to satisfy the conditions for the granting of orders for stay of execution as laid down under **Order 42 rule 6 (2)** of the **Civil Procedure Rules** first by failing to show or demonstrate to this court what loss if any he shall suffer if the orders sought are not granted. On this point, reliance was placed on 2 authorities:- **NGANGA KABAE – VS- KAHUNYO KIMANI H.C.C.A NO 182 of 1999 NAIROBI** and **HCCC NO 283 of 2004 NAKURU ANNE MUTHONI MWANGI –VS- VIJAY MORJARIA** amongst others. She further submits that the applicant has not offered any security at all and by so failing to offer security, he has shown his unwillingness to abide by any order the court may make in terms of security.

9. In discussing **order XLI Rule 4** of the now repealed **Civil Procedure Rules (now order 42 Rule 6)** the Court in the case of **TERESA KIMANI –VS- GITHERE INVESTMENT LTD HCCC NRB C.A 944 of 2003**.

“In an application for stay under order 41 Rule 4, the applicant will succeed if he/she demonstrates to the satisfaction of this court that substantial loss will ensue if the order of stay is not granted; that he has filed the application without undue delay and that he has offered such security as may be ordered. The onus is on the applicant to discharge the above throughout the trial. A stay order does not lie as a matter of course just because one has filed an appeal. One has to demonstrate the likelihood of suffering substantial loss if the order is refused.”

10. The applicant herein filed his Memorandum of Appeal on 25 February 2011 a month after the judgment was delivered. By 4th of October 2012 the appeal had not been admitted on the grounds that the lower court file from Keroka Law Courts had not been availed. I note however that the applicant did not raise this issue in their affidavit in support of the application or their submissions.

11. The respondent maintains that the applicant’s application has not satisfied the mandatory requirements for issuance of the stay of execution orders as prayed.

12. The brief background to this matter is that the respondent herein sued the applicant in Keroka SRMCC NO.124 of 2007, seeking compensation for injuries sustained during a road traffic accident in which the respondent suffered the following injuries:-

- a) *Fracture milieus bone.*
- b) *Fracture upper $\frac{1}{3}$ ulna bone.*
- c) *Cut on the left elbow joint.*

13. Liability was determined at 100%. The respondent had Pop applied. The doctor who examined the minor opined that the injuries suffered by the minor respondent were serious. The court awarded the sum of Kshs.300,000/= (three hundred thousand) as reasonable compensation for pain and suffering. The court also granted special damages in the sum of Kshs.2000/= plus costs and interest.

14. Being dissatisfied with the award of damages, the applicant filed his Memorandum of Appeal on 25th February 2011. The appeal is yet to be admitted on the ground that the original lower court file is yet to be obtained, though counsel for the appellant informed the court vide a letter dated 4th October 2012 that proceedings and judgment had already been typed and only awaited collection. Judgment was delivered on 2nd January 2011.

15. **Order 42 Rule 6 (2)** of the **Civil Procedure Rules** requires an applicant seeking orders for stay of execution to demonstrate to the satisfaction of the court before whom the application is placed that:-

a) *The applicant stands to suffer substantial loss if his application is refused;*

b) *The application has been brought without undue delay;*

c) *The applicant is ready and willing to offer security to cover any decree that may ultimately be passed against him should his appeal fail.*

16. The issue to be determined in this case is whether the applicant has complied with the above conditions. Upon reading the material before me, I do hold and find that the applicant has not demonstrated to the satisfaction of this court what substantial loss he would suffer if the order sought is refused. Further, he did not offer any security for the due performance of the decree should his appeal fail. The affidavit purportedly, supporting the application is also neither dated nor signed. The said affidavit is thus incompetent and is accordingly struck out. The result is that whatever is stated therein is a nullity. In essence therefore, the Notice of Motion is not supported by any affidavit as is required by the rules. The application is also found to be incompetent.

17. Thus, the applicant's failure to demonstrate real danger of suffering substantial loss if the order sought is refused coupled with the fact that the application is incompetent dictate against the granting of the order for stay. The condition for substantial loss is the cornerstone for applications seeking stay of execution and in the absence of it, the application has no legs to stand on. There was also inordinate delay on the part of the applicant in bringing this application.

18. As to whether or not the appeal herein will be rendered nugatory if the order sought is not granted, I only need to point out this principle is applicable for applications under the Court of Appeal Rules and not under **Order 42 Rule 6 (2)** of the **Civil Procedure Rules**. It is therefore a misapprehension of the law to seek to persuade this court with arguments that the appeal herein shall be rendered nugatory should the order sought be refused.

19. For the above stated reasons, the Notice of Motion dated 12th October 2012, be and is hereby dismissed with costs.

20. It is so ordered.

Dated and delivered at Kisii this 21st day of March, 2013

RUTH NEKOYE SITATI

JUDGE

In the presence of:

Mr. B.O. Masese (present) for Applicant/Appellant

Mr. Minda for Gisemba for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.

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