REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 151 of 2013

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JULIUS MATASYO...….....……...……PLAINTIFF/RESPONDENT
VERSUS
PYRETHRUM BOARD OF KENYA..…....DEFENDANT/APPLICANT

JUDGMENT

On 27/4/2012, I gave judgment in favour of the plaintiff against the defendant for a sum of Kshs.4,870,105/- plus costs and interest at 16% from 28/9/2001 till the sum was paid in full. The defendant/applicant has filed the notice of motion dated 9/8/2012 pursuant to **Order 42 Rule 6(1)** and **(2)** of the **Civil Procedure Rules 2010** and **Section 3A** of the **Civil Procedure Act**, seeking a stay of an order of stay of execution of the judgment/decree pending the hearing and determination of the appeal it has preferred against the said judgment/decree dated 27/4/2012.

Before the court can grant an order of stay under **Order 42 Rule 6, Civil Procedure Rules**, the applicant has to meet the following conditions:-

1. That the application was brought without unreasonable delay;

2. That the applicant will suffer substantial loss if an order of stay is not granted;

3. The applicant should provide security for due performance of the decree;

4. That there is a good or sufficient reason to granting stay.

The application was supported by two affidavits sworn by Isaac Mulagoli, the Managing Director of the applicant on 9/8/2012 and a further affidavit dated 24/8/2012. The applicant is dissatisfied with the decision of this court and lodged their notice of appeal on 10/5/2012 but on 8/8/2012, the respondent moved to proclaim the applicant's property. The applicant is apprehensive that attachment and sale of its property may proceed yet its appeal has high chances of success. The deponent stated that they came to court within reasonable time; the decretal sum is substantial and if paid to the respondent, he is unlikely to refund it if the appeal succeeds; that the employees of the applicant are also likely to lose their daily bread if the decretal sum were to be paid to the respondent. The applicant said that they are willing to abide by the court's directions towards depositing security in form of a bank guarantee or sufficient title deed. They exhibited a title deed of a property belonging to the applicant, Nakuru Municipality Block 11/81 worth Kshs.21,850,000/-. The deponent urged that the applicant is a State Corporation that is contributes to this Country's economy and it is only just and fair that the court accepts the alternative security.

The application was opposed and the respondents swore a replying affidavit which is not dated but was filed in court on 15/8/2012. He depones that the suit is 7 years old, the transaction having taken place over 10 years ago and he should not be denied the fruits of his judgment; that the applicant has not justified the delay in filing this application nor has it demonstrated what loss will be suffered if the decretal sum is paid to the respondent. The respondent has deposed that he is a man of means and at paragraph 9 of his affidavit, has listed the properties that he owns and annexed the relevant titles; at paragraph 10, the respondent has also listed the projects that his firm is engaged in. He depones further that it is the applicant who is in financial difficulty and there is every danger that the respondent will have nothing to recover after these protracted litigations. He is willing to have the court put a restriction on his property as security that he will restitute the decretal amount if the applicant's appeal succeeds. The respondent also observed that the applicant has not offered any security because the title annexed to the affidavit does not have a search certificate, there is no valuation report to show the value of the property and he urged the court to order some of the decretal sum to be paid to him and the balance in an interest earning account of the counsel for the respondent and applicant.

The court rendered its judgment on 27/4/2012 and the applicant did not move the court for an order of stay until 9/8/2012. That is a period of over 3 months. The applicant has not made any attempt to explain the delay of 3 months. In my view, the delay is unreasonable if indeed the applicant was aggrieved by the said judgment. The fact that the applicant filed a notice of appeal was no bar to the respondent proceeding with execution. The law is clear, that the filing of an appeal or notice of appeal does not amount to staying the decree or judgment. **Order 42 Rule 4(1)** provides:-

"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from any order but, the court appealed from may for sufficient cause order stay or execution of such decree or order …"

In this case, no stay order had been granted and the respondent had the right to move and commence the process of execution. The applicant cannot be heard to say that the respondent acted mischievously by starting the process of execution. He had a right to do so. The applicant's counsel relied on the decision of **Jetlink Express Ltd v E.A. Safari Air Express Ltd 73/2007**, where the court agreed with the ratio in **Mark Omollo Agencies & 2 Others v Daniel Kioko & Another** where J. Nyamu said:-

"In addition, proceeding with the hearing while the appeal is pending would constitute an abuse of the court process"

Unlike the **Mark Omollo** case, there was no order of stay issued in this case.

In this case the respondent has judgment which he has been waiting for 7 years and needs to realize the fruits of his judgment. On the other hand the applicant wishes to exercise his inherent right of appeal which will be rendered superfluous unless the order of stay is granted. It is the duty of this court to try and balance and safeguard the interests of both parties so that justice is not only done but also seen to be done to both parties. In this case, the applicant has failed to demonstrate any loss that will be suffered it if stay is not granted save that his employees will lose their jobs. The bottom line seems to be that which the respondent pointed out, that the applicant is to be in financial problems and is unable to meet its obligations. The respondent has demonstrated that he is not a man of straw. He has properties worth much more than the decretal sum herein. He is a practicing architect and has projects he is engaged in which will generate income.

The applicant merely alleged that they will not realize their money back if the decretal sum is paid to the respondent. The applicant submitted that the appeal will be rendered nugatory if the stay is not granted. In the High Court, the test is not whether the appeal will be rendered nugatory but whether the applicant will suffer substantial loss. In the case of **Moi University v Benard Mumo Musyoki (2006) KLR,** the court actively considered the test applicable in an application for stay before the Court of Appeal. It is whether an appeal will be rendered nugatory. In CA NRB 93/2002, **Reliance Bank (in liquidation) Ltd v Noriake Investment Ltd**, the court defined what nugatory means:-

"The point which clearly emerges from these cases is that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term 'nugatory' has to be given its full meaning. It does not only mean, worthless, futile or invalid. It also means trifling."

In my view, the term substantial loss cannot mean any of the descriptions given above **'substantial loss means'** considerable in size or value, important or worthwhile.

Like the test applicable in the Court of Appeal, whether or not substantial loss will occur really depends on the particular facts and circumstances of each case. So far, the applicant claims that it is a public body that contributes to the economy of this country and its employees will be rendered jobless if the execution proceeds. This seems to buttress the respondent's submissions that the applicant has been experiencing financial distress and is unable to meet its obligations. Bearing the circumstances of the applicant into mind and the fact that the decree is quite substantial, as it stands at about 12.5 million if the whole decretal sum were paid, the applicants operations may be crippled.

The applicant has exhibited the title of its property which it is offering as security. However, there is no search from the lands office to confirm the status of the title. Secondly, the land has not been valued. In my view, there is no security offered.

Before granting an order of stay, the court must be satisfied that there is ground or sufficient reason to do so. Earlier, I have noted that the applicant has not really explained the delay of 3 months before filing this application. The applicant has not demonstrated that if the respondent is paid the decretal sum, the applicant will suffer loss. I have, however, noted that the applicant is a public body, if asked to pay the whole decretal sum immediately, its operations may be adversely affected. In doing my best to balance the interests and rights of both parties, taking into account the period that the suit has taken, I direct that an order of stay do issue on condition that the applicant do within 30 days hereof, pay the respondent the principal sum of Kshs.4,000,000/- being 1/3 of the decretal sum, in default the stay order to lapse automatically. The balance to await the determination of the appeal. Costs to abide the appeal. It is so ordered.

DATED and DELIVERED this 15th day of March, 2013.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Tombe for the defendant/applicant

Mr. Sila for the plaintiff/respondent

Kennedy – Court Clerk