



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 585 of 2009

DR. KEVIN AGGREY..... 1ST PLAINTIFF

MARTHA NYAKAIRO WAKOLI.....2ND PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY LTD.....1ST DEFENDANT

JOSEPH MUNGAI GIKONYO T/A GARAM INVESTMENTS....2ND DEFENDANT

DOROTHY THENYA.....3RD DEFENDANT

RULING

The Plaintiffs' application before the Court is a Notice of Motion dated 9th February 2012 seeking orders that there be a stay of all proceedings herein until Civil Appeal No. 30 of 2011 pending in the Court of Appeal is heard and determined. The application is brought under sections 3, 3A and 63(e) of the Civil Procedure Act (Cap 21) and all other enabling provisions of the law.

The grounds for the application are the suit herein was dismissed on 1st October 2010 by Lady Justice Ruth Sitati, and that the Plaintiffs herein being aggrieved with the said ruling/order proffered an appeal in Nairobi Civil Appeal No. 30 of 2011 challenging the said decision which is pending. Further, that the 1st and 2nd Defendants though duly served with the copies of the said Appeal have prepared Bills of Costs which Bills are exorbitant. The Plaintiffs aver that if the said Bills are taxed the Applicants will be exposed to execution and such execution and render the Appeal nugatory.

The Plaintiffs also argue that the said pending Appeal has high chances of success hence this Honourable Court ought to stay all proceedings herein until the appeal is heard and finalized. Further, that the Defendant will not suffer any prejudice if the proceedings herein are stayed pending the hearing. The Plaintiffs attached a copy of the Memorandum of Appeal and Record of Appeal in Civil Appeal No 30 of 2011 to their supporting affidavit which they swore on 7th February 2012.

The 1st Defendant/Decree Holder opposed the application in a replying affidavit sworn on 14th February by Migui Mungai, its Manager for Litigation. The Deponent stated that Hon. Lady Justice R. N. Sitati on 1st October, 2010 dismissed the suit filed on 18th November 2009 by the Plaintiff/judgment Debtors, noting that the suit was *res judicata* and an abuse of the Court process and that the suit property had already been sold to the 2nd Defendant.

Further, that the 1st Defendant/Decree holder has a right to tax its costs, so as to know what amount the Court shall award towards the costs it has incurred in this matter. The Deponent also stated that since the Plaintiffs' filed their Notice of Appeal dated 6th October 2010, they have taken no steps to progress the hearing of the Appeal, neither have they filed their bundle of appeal. It was also averred that the Plaintiffs have not deposited into Court the amount sought by the 1st Defendant as costs in this matter.

The parties prosecuted the Plaintiffs' application by way of written submissions. The Plaintiffs' counsel in submissions dated 12th March 2013 contended that the Plaintiffs had shown that they filed a Civil Appeal No 30 of 2011 on 17th February 2011, and that they have an arguable appeal with high chances of success. Further, that unless the stay is granted the appeal if successful will be rendered nugatory as the 1st and 2nd Defendants will proceed with taxation of their Bill of Costs and process of execution, and which will also expose the Plaintiffs to substantial financial loss.

The 1st and 2nd Defendants' counsel filed written submissions dated 16th March 2013. The counsel argued that the suit herein was dismissed on 1st October 2011, and no interlocutory order can be granted as there is no existing suit. Further, that the Plaintiffs ought to have filed for a stay in the Court of Appeal under the relevant rules of that Court. The 1st and 2nd Defendant's counsel also argued that the Plaintiff's Notice of Motion is premature as the Bill of Costs has not been taxed, and that taxation does not amount to execution of the costs.

It was further argued by the 1st and 2nd Defendants that they are entitled to have their Bill of Costs taxed arising from a successful judgment in their favour. It was submitted that should the court find the said Notice of Motion to be merited, then the Plaintiffs be ordered to pay into court the total amount sought in the Bill of Costs as security for costs.

After consideration of the pleadings filed, evidence tendered and the submissions made, I note that the principles governing the stay of execution or proceedings upon appeal from a High Court decision are provided for in Order 42 Rule 6 of the Civil Procedure rules which states as follows:

“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(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.”

When will a court order a stay of proceedings? From a reading of Order 42 Rule 1 of the Civil Procedure Rules it is clear that a stay of proceedings apply when a decree and order of the court is being appealed from. It is my finding that the taxation of costs are proceedings capable of being stayed by this court. The main reason for this finding is that **Black's Law Dictionary, Ninth Edition at page 1324** defines judicial proceedings as “any court proceeding; any proceeding initiated to procure an order or decree, whether in law or in equity”. This in my opinion includes post-trial proceedings relating to execution.

I therefore with respect do not agree with the 1st and 2nd Defendant's arguments that as there is no suit

subsisting herein, there can be no interlocutory orders granted, for the reason that Order 42 Rule 1 gives this Court the power to grant orders staying proceedings even after judgment has been delivered in a suit.

The taxation proceedings sought to be stayed in the Plaintiffs' Notice of Motion are proceedings relating to execution, as judgment in the suit herein has already been given. The main issue to be decided therefore is whether the Plaintiffs have met the threshold in Order 42 Rule 6(2) for the stay of execution pending appeal. On the first condition of substantial loss resulting to the Plaintiffs I agree with the Defendants submissions that the Plaintiffs' application is premature to the extent that the loss they are likely to suffer is yet to be ascertained.

I am in this respect persuaded by the decision of Ochieng J. in **Deposit Protection Fund v Rosaline Njeri Macharia H.C.Civil Case 399 Of 2005 (Nairobi)**, where the Honourable Judge held as follows:

“To my mind the taxation of a Bill of Costs cannot occasion any loss to the person against whom it is taxed. Therefore, the issue of taxation causing substantial loss does not even arise. The only effect of taxing a Bill of Costs is the ascertainment of the quantum of costs payable by one person to another. Thereafter, the party whose costs had been ascertained could take out execution proceedings.”

Moreover the Plaintiff has not shown their willingness to deposit a security of costs which is the second condition to be met, and have also not brought any evidence to show the Defendants' inability to pay the costs in the event of their appeal succeeding.

The Plaintiff's Notice of Motion dated 9th February 2012 is accordingly hereby dismissed for the reasons given in the foregoing. The Plaintiffs shall bear the costs of the said application.

Dated, signed and delivered in open court at Nairobi this ___29th___ day of ___April___, 2013.

P. NYAMWEYA

JUDGE