



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 185 of 2010

CELTEL KENYA LIMITED 1ST APPELLANT

PAUL NJOROGE RUNGAI 2ND APPELLANT

AND

DANIEL MACHARIA RESPONDENT

(Being an appeal from the judgment and decree of the Hon. Mr. G.H. Oduor,

Resident Magistrate dated 9th February 2010 at Kisii CMCC NO.792 of 2006

RULING

1. The appeal herein was filed on 16th August 2011. It is an appeal arising from the judgment and decree of Hon. G.H. Oduor, Resident Magistrate given on 9th February 2010 in Kisii CMCC NO.792 of 2006. The appeal has been heard and determined vide the judgment of this court (Hon. R.L. Korir, J) dated 30th January 2013. In the meantime and pending appeal to the Court of Appeal the appellants filed Notice of Motion dated 12th February 2013 seeking orders:-

1. ***THAT*** this application be certified as urgent and be allowed to be heard *ex-parte* in the first instance owing to the urgency disclosed in the certificate of urgency and the affidavit in support of this application to preserve the ends of justice.
2. ***THAT*** there be an interim order of stay of execution of the decree herein and that of the subordinate court vide the Original ***Kisii Chief Magistrate's Court Civil Case No.792 of 2006*** between the parties herein while pending the hearing and determination of this application, *inter partes*.
3. ***THAT*** this Honourable Court be pleased to issue an order for stay of execution of the decree herein and that of the subordinate court vide the Original ***Kisii Chief Magistrate's Court Civil case No.792 of 2006*** between the parties herein while pending the hearing and determination of the appeal preferred by the Appellants.
4. ***THAT*** the costs of this application be provided for.

2. The application is premised on 7 grounds set out on the face of the application among them that the appellants are dissatisfied with the judgment of this honourable court delivered on 30th January 2013; that they have filed a Notice of Appeal to the Court of Appeal; that the appellants enjoyed a stay of execution while the appeal to this court was pending and that if the stay sought is not granted, the Respondent is

likely to execute the decree herein and that if execution were to issue as it seems likely, the appellants are bound to suffer substantial loss and their appeal rendered nugatory as well. The application is also premised on the supporting affidavit which was sworn by Jude Ragot, advocate, on 12th February 2013. The deponent reiterates the averments of the appellants as set out in the grounds on the face of the application.

3. The application is opposed vide the Replying Affidavit sworn by Lawrence M. Mungai on 19th February 2013. The deponent is an advocate of this court practicing as such in the firm of Lawrence Mungai & Company Advocates who have the conduct of this matter on behalf of the Respondent. The deponent avers that though judgment in this appeal was given on 30th January 2013, the decree referred to by the appellants is yet to be extracted and therefore the prayer for stay of execution of decree is misplaced since the said decree is non-existent. It is also averred that the respondent is in employment and that as such the appellant's claim that it may not be possible to recover the decretal sum from the Respondent if the appeal to the Court of Appeal succeeds is not well founded. The deponent also avers that the intended appeal, whose notice is yet to be served upon the Respondent, is frivolous and only intended to deny the Respondent the fruits of the judgment from the lower court. He wants the application dismissed with costs.

4. At the hearing of this application on 20th February 2013, I heard arguments from Mr. Ragot for the appellants/applicants and Miss Kabuthi for the Respondent. In brief, the appellants contended that since the decretal sum is colossal, being over Kshs.600,000/=, the appellants are genuinely apprehensive that if the same is paid out to the Respondent, it will be difficult for the appellants to get a refund of the money especially when the Replying Affidavit does not give details of the work the respondent does and how much money he earns. Counsel for the appellants contended that the appellant's contention that a stay order cannot be given in the absence of an extracted decree is hollow in light of **section 2 of the Civil Procedure Act, Chapter 21 Laws of Kenya. Section 2 of the Civil Procedure Act defines "decree"** in the following terms:-

"decree" means the formal expression of an adjudication, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but it does not include:-

(a) any adjudication from which an appeal lies as an appeal from an order; or

(b) any order of dismissal for default;

Provided that for the purposes of appeal, "decree" includes judgment and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up."

5. The above provision in my view, settles the question raised by the Respondent to the effect that failure to extract a formal decree by the appellants disentitles them from the discretion of this court to grant them a stay order. That position is obviously not correct.

6. Regarding the Respondent's allegation that he has not been served with the Notice of Appeal, counsel for the appellants submitted that the notice of appeal was served to the respondent together with the instant application.

7. In response, Miss Kabuthi submitted that the appellants have failed to demonstrate to this court, what substantial loss, if any they are likely to suffer if the order sought is not granted. Miss Kabuthi stated from the bar that the Respondent is a salaried employee of G4S Security. If this fact was so important to the Respondent, the Respondent himself should have sworn an affidavit to that effect. In the absence of such an averment, the court has no information regarding the Respondent's alleged employment with G4S. Finally, counsel for the Respondent contended that the intended appeal is indeed frivolous and is

intended to deny the Respondent the fruits of his judgment.

8. The instant application is expressed to be brought under **sections 1A, 1B and 3A** of the **Civil Procedure Act, Cap 21 Laws of Kenya** and **Order 42 Rule 6 (1) and (2)**, and **Order 51 Rule 1** of the **Civil Procedure Rules**. I must point out that where there are substantive provisions, namely **Order 42 rule 6**, governing applications for stay of execution before this court, it was not necessary for the appellants to rely on **Sections 1A, 1B and 3A** of the **Civil Procedure Act**. Those provisions apply in the absence of specific provisions for any intended cause of action/application.

9. Under **Order 42 Rule 6(2) of the Civil Procedure Rules**, the appellants herein must satisfy the court as to the following before the order sought is granted:-

a) *that substantial loss may result to them unless the order is made; and*

b) *that the application has been made without unreasonable delay; and*

c) *that such security as the court orders for the due performance of such decree or order as may ultimately be binding on them has been given by the appellants.*

10. It is to be noted that all the three conditions, and not just one or two, have to be satisfied. Secondly, it is to be noted that money decrees are not usually the subject of stay orders, but where the amount involved is huge, and the means of the Respondent are unknown, it can be inferred that the applicant will suffer substantial loss since the Respondent may not be able to refund the amount in case the appeal succeeds.

11. In the instant case, the appellants are genuinely apprehensive that the respondent whose job outfit and salary are unknown, will be unable to refund the decretal sum should the appeal to the Court of Appeal succeed. I am also satisfied that this application was made without unreasonable delay. Judgment was delivered on 30th January 2013 and on 12th February 2013, which was less than two weeks, the appellants filed the application. At this stage, it is not for this court to determine whether or not the intended appeal is frivolous. That is a matter for the Court of Appeal.

12. On the issue of security, the appellants are willing to have a conditional stay on terms similar to those imposed by the subordinate court which were that the decretal sum be deposited in a joint interest earning account in the names of the Advocates of the parties as security in the event that the appeal is not successful. The decretal amount is still in the interest earning account as ordered by the subordinate court.

13. The sum total of what I have stated above is that the Notice of Motion dated 12th February 2013 is allowed in terms of prayer 3 thereof conditional upon the decretal sum remaining deposited in the joint interest earning account in the names of the Advocates for the parties, as security in the event the appeal fails.

14. The Respondent shall have the costs of this application.

15. It is so ordered.

Dated and delivered at Kisii this 18th day of April, 2013

RUTH NEKOYE SITATI
JUDGE.

In the presence of:

Mr. Oguttu Mboya for Ragot (present) for Appellants/Applicants

M/s Lawrence Mungai (absent) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI
JUDGE.