



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

HCCA NO. 255 OF 2013

LESIT, J

ANDRIAN KITHINJI MUNGANIA.....APPELLANT

V E R S U S

JAPHET R. NKONGE

AUCTIONEERS.....1ST RESPONDENT

JOSES KITHINJI

CHAIRMAN KANU SOUTH IMENTI

BRANCH.....2ND RESPONDENT

RULING

The Application is a Notice of Motion dated 12th June 2013. It has been brought under Order 42 Rule 6(1) and (2) of the Civil Procedure Code and Section 3A of the Civil Procedure Act. The Applicant seeks orders 3 and 4 which state as follows:

1...

2...

3. **That this honourable court be pleased to stay the execution of the decree on Auctioneers cost in Nkubu-PMCC Misc Civil Application No. 25 of 2011 pending the hearing and determination of the appeal herein.**

4. **That the costs of this application be costs in the cause.**

The application is premised on five grounds on the face of the application namely

- a. **That the appellant has filed the appeal herein against the ruling of the lower court in Nkubu PMC MISC CIVIL APPL. No. 25 of 2011 delivered on 7th May, 2011.**
- b. **That the 1st Respondent herein will execute if stay of execution of the decree on auctioneer's costs is not granted and the appeal filed herein would be rendered nugatory.**
- c. **That the appellant stands to suffer substantial loss unless orders of stay of execution of the decree on Auctioneer's costs.**

d. That it is in the interest of justice and fairness that the orders sought be granted.

There was an affidavit in support of the Application sworn by the Applicant dated 4th June, 2013. The 2nd Respondent filed a replying affidavit dated 10th July, 2013. In that affidavit the 2nd Respondent deposes that he was not a party in Misc. Civil Application No. 25 of 2011 out of which the appeal herein arises, since the suit involved auctioneers charges between the 1st Respondent and the Appellant.

Mr. Gitonga urged the appeal on behalf of the Applicant. In his submissions he urged that Appellant stood to suffer substantial loss unless the stay was granted because he urged the 1st Respondent would not be able to refund the decretal sum if he paid Mr. Gitonga submitted that the 1st Respondent was not a man of means and that furthermore he had not filed any affidavit to controvert the Applicants affidavit on his lack of means. Mr. Gitonga urged that the application was filed within a reasonable time as the ruling against which the appeal herein was filed was delivered on 7th May, 2013.

Mr. Gitonga urged that the Applicant was willing to provide security for due performance of the decree as the court may direct.

Mr. Gitonga urged that the 2nd Respondent who was the only Respondent who filed a response stood to be affected if the Appellants appeal were to be successful.

Mr. Mwanzia for the 2nd Respondent relied on the replying affidavit dated 10th July, 2013. He urged that the appeal filed herein was between the Appellant and the 1st Respondent Auctioneer. Mr. Mwanzia urged that in the matter and had been dragged into it. Yet he had not participated in the trial. Mr. Mwanzia urged court to award costs to the 2nd Respondent for wrong joinder.

I have considered this application. It is on record that the Applicant is challenging a ruling on the bill of costs made by the PM's Court Nkubu. The 1st Respondent in this application has not filed any affidavit in response to the application and neither has he filed any grounds of opposition. The 2nd Respondent who has filed a Notice of replying affidavit has pointed out that the bill of costs was a matter between the Appellant/Applicant and the 1st respondent.

The application has been brought under Order 42 rule 6 of the Civil Procedure Rules which provide 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 sub rule

(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.”

Order 42 rule 6 sets out the conditions an applicant should meet in order to obtain an order of stay of execution. The application itself must have been brought without an undue delay from the date of the delivery of the order sought to be stayed. The Applicant must also demonstrate that substantial losses will result if the stay is not granted. Thirdly the Applicant must provide security for the due performance of the decree that will ultimately be binding on him if the appeal does not succeed.

This application was filed on the 5th June 2013 challenging the ruling of the learned trial magistrate delivered on the 7th May 2013. The application has therefore been brought without unreasonable delay.

The Applicant has averred in paragraphs 5 and 6 of his supporting affidavit that he will suffer substantial loss if the order sought is not granted on the basis that he may not be able to recover the decretal amount if he paid the 1st Respondent because he was a man of straw. That averment has not been controverted because the 1st Respondent despite being served with the application has not filed any affidavit to controvert the statements made in the Applicants Affidavit. Those averments remain unchallenged it is trite law that any statement of fact which is not controverted by the opponent is deemed to be admitted.

I find that the 1st Respondent has not controverted the statement that he is a man of straw and he may be unable to pay the decretal amount if paid to him if this appeal succeeds.

The Applicant has offered to give security for the due performance of the decree as the court may direct.

The 2nd Respondent has asked to be awarded costs for being dragged into this matter claiming that the bill of costs was a matter between the Applicant and the 1st Respondent. At this interlocutory stage the court cannot make any final finding on the issue raised by the 2nd Respondent if he wishes to pursue that line he should take the necessary steps before the Appeal is heard.

Having considered this application I find that the Applicant has satisfied all the conditions for granting of the prayer sought.

- 1. I will grant him stay of execution of the decree on the Auctioneer's costs pending the hearing and determination of the Appeal.**
- 2. The stay of execution granted in 1 above will be subject to the Applicant depositing with the court the Assessed Auctioneer's costs of Ksh.146,798/- within 30 days of todays date.**

SIGNED AND DELIVERED AT MERU THIS 25th DAY OF JULY 2013.

J. LESIIT

JUDGE