



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CIVIL DIVISION
CIVIL SUIT NO. 200 OF 2009

LETANGULE & COMPANY, ADVOCATES.....PLAINTIFF

VERSUS

1.P. K. ROTICH

2.MARY KITA NALIANYA

3.THE REGISTERED TRUSTEES OF TELEPOSTA PENSION SCHEME

4.KALE MAINA & BUNDOTICH, ADVOCATES.....DEFENDANTS

RULING

1. The suit herein was for damages in defamation. Interlocutory judgment in default of defence was entered against all the Defendants on 18th December 2009. Final judgment (after an *ex parte* hearing was entered for the Plaintiff for 17th May 2011. The Plaintiff was awarded general damages of KShs 5 million, plus costs and interest, among other reliefs.

2. The Defendants then applied by notice of motion dated 27th June 2011 for the main orders that the said judgment be set aside and that they may be granted leave to defend the suit. The application was canvassed *inter partes*. By a considered ruling dated and delivered on 9th November 2011 (Rawal, J) the application was dismissed with costs.

3. After the dismissal the Defendants filed notice of motion dated 7th December 2011. They sought the main order of stay of execution of decree pending hearing and determination of their intended appeal against the said order of 9th November 2011. That application is the subject of this ruling.

4. The application is brought under **Order 42, Rule 6** of the **Civil Procedure Rules, 2010** (the **Rules**). The grounds for the application appearing on the face thereof include –

(i) That the Defendants have preferred an appeal against the order of 9th November 2011.

- (ii) That the appeal will be rendered nugatory unless the stay sought is granted.
- (iii) That the Defendants are willing to give adequate security.
- (iv) That it will be in the interests of justice to grant the order sought.

5. The application is supported by an affidavit sworn by one Peter Rotich. He describes himself as the **“Administrator/Trust Secretary” of the Teleposta Pension Scheme Trustee, Registered**. It is not clear if he is the same person as the 1st Defendant, P K Rotich. The affidavit gives the factual basis for the application; it also argues the application. Various documents are annexed to the affidavit. One of those documents is a notice of appeal dated 9th November 2011 filed in court on 11th November 2011.

6. Unconditional interim stay of execution was granted on 8th December 2011. It was eventually extended to remain in place until delivery of ruling on the application.

7. The Plaintiff opposed the application by **grounds of opposition dated and filed on 15th December 2011**. Those grounds are –

- i. That the application is res judicata.
- ii. That the application is vain (whatever that may mean).
- iii. That the application is made in bad faith.
- iv. That there was unreasonable delay in bringing the application.
- v. That the Defendants will not suffer any prejudice if the application is refused.
- vi. That the Defendants have not provided any security.
- vii. That the application lacks merit.

8. There is also a **replying affidavit sworn by the Plaintiff and filed on 15th December 2011**. It is deponed, *inter alia* –

- (i) That issues raised in the present application were raised, canvassed and decided in the application that resulted in the order of 9th November 2011.
- (ii) That more specifically, the prayer for stay of execution was dealt with and concluded in the ruling of 9th November 2011, and the same cannot be ventilated again.
- (iii) That the application is intended to delay the Plaintiff in enjoying the fruits of his judgment.
- (iv) That in any event at the time of attachment the 3rd Defendant indicated a willingness to pay the decree.
- (v) That the application has no merit.

9. There is a **further replying affidavit filed on 17th February 2012** sworn by one **Stephen Kipkorir Bundotich**, a partner in the 4th Defendant. It is stated to be sworn in response to an affidavit sworn by one Charles Mwangi Kamande which I cannot find on the court record. Mr Bundotich essentially denies that the 3rd Defendant had agreed to settle the decree. He also points out that in any event the Defendants

have a right of appeal, which they have exercised.

10. I have considered the submissions of the learned counsels appearing, including the cases cited. I may point out straight-away that the application dealt with by Rawal, J was for an order to set aside the judgment entered for the Plaintiff on 17th May 2011, and for unconditional leave to defend the suit. Interim stay of execution was dealt with in that application, but only pending disposal of the application.

11. The present application is for stay of execution pending appeal. It is specifically provided for under Order 42, Rule 6 of the Rules. It has nothing to do with the interim stay sought pending disposal of the application to set aside the judgment entered on 17th May 2011. The issue of *res judicata* therefor does not arise.

12. I will also point out that for purposes of an application for stay of execution pending appeal, a notice of appeal duly filed is sufficient. See Order 42, Rule 6(4) of the Rules.

13. Sub-rule (2) of the said Rule 6 sets out the legal requirements for the grant of stay of execution pending appeal. Those requirements are –

(i) The application for stay must be made without unreasonable delay.

(ii) The court must be satisfied that substantial loss may result to the applicant unless the order is made.

(iii) The applicant must give such security as the court orders for the due performance of such decree order as may ultimately be binding on him.

Delay

14 The Defendants' application for setting aside judgment and leave to defend the suit was dismissed on 9th November 2011. They filed their notice of appeal two days later on 11th November 2011. They then filed the present application for stay on 8th December 2011; that was about one month since the order of 9th November 2011. In the circumstances of this case that cannot be construed as unreasonable delay. I find that the application was filed without unreasonable delay.

Substantial Loss

15. One of the grounds for the application is that the Defendants' intended appeal will be rendered nugatory unless the stay sought is granted.

16. It is not usual for an appeal against a money decree to be rendered nugatory. But it will be rendered nugatory for instance where the appellant, if he succeeds in his appeal, will be unable to recover the decretal sum from the respondent, or where he can do so only with considerable difficulty.

17. I have carefully and anxiously read the supporting affidavit and further supporting affidavit. There is no allegation at all in either affidavit that the Defendants will be unable to recover from the Plaintiff the decretal sum in the event that they succeed in their intended appeal, or that they can do so only with considerable difficulty. There is no mention at all of any other kind of substantial loss they might suffer so as to render their appeal, if successful, nugatory.

18. Substantial loss is a matter of fact and an applicant for stay of execution must address it properly in an affidavit. I therefore find that the Defendants have not established on a balance of probabilities that they stand to suffer substantial loss unless the stay sought is granted, thus rendering their intended appeal nugatory.

19. If the Defendant had succeeded in establishing substantial loss I would have imposed security

in the form of deposit of the decretal sum either in court or in a joint interest-earning account.

20. In the event, the Defendants' application has no merit. The same is dismissed with costs to the Plaintiff. The interim stay of execution now in place is hereby vacated. It is so ordered.

21. The Plaintiff shall have costs of this application.

DATED AT NAIROBI THIS 14TH DAY OF AUGUST 2013

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 22ND DAY OF AUGUST 2013