



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 72 OF 2011
GLADWELL WANGECHI KIBIRU

T/A SANTA LIBERA APPELLANT

V E R S U S

LADY KATHLEEN BLACKBURN RESPONDENT

RULING

1. The Appellant's Notice of Motion dated 24th June 2013 is seeking stay of execution pending determination of this appeal. The lower Court in **Mbsa CMCC No. 1078 of 2006** dismissed the Appellant's case and entered judgment in favour of the Respondent as prayed in the Counter Claim. The Appellant who was the Plaintiff in the lower Court has filed this appeal against that judgment.
2. It is important to note that the Appellant had sued two Defendants in the lower Court but when she filed this appeal she only filed it as against one of those Defendants. This is an anomaly which the Appellant will need to rectify by amending the memorandum of appeal to include the other party who was the 1st Defendant in the lower Court. The necessity of having that party also included in this appeal should not come as a surprise. This is because the Appellant by this Appeal seeks the setting aside of the lower Court's judgment and for the entry of judgment as prayed in her plaint. In her Plaint before the lower Court she sought judgment against both Defendants jointly and severally for Kshs. 502, 500/-. It is imperative therefore to include in this appeal the name of **LORD MELVYN JOHN BLACKBURN** who was the 1st Defendant in the lower Court. The inclusion of his name in this appeal will enable him to defend himself against the Appellant's claim.
3. The Appellant filed before the Mombasa Chief Magistrate's Court a claim against two Defendants namely; **LORD MELVYN JOHN BLACKBURN** as the 1st Defendant and **LADY KATHLEEN BLACKBURN** the 2nd Defendant. The 2nd Defendant who is now the Respondent in this appeal filed a Defence and Counter Claim. By its judgment of 13th April 2011 the lower Court dismissed the Appellant's claim and entered judgment for the Respondent as prayed in her counter claim. By a Decree of that Court dated 14th June 2013 the decretal amount which is due and payable by the Appellant to the Respondent is Kshs. 3,960,330/-.
4. The Appellant filed this appeal on 29th April 2011. On filing this appeal the Appellant filed before the Chief Magistrate's Court an application dated 3rd May 2011. By that application she

sought stay pending the determination of this appeal. By a ruling delivered on 17th October 2012 the Court ordered the Appellant to deposit in a joint account of the Advocates the decretal sum within 21 days. On depositing that amount the lower Court decree would be stayed pending the determination of the appeal.

5. The Appellant by a Notice of Motion dated 16th November 2012 filed before the Chief Magistrate's Court sought the enlargement of time to deposit the decretal amount. In the alternative the Appellant sought review of the Chief Magistrate's Court Ruling which required her to deposit the decretal amount in an account in the joint names of the Advocates. In that subsequent application she was asking in the alternative to be allowed to deposit her title document being CR 30864 as security instead of depositing the decretal sum. The lower Court declined to grant the orders sought by its ruling delivered on 15th May 2013.
6. The Appellant before this Court by her motion dated 24th June 2013 seeks the stay of execution pending the hearing and determination of this appeal. In support of that application the appellant stated that she is likely to suffer substantial loss because the Respondent is not a Kenyan citizen and if she succeeded in her appeal she was apprehensive that she may not get the decretal sum refunded by the Respondent. Further she submitted that she will suffer substantial loss if she deposited the decretal sum as ordered in the Chief Magistrate's Court. That she would suffer that loss because such deposit would affect her business operations and may lead to collapse of her business. Before this court the Appellant offered as security her Title document of Plot No. 20252/25 KILIFI (CR 30865).
7. The application was opposed by the Respondent. By her replying affidavit the Respondent referred to the Appellant's then the Advocates letter dated 5th November 2012 where the appellant sought the extension within which to deposit the decretal sum in an interest earning account as ordered by the Chief Magistrate's Court. It is important to reproduce that letter in this ruling as follows-

“Madzayo Mrima & Co.

Advocates,

MOMBASA

Dear Sir,

RE: MOMBASA C. M. C. C NO. 1078 OF 2006

GLADWELL KIBIRU T/A SANTA LIBERA –VERSUS-

LORD MELVYN JOHN BLACKBURN & ANOTHER

We refer to the above and the telephone conversation this morning.

As you are aware the ruling herein was delivered in the absence of both parties. We came to know of the ruling on 29th October, 2012 through your letter.

Our request is for you to accommodate our client by extending the period within which to deposit the decretal sum by 21 days so that we can open the account and deposit the sum on or before 26th November, 2012.

Kindly confirm to us that you will accommodate our client.

Your faithfully,

MURAYA WACHIRA ADVOCATES

D. K. WACHIRA”

8. The Respondent deponed that despite the Appellant being accommodated by being granted an extension she failed to make the deposit.
9. The Respondent in opposition submitted that the Appellant could not file the present application before this Court since she had already been granted a conditional stay of execution by the Chief Magistrate's Court.
10. That in my view is not the correct position in law. Order 42 rule 6(1)

in part provides as follows-

“... 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.”

11. As will be seen from that rule the Appellant had a right to come to this

Court to seek stay of execution whether or not such an application had or had not been granted by the Chief Magistrate's Court.

12. The Court in considering an application for stay pending appeal

should bear in mind the provisions of Order 42 Rule 6(2). By that rule the Appellant is required to satisfy the Court that if stay of execution is not granted, she will suffer substantial loss. She is also required by that rule to prove that her application for stay was brought without undue delay. As stated before she has provided security by her immovable property. She therefore has met the third requirement under that Rule.

13. As I understand the Appellant's plea on the issue of substantial loss is

that she is apprehensive that the Respondent may not refund the decretal sum if she leaves the jurisdiction of this Court since she is not

a Kenyan citizen. The Respondent in reply to that submission stated in

her replying affidavit that the money would be secure because it would be in the joint accounts of the Advocates.

14. On substantial loss I understood the Appellant to also argue that to

order her to deposit the decretal amount into an account could lead to the collapse of her business. The Appellant therefore does not allege that she does not have funds totalling the decretal sum. Rather, her concerns seem to be that such funds would be tied up in an interest earning account and would not therefore be benefiting her business.

15. If that be so the Court is of the view and balancing the interests of the

Appellant and the Respondent that the Appellant should provide a bank guarantee for the payment of decretal sum when called upon to do so. That would ensure that the Respondent's judgment

would be secure and that the Appellant's business would not be adversely affected by a deposit. In the case **M/S PORTREITZ MATERNITY -VS- JAMES KARANGA KABIA CIVIL APPEAL NO. 63 OF 1997** the Court discussed the need to balance the interest of the Appellant and the Respondent. The Court stated-

“That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

16. Was the Appellant's application filed within reasonable time? The

Chief Magistrate's Court delivered its Ruling on the application for review on 15th May 2013. The Appellant filed the present application on 24th June 2013. I find that there was no inordinate delay on the part of the Appellant that could defeat her application.

17. The Appellant in my view in offering her immovable property as

security for the due performance of the decree was not candid. This is because before the Chief Magistrate's Court she offered a Title No. CR 30864. This Court does not know the value of that property. When however she made the present application before this Court she offered another property as security namely Plot LR No. 2025/24/KILIFI. This latter property is only valued at Kshs. 2.5 million. The amount due in the Chief Magistrate's Court as at 14th June 2013 was Kshs. 4,408,730/-. This is evidence from the Notice to Show Cause issued by that Court. This Court therefore rejects the Appellant's offer of that immovable property. The value of that property does not match the amount due in the lower Court's judgment. In reaching my decision in respect of that property I am guided by the case **THE STANDARD BANK LTD -VS- G. N. KAGIA T/A KAGIA & CO. ADVOCATES CIVIL APPLICATION NO. NAI. 193 OF 2003** (unreported) where the Court of Appeal stated-

“So the amount that the Respondent is ultimately entitled to is not settled and will only be ascertained after the determination of the appeal. Although the Respondent has several pieces of land, they may depreciate in value or may be disposed of or it may be difficult to sell them by the time the appeal is determined. If the Applicant's appeal ultimately succeeds, either wholly or partially, such success will not be totally effectual if the Applicant will not easily recover the money it paid and if it has to institute other civil proceedings to recover the money. Such an eventuality should in the interest of justice be taken into account.”

18. I grant the following orders-

- a. **Stay of execution of Mombasa CMCC No. 1078 of 2006 is granted subject to the Appellant providing a bank guarantee to pay Kshs. 4,408,730/- when required to do so by this Court. Such bank guarantee shall be filed and a copy be served on the Respondent within fourteen days of the reading of this ruling. Failure to provide such security there shall then be no stay of execution. Liberty is granted to either party to make further applications in this regard.**
- b. **The cost of the Notice of Motion dated 24th June 2013 shall abide with the outcome of this appeal.**

Dated and delivered at Mombasa this 17th day of October, 2013.

MARY KASANGO

JUDGE