



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

CIVIL APPEAL 12 OF 2012

ALI SHUBER HABSY ALSO KNOWN AS SABRI HABSHI NASSIB.....APPELLANT

VERSUS

JUMA BAKARI SADIRESPONDENT

RULING

1. This is an application by the Appellant by way of Notice of Motion dated 17th January, 2012 under Sections 3 and 3A of the Civil Procedure Rules and Order 22 Rule 22 and Order 51 Rules 1 and 3 of Civil Procedure Rules. The Appellant came before court under urgency and was granted a stay of execution of the consent judgment recorded in CMCC 265 of 2009 by Hon. Mr. Aminga Resident Magistrate, Kwale.

2. The orders now sought are as follows:

“3. That this Honourable Court be pleased to stay the execution of the Consent judgment obtained herein pending the hearing and determination of the Applicant’s Appeal against the Ruling delivered on the 6th December, 2011.

4. That the application be heard inter partes on such date and time as this Honourable Court may direct.

5. That the costs of this Application abide the outcome of the Appeal.”

3. The Applicants grounds are as follows:

“a) That the Applicant herein being aggrieved by the lower court’s ruling delivered on 6th December, 2011 and wishes to appeal on the same.

b) That the Appeal has a high chance of success.

c) That the decree is for a substantial sum of money and if paid to the respondent/plaintiff the defendant/applicant is apprehensive that they will not be able to recover the whole sum.

- d) ***That if the said stay of execution is not granted, the Applicant's appeal will be rendered nugatory and the Applicants will suffer irreparable damage.***
- e) ***That this application will not occasion any prejudice to the Plaintiff/Respondent.***
- f) ***That this Application has been done without any unreasonable delay.***
- g) ***That it is in the interest of justice the application be granted as prayed."***

4. The parties agreed to dispose off the application by way of written submissions. The Respondent filed his submissions on 16th April, 2012 and the Appellant filed his on 17th April, 2012.

The Applicant submits that by mistake of counsel, a consent judgment was recorded on 31st March, 2010 in CMCC Number 265 of 2009. On application of the lower court to set aside the consent judgment, the court dismissed the application. The Applicant on 27th January, 2012 filed an appeal against the lower court's refusal to set aside the consent judgment. The Applicant avers that the Application has been made expeditiously and that unless stay of execution of the consent judgment is granted the Applicant's appeal will be rendered nugatory, notwithstanding that it has high chances of success.

5. I note that the Applicant annexed to his Supporting Affidavit the Memorandum of Appeal. However a copy of the consent judgment/order sought to be stayed was not availed or exhibited. The circumstances under which the entry of consent judgment was effected is therefore not clear, and therefore presumably, not in issue in this application. In addition, is there nothing on record that indicates the exact nature of the consent judgment and the decretal amount, if any, which was thereby awarded, or the nature of the orders made.

6. The above notwithstanding, the Applicant in his submissions states that he is:

"ready, willing and able to furnish such reasonable security to be deposited which sum this Honourable Court may deem fit (sic). The Appellant is further ready and willing to abide by such other or further conditions as to security of the decretal sum in granting an order for stay of execution pending the hearing and determination of the appeal."

7. The Applicant also submits that he had no way of knowing whether the Respondent is a person of means and whether he would be able to refund the decretal sum of the appeal is successful.

The Applicant relies in **NIC Bank Limited vs Aquines Francis Wasike and Another[2006] e KLR** where it was held that the question whether an appeal is arguable is left to the court once the Memorandum of Appeal is made part of the record, that it is unreasonable to expect an Applicant to know in detail the resources of a Respondent and whether he would be unable to pay back the decretal sum. As such the evidential burden must shift to the Respondent to show that resources he has.

8. The Respondent's submissions were that he was capable of refunding the decretal sum and that the doctrine of laches is applicable. The former submission is supported by his deposition that he can refund the decretal sum. The latter submission is that the consent judgment was recorded in court on 31st March, 2010 whilst the application to set it aside was filed on 10th August, 2011 over 1 year and 4 months later.

Further the Respondent concedes that in the event that the court is minded to grant the application, then two thirds of the decretal sum be released to the Respondent.

9. I have perused the Memorandum of Appeal carefully. I do not consider it to be frivolous. I am satisfied that it raises arguable grounds of appeal. The question, however, is whether stay pending appeal should be granted. I have not been provided with any submissions by the Applicant, however, concerning the reasons for their long delay in filing application for stay. Nor have details of the decretal amount or the nature of the consent order been availed.

10. Given that I have found that the appeal is arguable; and given that the Respondent submitted that if the court is inclined to grant the application then two thirds of the decretal sum be released to the Respondent, and given that the appeal is against a consent order, and given that the Applicant is ready to furnish security and to abide by any further conditions, I am prepared to, and do hereby, order as follows:

Stay of execution of the consent order is hereby granted on the following conditions:

- a) The Applicant shall pay 50% of the decretal sum to the Respondent.
- b) The Applicant shall pay the other 50% of the decretal sum into court.
- c) The payments of the decretal sum shall be made within fourteen (14) days from the date hereof failing which the order of stay shall lapse.

Orders accordingly.

Dated, signed and delivered this 16TH Day of MAY, 2012

R.M. MWONGO
JUDGE
Read in open court
Coram:

- 1. Judge: Hon. R.M. Mwongo
- 2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d).....