



REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

Civil Appeal 164 of 2010

ANNE N ONDABU.....APPELLANT

VERSUS

THOMAS OSAKA.....1ST RESPONDENT

NEHEMIA ACHUTI MOCHAMA.....2ND RESPONDENT

RULING:

This application is brought by way of Notice of Motion which is dated the 21st March, 2011 brought under Order 42 Rule (6) of the Civil Procedure Rules.

The Applicant seeks an order for stay pending the hearing and final determination of the appeal. The application is supported by the affidavit of ANNE ANDABU made on the 1st March, 2011 and other grounds as set out in the application.

Judgment in favour of the Respondent was delivered on the 10th August, 2010 in the sum of Kshs 152,500/=. The Applicant was granted an interim stay of execution and was ordered to deposit half the decretal sum of Kshs 76,050/= into court, which sum was duly deposited on the 12th July, 2012.

The Applicant submits that the appeal has high chances of success and prays that the Orders for stay of execution pending appeal be granted together with costs.

The application was opposed by the 2nd Respondent who relied on his Replying Affidavit dated the 4th May, 2011.

Counsel for the 2nd Respondent argued that the application does not meet the terms of stay as provided for under Order 42. The Applicant had not demonstrated the substantial loss that she would suffer by the payment of Kshs 152,500/= which sum was not colossal and could be refunded by the 2nd Respondent.

That the Applicant had deposited half the decretal sum in court and was offering a Bank Guarantee from a third party. It was Counsel's submission that this did not constitute security.

Counsel argued that the Applicant had filed a similar application in the subordinate court and an order was made that the Applicant pays two thirds of the decretal sum and the balance be deposited in a joint interest earning account. That the Applicant did not comply with the said order but instead proceeded to the High court and filed a similar application for stay of execution.

Counsel urged the court to treat the matter as already having been adjudicated upon, and to allow the same would be to sanction disobedience.

It was further submitted that the application before the court was also not filed timeously as it was filed after a period of six (6) months from the date judgment had been delivered.

In conclusion Counsel submitted that the 2nd Respondent was a man of means and capable of refunding the said sum and should also be allowed to enjoy the fruits of the judgment. For the those reasons Counsel prayed that the application be dismissed with costs to the 2nd Respondent.

I have heard the arguments of both Counsel for the Applicant and the 2nd Respondent. Under the provisions of Order 42 Rule (6) the court must be satisfied that the application was made without unreasonable delay.

The judgment in CMCC No. 1003 of 2004 was delivered on the 10th August 2010 and the application herein was filed in court on the 22nd March, 2011 which is a period of over six(6) months. There are several authorities in which the High Court has held that a period of four (4) months is tantamount to an inordinate delay.

I shall assume that within this period of six (6) months the Applicant was busy prosecuting the other application before the subordinate court and was awaiting the outcome before proceeding to file a similar application in the High Court.

I find that in the circumstances there was no inordinate delay.

The same Order 42 of the Civil Procedure Rules also states clearly that the court must be satisfied that substantial loss may result to the Applicant if the order sought is not granted. I concur with Counsel for the 2nd Respondent that the decretal sum is not colossal and that the Applicant has not shown the court the loss she stands to suffer if the amount is paid out to the Respondents.

If it is true that the subordinate court had granted the Applicant orders for stay of execution which she did not comply with, then I find that the Applicant is deliberately trying to frustrate the Respondents with the sole intention of denying the Respondents the fruits of their judgment. She also perceives them to be persons of straw, who might not be able to repay the sums, if paid out directly to the Respondents.

However, I shall grant the Applicant the order for stay of execution pending hearing and determination of the Appeal provided;

The Applicant pays to the Respondents the other half of the decretal sum in the sum of Kshs 76,050 within seven (7) days from the date hereof.

In default the Respondents be at liberty to proceed to execution to recover the said portion.

The balance deposited in court shall be retained in court pending hearing and final determination of the appeal.

The 2nd Respondent shall have costs.

Dated and Delivered at Eldoret this 8th day of June 2012.

A.MSHILA

JUDGE

Coram: Before Hon. A Mshila J

CC; Andrew

Counsel for the Appellant Kiplimo holding brief for Buluma

Counsel for the Respondents: No appearance.

A.MSHILA

JUDGE