REPUBLIC OF KENYA

High Court at Bungoma

Miscellaneous Application 42 of 2011

JAMES WANGALWA

JOSEPH SIMIYU MUKENYA …….APPELLANTS/APPLICANTS

VERSUS
AGNES NALIAKA CHESETO ……RESPONDENT

RULING

INTRODUCTION

1. The Applicants/Appellants (hereafter the Applicants) have moved this court through their application dated 11th day of April 2011 where they are seeking among other things:

a) THAT there be stay of further execution of Decree dated 30/11/2012; pending the hearing and final determination of the Appeal filed herein.

b) Costs of the suit.

2. The other prayers in the application have been overtaken by events since the matter was fixed for inter parte hearing by consent of the parties when their representatives appeared before the DR on 4.7.2012. I will say no more on them.

Application heard in the absence of respondent

3. M/S Lucy Nanzushi on 10.10.2012 urged the application dated 11.4.011 in the absence of counsel for the Respondent, who, inspite of the hearing date having been taken by consent did not appear before me on that day.

4. Mr. Wanyama, however, in the afternoon of 10th of October 2012, after the application had been heard, came to my chambers with a request that he be allowed to put in his submissions. The court accordingly ascertained to him the position of the law on arresting a pending judgment or ruling, and that formal intervention is required, or consent of the parties. He promised to take immediate steps and write to court and the Applicants in accordance with the law. But to the best of my knowledge, nothing has been done to arrest this ruling before it is delivered. On that basis, I will deliver the ruling as hereunder:

APPLICANT'S ARGUMENTS ON THE APPLICATION

5. Counsel for Applicants/Appellants, M/S Lucy Nanzushi told the court that she relies on the grounds on the face of the Application and the Affidavit in support thereto. She also referred the court to the proceedings of the Lower court and some draft defence annexed to the application before me, which, according to her reveals that the suit before the trial court was *res judicata*, the subject matter therein having been determined in Sirisia Magistrate's court Civil Misc No. 4 of 2001.

It is the learned counsel's contention that that aspect of the appeal clothes the appeal with overwhelming chances of success.

6. The learned counsel further urged that there has been a prior execution and sale of the properties of the Applicants, and there is a real danger of another execution on the Applicants.

GROUNDS OF OBJECTION BY THE RESPONDENT

7. Although the counsel for Respondent did not attend court on the day this application was heard, I am by law enjoined to consider the grounds of objection filed by Wanyama Wanyonyi & Co. Advocates on 5.5.2011 for the Respondent. This will avoid prejudice to the Respondent, and at the same time, enable the court to determine the application at hand effectually and completely. In a nutshell the grounds of objection by the Respondent are:

1. The applicant has not shown good grounds why this court should interefere with the discretion of the lower court

2. The applicant has failed to demonstrate what Substantial loss he may face unless a stay of execution is issued

3. No security for the performance of the decree of the lower court has been offered or furnished

4. The application has been overtaken by events and has been brought after undue delay

ISSUES FOR DETERMINATION:

8. From the pleadings herein and the arguments of the counsel for the Applicants, the following singular issue emerges:

a) Whether the Applicants have satisfied the conditions for grant of stay of execution set out under Order 42 Rule 6 of the Civil Procedure Rules.

DISPOSITION OF THE ISSUE

Applicable law

9. The granting of stay of execution pending appeal by the High Court is governed by Under Order 42 Rule 6 of the Civil Procedure Rules. It is grantable at the discretion of the court on sufficient cause being established by the applicant. The incidence of the legal burden of proof on matters which the applicant must prove lies with the Applicant. See the Halsbury's Law of England, vol.17, paragraph 14:

14. Incidence of the legal burden ……. in respect of a particular allegation, the burden lies upon the party for whom the substantiation of the particular allegation is an essential of his case.

Sufficient cause being a technical as well as legal requirement will depend entirely on the Applicant satisfying the court that:

a) Substantial loss may result to the applicant unless the order is made,

b) The application has been made without unreasonable delay, and

c) Such security as the court orders for the due due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

10. These conditions are the essence of Order 42 Rule 6 CPR which I need not recite in verbatim. The conditions share an inextricable bond such that the absence of one will affect the exercise of the discretion of the court in granting stay of execution. The Court of Appeal in **Mukuma V Abuoga (1988) KLR 645** reinforced this position. I will therefore give a deep consideration of each condition and see whether the circumstances of this case neatly fit those scales.

a) Substantial loss occurring

11.No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of ***Silverstein N. Chesoni [2002] 1KLR 867,*** and also in the case of ***Mukuma V Abuoga*** quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

"…the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion under order 42 Rule 6of the CPR only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above.

12. The Applicants in their Memorandum of Appeal have raised a question of *res judicata.* They alleged that the case being appealed against is *res judicata* since the same issues were determined in Sirisia Magistrate's Court Miscellaneous Application No. 4 of 2001. That is an arguable point of law except the proceedings with regard to Sirisia Magistrate Miscellaneous Application No. 4 of 2001 were not annexed.

13. The Applicants further argue that failure to issue the necessary notice of entry of judgment in default of appearance is a breach of a mandatory requirement under the CPR. That as well may be an arguable point.

14. The Applicant also argue that the lower court should have allowed them to defend the case to avoid causing injustice to them.

15. The question is; whether the Applicants have demonstrated that substantial loss will occur unless an order for stay of execution is issued?

16. The applicants in answer to the above question say that substantial loss will result as their appeal will be rendered nugatory. The Respondent on the other hand, says the Applicants have not established that substantial loss will occur unless an order for stay is made.

17. After considering all the rival arguments herein, I am of the view that substantial loss would befall the Applicants if another execution is levied at this stage. The judgment being executed was in default of appearance and on formal proof. Without making a decision, it is desirable that cases are heard between the parties.

The fact that an execution has already been levied on the Applicants makes it undesirable that further execution should be levied when an appeal, which I believe is not frivolous, is pending before the court. The right of appeal is a constitutional

right that actualizes the right to access to justice, protection and benefit of the law, whose essential substance, encapsulates that the appeal should not be rendered nugatory, for anything that renders the appeal nugatory impinges on the very right of appeal. On this basis, I will order a stay of any further execution of the decree appealed from until determination of the appeal herein. But the stay is dependent on the terms contained below.

b. Requisite security

18. I agree with the respondent that the Applicants have not offered or proposed any security for the due performance of the decree of the lower court. This should be done as a sign of good faith that the Applicant is ready and willing to commit to giving security. But my reading of order 42 rule 6(2) (b) of the CPR reveals that, it is the court that orders the kind of s[ecurity the applicant should give as may ultimately be binding on the applicant. This modeling of the law is to ensure the discretion of the court is not fettered.

19. In light thereof, the Applicants shall within 30 days from the date of this ruling, give such security as shall be approved by the court for the due performance of the decree appealed from. Failure to give security in the terms of this ruling will terminate the stay granted herein.

c. Was there undue delay?

20. This condition is by no means the least of the conditions for grant of stay of execution jut because it is being treated last. I have deliberately considered it at this stage, as: from the record I find there was no undue delay in making this application.

21. The application herein was filed on the 1th April, 2011 which is barely 12 days from the date when the Applicant's application for stay was dismissed by the lower court, i.e. 31st March 2011. The rest of the time that lapsed between the date of the decree and when the application for stay was dismissed the lower court has been explained by the legal processes that were undertaken then.

COSTS
22. Each party to bear own costs.

Those are the orders of the court.

Dated, signed and delivered at Bungoma this 24th day of October 2012

F. GIKONYO
JUDGE

24.10.2012

Before F. Gikonyo, judge

Alusa court clerk

Ocharo for Nanzushi

Court - Ruling read, signed and dated in the presence of Ocharo for Nanzushi.

F. GIKONYO, JUDGE
24.10.2012