REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 1413 of 2005

HOSEA KIPLAGAT.....APPLICANT/ DEFENDANT

VERSUS

JOHN ALLAN OKEMWA.....RESPONDENT/PLAINTIFF

RULING

Before me is a Notice of Motion dated 15th August 2012 expressed to be brought under the provisions of **Order 42 rule 6** of the Civil Procedure Rules seeking inter alia the following orders:

1. This Application be certified urgent and be admitted for ex parte hearing at the first instance for the grant this prayer and prayer(2)

2. This Honourable Court be pleased to stay the execution of the judgement/decree entered herein on 6th February 2006 and confirmed on 7th April 2011 and any other order or proceedings pursuant thereto, pending the hearing of this application inter partes

3. This Honourable Court be pleased to stay the execution of the Judgment/decree entered on 6th February, 2006 and confirmed on 7th April, 2011 and any other order or proceedings pursuant thereto, pending the intended appeal.

4. The costs of this application be provided for

The application is premised on the following grounds:

a) That interlocutory judgment on this matter was entered against the Defendant on 6th February, 2006 and confirmed as final judgment on 7th April, 2011 for a total sum of Ksh. 10,800,000/- and an order of eviction without the defendant being heard.

b)That the Applicant's application to set aside the judgement was dismissed as per the ruling dated 18th May, 2012 by Hon. Dulu J. and delivered on 5th June, 2012 by Hon. Musinga J.

c) That the defendant/Applicant aggrieved by the ruling, has appealed to the Court of Appeal against it.

d)That the aforesaid ruling has opened up the judgment/decree to execution and the conducting of

further proceedings in the matter

e) That if execution occurs and further proceedings conducted in the matter, the applicant's appeal will be rendered nugatory and the applicant will suffer irreparable damage and loss.

f) That the applicant has an arguable appeal with a high probability of success

g)That in any event the respondent stands to suffer no prejudice irredeemable by an award of costs.

h) That this application has been made without unreasonable delay.

i) That the application ought to be granted in the interests of equity and substantive justice.

The application is supported by the affidavit of **HOSEA KIPLAGAT,** the applicant. The deponent deposes that he made an application dated 4th October 2010 seeking to set aside the interlocutory judgement entered on 6th February 2006 which application was dismissed by a ruling of this Court delivered on 5th June 2012. The said ruling has aggrieved him and he has instructed his legal advisers to appeal therefrom which appeal according to him is very arguable and has overwhelming chances of success. He is, however, apprehensive that following the ruling delivered on 5th June 2012 the Plaintiff will descend on him with execution proceedings and render his appeal nugatory. He deposes that he has enjoyed quiet and interrupted possession and occupation of the suit property since 1990 and have carried out investment on it including cultivation of crops and putting up of farm structures thereon. Therefore, he deposes that should the respondent proceed with the execution of the said judgment/decree, his appeal would not only be rendered nugatory but he shall also suffer irreparable loss yet the grant of the stay sought is unlikely to prejudice the Plaintiff. It is therefore in the interest of justice that the court exercises its discretion in his favour moreso as the circumstances that led to the entry of the interlocutory judgement for a colossal sum of Kshs. 10,800,000.00 against him, a judgement which, according to his was irregularly entered, were as a result of the mistakes of his erstwhile advocates. The deponent avers that the omissions of his former advocates led to his being condemned unheard and the said judgment entered against him. The astronomical judgement of Kshs. 10,800,000.00, according to him, is likely to cause him irreparable and debilitating harm hence the stay sought. To him, the nature of the reliefs sought did not merit the entry of the interlocutory judgement and hence the Deputy Registrar had no jurisdiction both territorial and under the former Order IXA of the Civil Procedure Rules to enter the said judgement. Hence in order for the said appeal not to be rendered nugatory the stay ought to be granted as the application has been made without unreasonable delay.

The application was opposed through a replying affidavit sworn by 24th August 2012. According to the deponent that the application is a non-starter, is bad in law and is incompetent. Further the applicant has not discharged the mandatory obligation under Order 42 rule 6 of the Civil Procedure Rules and hence the application ought to be dismissed. However, it is the plaintiff's view that in the event that the Court is inclined to grant the stay sought, the defendant should be compelled to deposit security of Kshs. 21,384,000.00 in satisfaction of the Principal Decretal sum and interest from filing todate.

In his oral submissions, **Mr. Omwebu**, learned counsel for the applicant reiterated the application herein and submitted that the applicant having filed a notice of appeal need the Court's protection by way of stay in order not to render the said appeal nugatory since the applicant has been in possession of the suit land where for the last 12 years he has heavily invested resources. According to him the applicant stands to suffer substantial loss going by the said investment. With respect to the deposit of security it is submitted that the same ought not to be as punitive as suggested taking into account the fact that the decretal sum is for a sum of Kshs. 10.8 million. Though the applicant is ready to abide by any reasonable conditions that may be imposed, to order the sum of Kshs. 21 million to be deposited, in counsel's view, when the said sum is dispute would not be in the interest of justice balancing the interest of both parties. In support of his submissions learned counsel relied on **Mathu –vs- Gichimu [2004] EKLR** and **Wilfay Investments Ltd –vs- Monica Wangui & 7 Others [2011] eKLR.**

On his part, **Mr. Mutubwa**, learned counsel for the plaintiff, while reiterating the contents of the replying affidavit, submitted that though a notice of appeal has been filed, the appeal is a non-starter as the appeal does not lie as of right. The ruling being appealed against resulted in dismissal of an application seeking to set aside final judgment. Appeals, according to counsel lie from final decrees and orders as per **Order 43 of the Civil Procedure Rules and section 75** of the Civil Procedure Act. In counsel's view, only rulings arising from applications seeking to set judgements entered in default of appearance are appealable as a matter of right but not those arising from applications to set aside judgements entered in default of defence. It follows that the first limb is thereby not satisfied. On the second condition whether substantial loss would be occasioned to the applicant if stay is not granted, it is submitted that the applicant has failed to discharge the burden on him of showing that if he meets the judgement, he stands to suffer substantial loss. This, it is submitted, is a matter of accounts and nothing has been exhibited to support this allegation by way of tax returns, pay slips and documents showing income and expenditures. On the third limb, it is submitted that judgement was entered in February 2006 and assessment done in April 2010. About 6 years have lapsed since the entry of the first judgement and 2 years after the second judgement. Such undue delay is unacceptable without an explanation since the remedy sought is a discretionary equitable remedy and delay defeats equity. It is further submitted that under Order 42 Rule 6 the applicant is required to give security for the decretal sum that may be ultimately binding which in counsel's view is the principal sum plus costs and interests hence the reasoning behind the request for a deposit of the sum of Kshs. 21,384,000.00. However, there is no offer for security whatsoever by the applicant which goes to the bona fides of the applicant against whom judgement is binding until set aside. In the High Court the issue of whether or not the appeal is meritorious is irrelevant, it is submitted. However the conduct of the applicant in offering security is important and counsel relies on **Kenya Anti-Corruption Commission –vs- Industrial Collaborative Limited [2012]eKLR and Denis Ouma Simolo –vs- Transporters Limited [2010] eKLR. He emphasized that Order 42 rule 6 is clear on security and the court ought to take into account that there is a successful litigant who is entitled to the fruits of the judgment. Counsel questioned the plaintiff's is *bona fide* in light of an application filed in Nakuru seeking injunctive orders in which the Court found that the plaintiff was abusing the Court process.**

In his brief rejoinder Mr. Omwebi submitted that the delay has been explained in the affidavit and that the Nakuru suit is unrelated to the present suit. On the issue if the right of appeal it is submitted that is a technicality.

I have carefully considered the application, the affidavits filed, submissions made as well as authorities cited by counsel for both parties. **Order 42 rule 6(1) and (2)** of the Civil Procedure Rules provides as follows:

"6.(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and 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.

(2) No order for stay of execution shall be made under subrule (1) unless –

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

I must say that in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court is nolonger limited to the foregoing provisions. The courts are now enjoined to give effect

to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. Since the enactment of the said provisions the Court of Appeal has made pronouncements on the same. In **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009, Nyamu, JA** on 20/11/09 held *inter alia* that:

"the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible".

The same Judge in**Kenya Commercial Bank Limited Vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010** held that:

"where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfill them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case".

In **Kenya Commercial Finance Company Limited vs. Richard Akwesera Onditi Civil Application No. Nai. 329 of 2009** the Court of Appeal expressed itself as follows:

"the applicant's submissions that the omission to include primary documents rendered the appeal incurably defective would have had no answer to them if they were made before the enactment of section 3A and 3B of the Appellate Jurisdiction Act...**The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.*****In applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court the provisions of sections 3A and 3B of the Appellate Jurisdiction Act. The Court still retains an unqualified discretion to strike out a record of appeal or a notice of appeal; the only difference now is that the Court has wider powers and will not automatically strike out proceedings. The Court, before striking out, will look at available alternatives".**

It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective.

The first issue for determination is whether the applicant stands to suffer substantial loss if the Court declines to grant the stay sought. According to the defendant, he has enjoyed quiet an uninterrupted possession and occupation of the suit property since 1990. He also stated that he has carried out developments on it by putting farm structures and cultivation of crops. This contention is not controverted by the plaintiff on oath. However, it is the plaintiff's position that the defendant has no right of appeal since there is no automatic right of appeal from a decision dismissing an application seeking the setting aside of ex parte judgement entered in default of defence. Section 75 of the Civil Procedure Act provides:

(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—

(a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;

(b) an order on an award stated in the form of a special case;

(c) an order modifying or correcting an award;

(d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

(e) an order filing or refusing to file an award in an arbitration without the intervention of the court;

(f) an order under section 64;

(g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;

(h) any order made under rules from which an appeal is expressly allowed by rules.

(2) No appeal shall lie from any order passed in appeal under this section.

It is therefore clear that apart from the provisions of section 75 aforesaid resort must he had to the rules in deciding whether or not an appeal lies. The relevant Order in this case is Order 43. Rule 1(1)(g) provides for appeals under "Order 10, rule 11 (setting aside judgment in default of appearance)". That provision, on the face of it clearly omits orders arising from applications to set aside judgement in default of defence. Order 10 rule 11, however provides:

Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

Whether or not the Rules Committee by limiting the words in bracket meant to only deal with default of appearance despite the fact that Order 10 rule 11 applies to the whole order, is a decision which is beyond the scope of this ruling. However, it is trite that the only relevant consideration for the Court is whether a notice of appeal has been filed and not whether or not the applicant has a valid appeal. In light of the uncontroverted averments made in the supporting affidavit I am prepared to hold that the defendant stands to suffer substantial loss. In **Job Kilach vs. Nation Media Group & 2 Others Civil Application No. Nai. 168 of 2005** the Court of Appeal citing **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited Civil Application No. Nai. 358 of 1999** held that where there is a decree against the applicant but the amount is colossal, it cannot be lost sight of the fact that the decretal sum is a very large sum, which by Kenyan standards very few individuals will be in a position to pay without being overly destabilized. In the said case the amount in question was Kshs. 4,000,000.00. I am therefore satisfied that the defendant stands to suffer substantial loss unless the stay sought is granted.

That leads me to the issue of the delay. It is true that the interlocutory judgement was entered more than 6 years ago with the final judgement being entered 2 years ago. However, the decision that gave rise to the intended appeal was not given until 5th June 2012. The present application was filed on 15th August 2012 which is about 2 moths latter. In my view it is this period of two months that the defendant was obliged to explain. Although no explanation was proffered, in my view the said period cannot in the circumstances be termed as inordinate.

The next issue for consideration is the issue of security. It is true that under Order 42 rule 6 aforesaid, the applicant is required to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder. However, as already stated above the Court must similarly consider the overriding objective and balance the interest of the parties to the suit. The law is that where the applicant intends to exercise its undoubted right of appeal, and in the event it were eventually to succeed it should not be faced with a situation in which it would find itself unable to get back its money. Likewise the respondent who has a decree in his

favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security. The issue of adequacy of security was dealt with by the Court of Appeal in **Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100** where the Court of Appeal expressed itself as follows:

"The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so…The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it".

Taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful plaintiff I grant a stay of execution of the decree herein on condition that the defendant deposits within forty five (45) days a sum of Kshs. Eight Million Only (Kshs. 8,000,000.00) in a joint interest earning account in the names of the advocates for the parties herein. In default of compliance this application shall be deemed to have been dismissed with costs and the plaintiff will be at liberty to execute.

The costs of the application to the plaintiff.

Dated at Nairobi this 17th day of October 2012

G V ODUNGA
JUDGE

Delivered in the presence of

Ms Ngeresa for Mr Mutubwa for Plaintiff

Mr Mburu for Mr Ojienda for the Defendant