



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL 7 OF 2003

MUGURE MAHINDA.....APPELLANT

VERSUS

ALI MOHAMMED FARAH.....RESPONDENT

RULING

In her Notice of Motion dated and filed on 21st February 2012, the Applicant, judgment-debtor, seeks an order for the Respondent to give security for Repayment of Money Paid to the Respondent in satisfaction of the Decree should the appeal succeed or the decretal sum be deposited elsewhere pending the determination of the Appeal, and that costs of the application be provided for.

The application is supported by the Applicant's Affidavit sworn on 21st February 2012 and the grounds that -

- (a) the Respondent has insisted on being paid the decretal sum failure to which he would sell the Appellants piece of land which she had given as security during the prosecution of the appeal in this court,
- (b) the Respondent does not accept that the security given during the prosecution of the appeal in this court does act as security during the pendency of the appeal in the Court of Appeal,
- (c) it is not possible to establish whether the Respondent is capable of restoring the Appellant the money paid to him should her appeal succeed since his occupation is not known to the Appellant,
- (d) this is a proper and fit case for an order to be made to have the decretal sum put elsewhere if the Respondent does not give security for its restitution to the Appellant in the event of the appeal being allowed.

The Respondent (*the decree-holder*) opposes the Application, and in his Replying Affidavit sworn on 13th April 2012 and filed on 19th April 2012 depones *inter alia* that -

- (1) the Application herein is bad in law, malicious, ambiguous, scandalous made in bad faith, inept and otherwise abuse of the court process,
- (2) he sustained very severe injuries on 11th October 1997, judgment was given in his favour on 13.12.2002, whereupon the applicant appealed and her appeal was dismissed for want of prosecution on 5th November 2007. The Appeal was later reinstated and on 29th June 2009 the appeal was again dismissed for want of compliance.

(3) The Applicant had not demonstrated that there is a sufficient cause requiring security to be given for the restitution of the money paid to him in satisfaction should her appeal succeed.

(4) The suit herein was heard and determined on merit and the intended appeal to be filed is not merited.

When the matter came up for hearing Mr. Gekong's learned counsel for the Respondent submitted that they would give an undertaking in writing for restitution of the decretal sum should the Applicant be successful in her appeal.

The Application herein is based upon the court's inherent power to make such orders as would meet the ends of justice (*S.3A of the Civil Procedure Act, Cap. 21, Laws of Kenya*). The Applicant also relies upon the provisions of Order 42 rule 7(1) of the Civil Procedure Rules. That rule provides -

“7(1). Where an order is made for execution of a decree from which an appeal is pending, the court which passed the decree, or the court to which an appeal is pending in terms of rule 6 shall, on sufficient cause being shown by the Appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the court from whose decree or order such appeal shall have been brought.

(2) ...

The Applicant gave Notice of Appeal dated 13th May 2011 against my decision made on 6th May 2011. There is no evidence of such an appeal having actually been filed, and the application for security (*the subject of this Ruling*) was made 21st February 2012, some 8 or so months later showing that the application was actually an afterthought, giving credence to the Respondent's contention that the application is an abuse of the process of court.

However the issue under Order 42 rule 7(1) is whether the Applicant has shown sufficient cause why the security should be given. The Applicant says that the Respondent is a person of no known abode or income. Should the appeal be successful, and the decretal sum has been paid to the Respondent, there may well be no wherewithal for the Respondent to pay or refund such sum.

The Respondent has not answered the concerns of the Applicant except an offer through his counsel on record for a written undertaking to reconstitute such decretal sum should the appeal be successful.

The Appellant had however offered through her application that the decretal sum be placed “elsewhere” without specifying what exactly “elsewhere” meant.

In the context of our usual practice contexts orders are secured either through the decretal sums being deposited in court, or in the joint names of the parties' Advocates. The sum outstanding as at 12th April 2011 (*according to the Respondents Letter of that date to P. M. Dick Auctioneers*), was Ksh 825,098/=.

The proper order to make in these circumstances would be that the Applicant does deposit the sum of Ksh 828,098/= together with accrued interest to 31.10.2012 into court within 60 days of the date hereof. In default the parties be at liberty to move the court for further orders.

The costs of the Application herein be to the Respondents in any event.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 12th day of October, 2012

M. J. ANYARA EMUKULE

JUDGE