REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 12 of 2006

GITONGA KAMITI…..…….....……1ST PLAINTIFF
BROWN M. KAIRARIA…….....…….2ND PLAINTIFF
(BOTH TRADING AS GITONGA KAMITI, KAIRARIA & CO. ADVOCATES)
VS
ROSE M. SIMBA……...…...…….……1ST DEFENDANT
JOHN P.N. SIMBA……2ND DEFENDANT
(BOTH TRADING AS SIMBA & SMBA ADVOCATES)

RULING

1. Before me is an Application by way of a Notice of Motion dated 24th August 2012 brought by the Defendants and through which they seek the substantive order that this court be pleased to order stay of execution of the judgment and/or decree against the Defendants/Applicants pending the hearing and determination of their intended preferred appeal.

2. The Application is based on the grounds rendered on the face thereof and is supported by the affidavit of Maruti N. Khamala sworn on 24th August 2012.

3. Essentially, the Applicants aver that unless the orders of stay are granted, the appeal they intent to lodge would be rendered nugatory thereby occasioning substantial loss and prejudice to them. They aver further that they have an arguable and meritorious appeal with good prospects of success which appeal may be rendered nugatory unless the stay orders sought are granted. A draft memorandum of appeal is annexed in that regard. They further contend that the amount of money involved in the judgment is substantial.

4. In opposition to the Application, the Plaintiffs/Respondents have filed Grounds of Opposition dated 12th September 2012 in which they contend that the application lacks merit in that the defendant had not taken steps to lodge the appeal and have not indeed even extracted the decree. They see the present application as geared at denying the Plaintiff the fruits of judgment. They further claim that they are capable of refunding the decretal amount should the appeal succeed as they are not men of straw. They further contend that the Defendants have not satisfied the condition as to substantial loss.

5. Counsel for both parties put in written submissions which I have read and taken into account.

6. I have carefully considered the application, the grounds in opposition and the written submissions by counsel for both parties. I have also had the occasion to review the authorities cited.

7. The sole issue that I am required to determine in the present application is whether the applicant has met the conditions for grant of stay of execution set out at order 42 rule 6(1) and (2) of the Civil Procedure Rule 2010 which provides:-

"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."

The above provision was aptly considered by the Court of Appeal in the case of ***Butt Vs Rent Restriction Tribunal*** **[1982] KRL 417** where the learned Judge, Madan JA (as he then was) quotes with approval the views of *Brett L.J. in Wilson Vs Church* (No 2) 12 ch D [1879] 454 AT 459 as follows:

"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory"

Justice Madan then rendered himself thus in the Butt case (Supra) at page 419,

"if there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be nugatory. A stay which would otherwise be granted ought not to be refused because the Judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings"

10. With the legal parameters for the grant of stay of execution pending appeal laid down as above, I can now apply them to the present case.

11.With regard to whether the Applicant has an arguable appeal, I have perused the memorandum of appeal annexed as "AMK4" and although I do not necessarily agree with most of the grounds of appeal set out therein, I at the same time do not think it just to block the Applicant from pursuing its right of appeal as I reckon that judges are not infallible. I would therefore find that the intended appeal reasonably meets this test.

12.On the test of substantial loss, it is already common ground that the sum of Kshs. 2.6 Million held in an escrow account together with all interest earned thereon would be refunded by the Applicant to the Plaintiffs and indeed should have been refunded by now. The decretal sum in question, for purposes of this application is therefore the sum of Kshs. 2 Million which this court allowed as damages for breach of trust.

13.Order 42 Rule 6 (2) requires the applicants to show that substantial loss may result if stay is not granted. What constitutes substantial loss is usually depended on the facts of each particular case. However, I gather guidance from the case of ***Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited (1999) EA 236*** where the Court of appeal held as follows:

"…and we must therefore consider whether or not the intended appeal will be rendered nugatory if stay is not granted. Mr. Gatonye for the Respondent Bank argued that if Mr. Oraro were to succeed in the appeal, the Respondent Bank was sound enough to be able to refund the sum in question.

Ordinarily that is the principle on which the court acts but recent rulings of this court suggested that dealing with this limb on the application, the court ought to weigh the claims on both sides. We must weigh the claims on both sides. Is M/s Oraro & Rachier Advocates are required to pay the full decretal amount, as a law firm, they might find themselves in a very tight situation. Whereas if the Bank is kept out of a sum of Kshs. 10,000,000/- it would not be affected. This is in our view, in this case, the position when we are considering the situation. The balance of convenience overall favours the Applicant".

14. In the case before the court, two law firms are involved in the litigation and the question arising is whether payment of a sum of Kshs. 2 Million is one which would place the law firm of Simba & Simba Advocates "in a very tight situation". On the other hand, the question also needs to be asked of whether the firm of Gitonga Kamiti, Kairaria Advocates is also a firm that would be unlikely to refund the sum of Kshs. 2 Million should the appeal succeed.

15.The case of Oraro & Rachier Advocates (supra) was decided 14 years ago and the sum of Kshs. 10 Million then would now be probably be equivalent to ten times the figure as of today. In that regard, the sum of Kshs. 2 Million in issue in this matter is a paltry sum which either law firms involved would have no difficult to raise. I would not therefore find that the Applicant would suffer substantial loss if it parted with the said sum of money. I also have little doubt that the Plaintiff firm would not struggle to refund the said sum of money should the appeal succeed.

16.However, I am aware that the court is enjoined to ensure that parties should be placed on equal terms in the pursuit of an appeal. In ***Harit Shett T/a Harit Sheth Advocate Vs Shamas Charania*****[2010] eKLR (Civil Application No 68 of 2008) the Court of appeal underscored this position** as follows:

"We have also taken into account the provisions of Section 1A and 1B of the Civil Procedure Act and section 3A and 3B of the Appellate Jurisdiction Act, which provisions came into force on 23rd July, 2009. By these new concepts of jurisprudence the courts, including this court, in interpreting the Civil Procedure Act or the Appellate Jurisdiction Act or in exercising any power must take into consideration the overriding objective as defined include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing".

17.Consequently, to ensure that the parties pursue the appeal on equal terms, I direct that the Applicant do furnish security by placing the sum of Kshs. 2 Million in an interest earning account opened in the names of the lawyers for both parties to be held until the hearing and determination of the appeal. The said deposit should be made within 21 days from today. In default, the Plaintiff would be at liberty

18.In the upshot, I am inclined to allow the Plaintiff's Notice of Motion application dated 24th August 2012 subject to the furnishing of security as aforesaid and with no orders as to costs.

IT IS SO ORDERED.

DATED, DELIVERED AND SIGNED THIS 29TH DAY OF NOVEMBER 2012

J.M MUTAVA
JUDGE