REPUBLIC OF KENYA

High Court at Eldoret

Civil Appeal 155 of 2011

PENINA NZISA NGOMO ….. 1ST APPELLANT

FELIX KIPTOO BETT …... 2ND APPELLANT

VERSUS

TRANS-NATIONAL BANK LIMITED .... RESPONDENT

(Being an appeal against the judgment/decree of the Hon. A. Onginjo – Senior Principal Magistrate in Eldoret Chief Magistrate's Court Civil Case No. 798 of 2009)

RULING

By way of Notice of Motion dated 12th October 2012 brought under Order 42 Rule 7 of the Civil Procedure Rules and Sections 3A and 63 of the Civil Procedure Act, Cap 21, Laws of Kenya the Appellants who are the Applicants pray for stay of execution of the decree and the warrants of arrest issued in **ELDORET CHIEF MAGISTRATE'S COURT CIVIL CASE NO. 798 OF 2009 TRANS-NATIONAL BANK LIMITED -VS- PENINA NGISA NGOMO & ANOTHER** pending the hearing and determination of the appeal and that costs of this application be provided for.

It is based on grounds that the Appellants shall suffer substantial loss if orders are not granted, Appellants are willing to tender security save for a cash deposit and that the application has been made without undue delay.

It is supported by the affidavit of Penina Nzisa Ngomo, the 1st Applicant sworn on 17th October 2012. The application is vehemently opposed vide a Replying Affidavit sworn on 5th November 2012 by Patrick Kiprop, the Branch Manager of the Respondent Bank.

It is argued in the Replying Affidavit that the Applicants are not entitled to the orders sought as they are guilty of laches. That application for stay of execution was lodged in the lower court about seven and a half (7½) months after Judgment was delivered. That the said application was dismissed on 25/6/2012 and it was not until 12th October, 2012 that this application was filed. That this delay is inordinate and inexcusable. The Respondent's deponent also argues that the assessment of costs of the lower Court's suit was done in the presence of Counsel for the Applicants and it took them up to nine (9) months to file the application in that court.

Respondents further argue that the application is made merely to delay ends of justice and to deny the Respondent enjoy the fruits of the judgment in the subordinate court.

The brief background to this appeal is that on 9th August, 2011 Judgment was entered against the Defendants (Appellants) jointly and severally for the sum of Kshs. 838,990/= plus costs and interests in

ELDORET CHIEF MAGISTRATE'S COURT CIVIL CASE NO. 798 OF 2009 – TRANS-NATIONAL BANK LIMITED -VS- PENINA NZIZA NGOMO AND FELIX KIPTOO BETT. The Defendants had allegedly taken a loan from the Plaintiff Bank which they failed to pay and being dissatisfied with the said Judgement, the Defendants filed this appeal.

I do not wish to go into depth on grounds why this appeal is preferred. My onerous task is to determine whether this application is merited.

It is brought under Order 42 Rule 7 of the Civil Procedure Rules and Section 63 of the Civil Procedure Act. My reading of Order 42 Rule 7 is that it is applicable where security is required to be deposited where an order for execution of decree appealed from exists. The part relevant in Section 63 is sub-section (b) where a court may order a Defendant to furnish security during execution proceedings.

Order 42 Rule 7 reads:

"42 . 7 (1) Where an order is made for the 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) Where an order has been made for the sale of immovable property in execution of a decree and an appeal is pending from such decree, the sale shall, on the application of the judgment- debtor to the court which made the order, or to any court to which such appeal or second appeal shall have been made, be stayed on such terms as to giving security or otherwise as the court thinks fit until the appeal is disposed of.

When Counsel for the Applicants argued in this application, he submitted why he felt the stay of execution of the decree of the subordinate court should be granted. In particular he argued that the Applicants have come to court within reasonable time and that they are ready to deposit security of any form except money. That explains why before a party meets the requirement of Order 42 Rule 7, conditions set out in Rule 6 thereof must be fulfilled.

It reads:-

"6 (1) No appeal or second appeal shall operate as a stay of execution or proceedings 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 may 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 sub-rule (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 reading of sub-rule (2) is that conditions set out in paragraphs (a) and (b) above must be met entirely and not singly. With regard to sub-rule (2) (a) court must be satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without reasonable delay. In

the first limb of (a) the only loss demonstrated that the Applicants stand to lose is that of their freedom. Their freedom because they are likely to be committed to civil jail, thus will be denied their freedom of movement and association due to the confinement that comes with the committal. It is also an undisputed fact that both Applicants are a wife and husband respectively. Their committal to jail again denies them the right to live as a family and with their children, if any. This to me is a substantial loss on their part.

On the second limb of paragraph (a) I must consider whether this application has been brought without unreasonable delay. Facts deponed to in the Replying Affidavit of Patrick Kiprop sworn on 5th November, 2012 on the laxity of the Applicants in bringing this application to court were not controverted by the Applicants or their Counsel at the hearing of this application.

Court has confirmed from the record, as is deponed in the Replying Affidavit that Judgment was delivered on 9th August, 2011. It was not until 20th April, 2012 vide an application dated 19th April, 2012 that an application for stay of execution in the subordinate court was lodged. This translates into over eight months since date of delivery of the Judgment. A copy of the application is attached to the Replying Affidavit and marked PK.1.

The said application was dismissed on 25th June, 2012 and it was not until after another four months that this application was brought. Suffice it to say, the appeal itself was filed on 26th September, 2012; which means that the Applicants came to this court close to 15 months since Judgment of the subordinate court was delivered.

All through the proceedings of the subordinate court, the Applicants were involved. Indeed, their Advocate participated in the assessment of costs. Hence nothing is strange to them.

The chronology of events I have given herein above does demonstrate the indolence with which the Applicants have come to court. They have sat back and watched things happen oblivious that one day they will hit them. As such I find that they have not come to court timeously. In fact, the grounds they have raised in their Memorandum of appeal called on them to have filed the appeal immediately the Judgment was pronounced. It is not until execution proceedings began that they have rushed to court to block the Respondent from enjoying the fruits of its judgment. I hold accordingly that the delay in filing this application has been inordinate and inexcusable and cannot bail them out.

I now move to the condition spelt out in sub-rule 2 (1) (b) which is that the court may order the deposit of such security for the due performance of the decree. Under this head the Applicants' Counsel submitted the Applicants are willing to furnish any security as may be ordered by the court save for one in monetary terms. The fact is that the rule does not specify the kind of security the parties may deposit so long as it is satisfied the security is sufficient and I add appropriate. The nature of this case is that Judgment was entered for a specific figure and for a judgment creditor to feel equitably awarded, it is only fair to order for a monetary security to be furnished. However, if the court is satisfied that a party is incapacitated to deliver monetary security, may order any other security be furnished with such terms as it deems fit and just. The explanation given as to why the applicants are not able to furnish a monetary security is that they have been having financial difficulties. Whereas it may be true that they have the financial difficulties, it was imperative that prove of that be tendered, for example a bank statement which would indicate account balances, if any. Most importantly however is that prove of security they suggested should have been exhibited, that is a Title Deed. It is not sufficient to say that a Title Deed or a Log Book would be delivered thereof; existence of such property must be proved. These Applicants failed to demonstrate this very important aspect that would mitigate their request. Again their submission in this respect cannot bail them out.

As I had earlier noted the conditions set out in Rule 6 Rule (2) (a) and (b) must be fulfilled in unison and not salitarily. Further, Rule 7 thereof would be applicable once Rule 6 has been fully complied with and court has deemed it fit that a security be deposited. In my considered view, the Applicants have failed the test of the law. I can only add that, it is just and fair at this juncture to allow the Respondent to enjoy the fruits of its Judgment. The upshot of my findings is that this application is dismissed with costs to the

Respondent.

DATED and **DELIVERED** at **ELDORET** this 22nd day of November, 2012.

G. W. NGENYE - MACHARIA
JUDGE

In the presence of:

Barasa Advocate for Applicants

Maritim Advocate for Respondent - absent