



REPUBLIC OF KENYA

PHILIP OJWANG KAMAU. PLAINTIFF

VERSUS

THE ATTORNEY GENERAL 1ST DEFENDANT

SURESH JETHWA & JYOTSANA SURESH JETHWA.2ND DEFENDANT

SUKHDEV SINGH LALY. 3RD DEFENDANT

R U L I N G

The application before the court is dated 11th December, 2007 and seeks stay of execution pending the hearing and final determination of the appeal. A decree in favour of the 2nd Defendants had been issued ordering the 3rd Defendant to pay the Plaintiff a total sum of Kshs.4,250,000/- with costs arising from a transfer of land transaction found to be based on fraud or misrepresentation of facts or in whatever name it may be called. The 3rd Defendant being aggrieved, filed the stated pending appeal. In the process the court also decreed that the 3rd Defendant and the 1st Defendant who is the Registrar to the plaintiffs, was to refund the purchase price and expenses of transfer aforesaid.

I have carefully perused the material upon which the application for stay is based. The orders made against the applicant/3rd Defendant are really against the plaintiff and consist of refund of the purchase price of the piece of land in dispute inclusive of the expenses incurred in the transfer plus the plaintiff's costs of the suit. Stay sought by the 3rd defendant therefore would be to stall the payment of the above items whose value is shown in the application for execution to amount approximately to kshs.5,600,000/- until the pending appeal is heard and finally determined.

To grant stay under order 41(4) of the Civil Procedure Rules to an applicant, the latter must have satisfied the following main conditions.

- a) That unless the stay is granted the applicant is likely to suffer substantial loss or damage.
- b) That unless the stay is granted the appeal is likely to be rendered nugatory.
- c) That the appeal has high chances of success and the application for stay was made without delay.
- d) That the applicant has or is willing to give such security as the court may order.

I will start by stating that an appealing party, exercising his undoubted right of appeal, should as much as possible be protected so that his appeal may not be rendered nugatory. Where it is accordingly shown that execution or enforcement of a decree would render a

proposed appeal nugatory, the court will easily be persuaded to grant a stay after properly balancing the decree-holder's claim that he is also entitled to protection from not being deprived of the fruits of his judgment.

In this case the applicant/3rd defendant argues that if he presently satisfies the Plaintiff's decree to the tune of about Kshs.5.6 million, he is likely to suffer loss since the Plaintiff who resides in Egypt and has no property in this jurisdiction, will not be able or be willing to refund the said sum to him (the 3rd defendant). Similarly, the 3rd defendant argues, that the failure of the Plaintiff to refund, will that way render his appeal nugatory if it succeeds, as he thinks it has high chances of success.

I have considered this ground. It is not denied that the Plaintiff lives in Egypt and works there for African Export-Import Bank as a Senior Director. The applicant did not attempt to persuade this court with any tangible evidence that the Plaintiff is a man of straw. Indeed the fact that he is a Senior Director of a reputable bank would on the contrary, reassure this court of his ability to give restitution of the relevant funds when called upon to do so. In addition, the court is not oblivious of the fact that money to be paid by the 3rd Defendant/applicant, are moneys he had received as land purchase price for a title he did not have due to some fraudulent transaction. Payment of it to the plaintiff, will only be an act of restitution of funds earlier received by the applicant from the Plaintiff. As stated by Platt, JA in Kenya Shell Ltd Vs Benjamin Karuga Kibiru & Ruth Wairimu Karuga, (1982-1988) 1KAR, pg 1018: -

“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other suits. Substantial loss is the cornerstone of best jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept off their money.”

This court does not accordingly see the refund of the funds earlier received by the applicant as loss. There is therefore no likelihood of the applicant's appeal being rendered nugatory. If I am wrong in this assessment, I have nevertheless already stated that the Plaintiff is in a clear position of making restitution.

As to the chances of the appeal having high chances of success, I will withhold much comment. I however, note that the appeal was due to be filed within 60 days of giving of the Notice of appeal, and it was filed on the 62nd day, of the filing of the Notice of Appeal. Commons sense would dictate a conclusion that the appeal was filed out of time. It does not require the Court of Appeal to notice such a fact as the records alone will be conclusive. Unless the Court of Appeal extends the time and in the absence of a certificate of delay accompanying this application, a valid or competent appeal upon which the stay sought is to be pended, is lacking. In those circumstances the high chances of the appeal's success also are lacking. I will say no more on that issue.

Finally, this court notices that this application was filed three months after the judgment was delivered. It was filed almost the last moments of an interim stay which had been granted by the court which delivered the judgment. The applicant has not explained away the three month's delay. It is like he was waiting to ambush the court to extend or grant fresh stay after he had spent every one day of stay earlier granted. Furthermore, this application before me was prosecuted about 18 months after it was filed. The applicant has not explained why he required 18 months to prosecute the application except most likely to delay the execution and delay the plaintiff from enjoying the fruits of his judgment. In my view the applicant does not deserve the stay, which itself is an equitable or discretionary relief. As stated by the Court of Appeal in Joseph Wakari, Vs Barclays Bank Ltd & Another in Civil Application No. 27 of 1998,

“There must be substantial reasons for grant of stay of execution. It is not enough to say that the applicant will be burdened financially. That is the natural consequences of a judgment entered against him. It is also not enough to say that the fact of filing of the proposed appeal entitles an applicant to a stay of execution of a decree.”

In my view the applicant herein believed all along that the filing of an appeal should entitle him a stay. He must also have believed that paying the decretal money, which in this case he must have happily received earlier while he was really not entitled to it considering the doubtfulness of the transaction, burdened him financially. And yet as stated in the cited case above, that was the consequence of a judgment of court which must have weighed all the aspects of the case before it.

In the circumstances of this case therefore, this application for stay has no merit. It is hereby dismissed with costs to the applicant. Orders accordingly.

Dated and delivered at Nairobi this 3rd day of February, 2010.

.....

D A ONYANCHA

JUDGE