REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Appeal 2 of 2009

1. THE ANGLICAN CHURCH OF KENYA

2. A.C.K GUEST HOUSE ..... APPELLANT

V E R S U S

ALFRED IMBWAGA MUSUNGU ..... RESPONDENT

R U L I N G

This application is brought by a Notice of Motion dated 8th January, 2009, and is made under Order XLI rule 4(1) of the Civil Procedure Rules. The applicant seeks an order for stay of execution and/or proceedings in CMCC No. 624 of 2000, pending the hearing and determination of the appeal.

The application is supported by the annexed affidavit sworn by the applicant's manager, and is based on the grounds that the judgment in the lower court is null and void and the appeal would be rendered nugatory if stay is not granted. The application is strenuously opposed by a long replying affidavit sworn by the respondent. It comprises 49 paragraphs spanning more than 7 pages, and paragraph 47 alone covers nearly 2 pages.

In a nutshell, the suit in the lower court involved a dispute over alleged wrongful dismissal from employment. After the trial court found in favour of the plaintiff, the defendant filed an application for orders, inter alia, that the summons to enter appearance in the suit be struck out, and that all orders including the judgment issued in this matter and warrants of attachment and sale in execution be declared null and void and be set aside. By a ruling delivered on 13th November, 2008, the trial court declined to strike out the summons to enter appearance and all subsequent orders in this suit. The applicant filed yet another application dated 17th November, 2008, seeking leave to appeal against the ruling dated 13th November, 2008, and further seeking a stay of execution of the judgment herein pending such appeal. The lower court granted leave to appeal but declined to grant an order of stay of execution. It was this latter ruling which led to the present appeal against the refusal to strike out the summons to enter appearance and to stay execution.

The main issue for determination is whether the applicant is entitled to an order for stay of execution pending appeal. O. XLI rule 4(1) of the Civil Procedure rules is clear that no appeal or second appeal shall operate as a stay of execution. However, the court appealed from may, for sufficient cause, order stay of execution of such decree or order. And whether such stay is granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty to consider such application

and to make such order thereon as may to it seem just.

O.XLI rule 4(2) then states as follows-

"*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.

(b) ... "

The respondent seems to be under a misapprehension that the application is brought after an unreasonable delay since the judgment in the suit was pronounced in October 2002. However, the correct position is that the appeal on record is not against the entire suit, but only against the lower court's ruling dated 13th November, 2008, refusing to strike out the summons to enter appearance and all subsequent orders in the suit. Leave to file appeal against the said order was granted on 7th January, 2009, and the same was filed with this application on 12th January, 2009. I therefore find that the application was filed without unreasonable delay. This satisfies the second limb of O. XLI rule 4(2) (a).

In an application for stay of execution, it is upon an applicant to satisfy the court that substantial loss may result to it unless the order for stay is made. In this case, what is at stake is a money decree. In the case of KENYA SHELL v. KARUGA (1982-88) I KAR 1018, a similar application failed in the High Court because there was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts. In the words of Platt, J.A. at page 1022-

"*... Substantial loss in its various forms, is the corner stone ... 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 out of their money ...*"

In the matter before this court, the applicant's apprehension is that the respondent is a pauper and jobless and if he is paid a sum of money close to half a million shillings, he would not be able to refund it ultimately. In answer to that, the respondent says that he owns a house at Shelly Beach whose value exceeds the amount awarded herein, and he can easily compensate the appellants if the appeal were to succeed. The onus lies on the respondent to show that he owns a house at Shelly Beach. He has not adduced any evidence in support of the alleged ownership. He would have done better to explain whether it is a permanent or semi permanent house, whether it is a house without land, and if it is with land, whether it is freehold or leasehold, etc. In the absence of such particulars, it is not enough for a litigant to say

"*I own some property.*" I therefore find that the respondent's statement that he would be able to refund the decretal sum, if released to him, is not different from one in which a respondent says he would be able to refund the decretal sum since he is in gainful employment in the City.

The very use of the phrase "decretal sum" is misleading in the context of this application. The warrant of attachment sought to be enforced is dated 12th August, 2008. It shows that the defendant/applicant was ordered by decree of the court passed on 10th December, 2002, to pay to the plaintiff/respondent the sum of Kshs. 303,538/-. However, in a ruling dated 13th November, 2008, the learned Principal Magistrate, referring to the submission of the applicant's counsel that there was no decree which could be executed, said-

"*I have perused the record and concur with him as there is no decree extracted, signed and issued by the court as required under Section 25 of the Civil Procedure Act. It therefore follows there is nothing to execute and unless and until a decree is issued execution cannot issue or proceed.*

For that reason ... execution is stayed pending issuance of a proper decree herein."

As of now, therefore, there is no decree capable of enforcement.

Finally, Mr. Ambwere for the Respondent raised a preliminary objection which was argued with the main application. His argument was that since this matter came to court during the vacation, it was imperative for the applicant to bring two applications - the first one for leave to be heard during the vacation, and then the substantive application. Two applications are therefore required, and since the applicant combined the two applications under one Notice of Motion, the court's jurisdiction was invoked in the wrong way. In his response, Mr. Gathuku for the applicant submitted that the matter was within the discretion of the court and the court allowed the application after being satisfied that it was urgent.

It was this court which was on vacation duty, and the court noted the point raised by Mr. Ambwere. The applicant incorporated the application for leave to be heard during the vacation into the main application. Because of the urgency, the court cautioned the applicant that the best practice is to bring two separate applications, but because of the urgency, the court nevertheless consciously admitted the application for hearing during the vacation, gave some interim orders on the substantive application, and directed that the same be served for inter partes hearing. In my view, the worst that can be said is that what happened was an irregularity but certainly not an illegality. And since the respondent does not claim to have been prejudiced in any way, I don't see that he should make so much fuss about it. Otherwise the best practice remains the making of two separate applications.

In sum, after considering that the respondent has not demonstrated that he would be able to refund the money if it is paid out to him, it seems to me that the just order to make in these circumstances is to grant a stay of execution in terms of prayer 3 of the Notice of Motion dated 8th January, 2009 as prayed. It is so ordered. Costs to abide the outcome of the appeal.

Dated and delivered at Mombasa this 13th day of March, 2009.

L. NJAGI

JUDGE