REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Appeal 161 of 2007

MCHENZALA SITA…..……..…APPELLANT

VERSUS

IDHA MARIE…….……..……...RESPONDENT

RULING

I have before me an application by way of Notice of Motion dated 19th March 2009 by Idha Marie (hereinafter "the respondent"). The application is expressed to be brought under the provisions of Order XLI Rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The main order sought is stay of execution pending the hearing and determination of an intended appeal.

The main reason for the application is that unless the stay is ordered the respondent shall suffer substantial loss. The application is supported by an affidavit sworn by the respondent. In the affidavit, it is deponed, *inter alia*, that the respondent has given notice of appeal in respect of the judgment entered against him and further that the intended appeal has good chances of success and unless the stay is ordered the respondent shall suffer substantial loss since the appellant cannot refund the decretal amount in the event the appeal succeeds.

The application is opposed and there are Grounds of Opposition and a Replying affidavit filed in opposition to the application. The replying affidavit is sworn by the appellant and the Grounds of Opposition are filed by her advocates. In the affidavit it is deponed, *inter alia*, that the sum of the judgment is small and can be recovered from sale of domestic equipment. In any event, it is further deponed, the appellant owns land and a house where she lives in Mazeras which is valued at more than a half a million shillings. In the premises, the appellant contends that the intended appeal shall not be rendered nugatory in the event it eventually succeeds.

Counsel in their oral submissions before me, recited their respective client's averments in their affidavits and urged the stance stated in those affidavits. I have considered the application, the affidavits and the submissions of counsel. Having done so, I take the following view of the matter.

For the respondent to succeed in this application, he had to show that there is sufficient cause to order stay of execution. He was also required to establish that he will suffer substantial loss if the order of stay is not granted and that the application had been made without unreasonable delay. Finally, he had to demonstrate that he can furnish sufficient security to meet the decree in the event the amount therein has ultimately to be paid.

With regard to delay, it is noted that the judgment intended to be challenged was delivered on 1st December 2008. This application was lodged on 19th March 2009. The delay involved was therefore of

more than $3^1/_2$ months. That delay has not been explained in the affidavit in support of the application.

With regard to the establishment of sufficient cause, I note that the appellant has not exhibited a draft of the intended appeal. At paragraph 9 of the supporting affidavit the respondent has deponed that he has a good appeal since *inter alia*, no negligence was proved against him. A finding on the issue was made in the judgment intended to be challenged. It should be remembered that the intended appeal will be limited to issues of Law only. A draft of the proposed appeal would have disclosed the issues of Law intended to be raised on appeal and would thereby show sufficient cause.

With regard to the establishment by the respondent that substantial loss may result to him if the order of stay is not granted, I note that the respondent, in paragraph 8 of the supporting affidavit, depones that the appellant is an old and sickly lady who cannot refund the decretal amount in the event the appeal eventually succeeds. That averment was specifically rebutted by the appellant in paragraph 8 of the replying affidavit. In her own words:-

"8. That the allegation made that I cannot refund the principle sum is false considering it is a very small amount which can be recovered from sale of domestic equipment. In addition I own the land and house in which I live at Mazeras which is more than half a million shillings in value."

It is to be noted that it is substantial loss which is to be prevented by an order of stay. The appellant's averment in paragraph 8 aforesaid has not been challenged in a subsequent, further or supplementary affidavit. In the premises, the respondent has not demonstrated how his appeal will be rendered nugatory if stay is not allowed. All that will result is payment of the sums decreed and no more. In the event the intended appeal succeeds, the appellant will be called upon to pay back, an event she says presents no difficult at all.

With regard to security, the respondent has deponed that he is ready to deposit the sum of Kshs. 35,000/= and that it would be punitive for him to be ordered to deposit costs and interest since the Lower Court had earlier decided in his favour. It is plain therefore that only partial security is on offer. That is not in accord with Order XLI Rule 4 (2) (b) which reads as follows:-

"4 (2) No order of stay of execution shall be made under sub-rule (1) unless

(a) …….

(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."

In the event that the respondent's proposed appeal fails, he will ultimately be required to pay more than the sum he is ready to deposit. Failure to furnish security is not a bar to making an order regarding the same. I would still have ordered stay if the respondent's only default is the averment in paragraph 10 of the supporting affidavit. However, the respondent has not satisfied any of the other conditions for granting stay given in Order XLI Rule 4 of the Civil Procedure Rules.

In the end, I have no alternative but to dismiss this application. The same is accordingly dismissed with costs.

Order accordingly.

DATED AND DELIVERED AT MOMBASA THIS 20TH DAY OF MAY 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Gathuku for the Respondent.

F. AZANGALALA

JUDGE

20TH MAY 2009