REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL CASE 11 OF 2007

WATSON MUNYORI NJERU……..…..……APPELLANT/APPLICANT

Versus

JANE WANJIRU WANJOHI……..RESPONDENT/DEFENDANT

RULING

The application the subject of the present ruling is made by the Appellant by Notice of Motion dated 10th July 2007. That application is brought under ***Order XLI Rule 4*** of The Civil Procedure Rules. It seeks an order of stay of execution of the judgment delivered on 11th February 2007. The Appellant in support of that application stated in his affidavit that judgment of the lower court against him was for Ksh.823,460/= and that he has to-date paid to the Respondent Ksh.200,000/=. He stated that he is of the view that his appeal has high chances of success. The Respondent has in the meanwhile served him with a notice to show cause why he should not be committed to civil jail. The Appellant stated that he suffers from diabetes and hypertension. In that regard he annexed to his affidavit the discharge summary of the Mater Hospital, which seems to be dated 6th May 2006. He also annexed a document which seems to be the result of laboratory tests carried out on him. The Appellant stated that he is likely to suffer irreparable loss if stay is not granted. The Respondent opposed the application by a Replying Affidavit. In that Replying Affidavit the Respondent was of the view that the application being brought late in the day was intended to deny her the fruits of her judgment. At the time when the application was filed by the appellant the Notice to Show Cause was due to be heard within five days. The Respondent was of the view that the appeal does not have overwhelming chances of success. Further she was of the view that illness is not a ground for seeking stay. That the Appellant has not shown that she is unable to refund the decretal amount if the appeal is successful. That she is a person of means and to that end she gave the example to the money lent to the Appellant, which is the subject of the present appeal.

The Appellant's counsel in submissions sought to rely on ***Section 43*** of the Civil Procedure Act. That section in part provides as follows:

"At any time after a warrant for the arrest of a judgment-debtor has been issued, the court may cancel it on the ground of his serious illness.

Where a judgment-debtor has been arrested, the court may release him if in its opinion he is not in a fit state of health to be detained in prison."

That section in my view does not apply to this case since the warrant of arrest has not been issued for the court to order its cancellation or to order for the release of the Appellant from civil jail. The arguments therefore in relation to that section are rejected. The Appellant's counsel also relied on ***Section 38*** of the Civil Procedure Act, which he said provided the hierarchy of the modes of execution. What I understood the Appellant's counsel to say was that the order in which the modes of execution are provided in that section were indicative of the way a party wishing to execute a decree should follow. In other words a party wishing to execute a decree would begin by seeking the attachment and sale of any property of the judgment-debtor. Thereafter would follow the other modes in the order they appear. In that section warrant of arrest is the fourth mode of execution. That argument has no basis in law and is hereby rejected by this court.

The application before court has been brought under ***Order XLI Rule 4*** of the Civil Procedure Rules. Under ***Subrule (1)*** of that Rule, the court may, for sufficient cause, order stay of execution of a decree or an order. ***Subrule (2)*** provides that a stay cannot be ordered unless the provisions thereof are considered. ***Subrule (2)*** of ***Rule 4*** provides 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; 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 Appellant stated that because he is ill he will suffer substantial loss if stay is not granted. In that regard he relied on the medical documentation which included the discharge summary and laboratory tests. It ought to be noted that all those medical documents are in the medical jargon and the court is unable to understand the meaning of them. Indeed the court is unable to ascertain from those documents the state of health of the Appellant. Over and above that as correctly pointed out by the Respondent, all those documents relate to a period in the year 2006, which was even before judgment was entered against the Appellant.

The court needs to consider whether indeed medical illness of the nature of the Appellant can lead to substantial loss if stay is not granted. I would answer in the negative. What loss would the Appellant suffer? After all the Appellant can still be medicated wherever he is. In saying that the illness would cause him substantial loss, the Appellant did not say that he is incapable of paying the decretal amount. That leads this court to conclude that the Appellant is in a position to pay the decretal amount but he refuses to make that payment. The Appellant did not also say that he fears that the Respondent would not refund the money if the Appeal was successful. As seen from the above quotation of ***Order XLI Rule 4(2)*** for an applicant to be granted stay, he ought to have made his application without unreasonable delay. In this case judgment was entered against the Appellant on 14th February 2007. The Appellant filed the present application on 13th July 2007. The Appellant in making that application did not explain his delay in bringing the same before court. In the case of **TANZANIA COTTON MARKETING BOARD -V- COGECOT COTTON CO. S. A. 1995-1998 1 E.A. 312,** the Court of Appeal of Tanzania at Dar-es-salaam stated that in an application for stay where the appellant claimed that unless stay is granted he would suffer substantial loss, that it was incumbent upon such a party to give detailed particulars of the loss to enable the court satisfy itself that such loss would really be incurred. I do accept the Appellant counsel's argument that under ***Rule 4(2)*** substantial loss is not defined. However for one to accept the argument raised by the Appellant as a reason for substantial loss that would be a very simplistic way of considering substantial loss. In all of this it ought to be remembered that what the Appellant is facing is a notice to show cause. He can indeed attend court to show cause why the warrant of arrest should not be issued. But to seek to have a stay on the basis of his illness, if at all, which he seems to have suffered in the year 2006, cannot be acceptable by this court. In the end the court finds that the Appellant has failed to prove the conditions necessary for stay to be granted and accordingly the Notice of Motion dated 10th July 2007 is hereby dismissed with costs to the Respondent.

Dated and delivered at Nyeri this 21st day of September 2007.

MARY KASANGO

JUDGE