



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 457 of 1999

SALLY NYAKIO THUO.....PLAINTIFF

VERSUS

DOUGLAS OJWANG.....1ST DEFENDANT

CHARLES MAGETO.....2ND DEFENDANT

RULING

This is an application for stay of execution of this court's judgment delivered on 20th September, 2007 pending hearing and determination of an intended appeal to the Court of Appeal. The application was made pursuant to the provisions of Order XLI rule 4 of the Civil Procedure Rules. The judgment sum was Kshs.1,906,300/- plus costs and interest.

The application was supported by an affidavit sworn by the defendants' advocate, Mr. Dilipsinh Prabhatsinh Mahida. He deposed that he had full knowledge and information concerning this suit derived from his conduct of this suit. He had also been duly authorized to swear the affidavit by the defendants. The defendants had filed a notice of appeal and pursuant to the provisions of **Order XLI rule 4(4)** they are deemed to have filed the appeal to the Court of Appeal. They have also applied for certified copies of the proceedings and judgment.

Counsel deposed that the appeal was likely to be rendered nugatory unless stay of execution was granted. This is because if the decretal amount is paid to the plaintiff, it will be distributed amongst all the eight beneficiaries of the deceased's estate and it would be difficult to recover the same in the event that the appeal was successful. Lastly, he deposed that the defendants' insurers were willing to deposit the decretal sum in an interest earning account in the joint names of the advocates for the parties herein.

Mr. Wahome for the plaintiff opposed the said application. He submitted that the application was incompetent because the affidavit in support thereof was sworn by the defendants' advocate who had deposed to contested facts. He stated that Mr. Mahida could not competently aver that the plaintiff would be incapable of refunding the decretal sum if the appeal was successful. He urged the court to strike out the affidavit and since the chamber summons cannot stand without the supporting affidavit proceed to strike out the same. He sought to rely on the decision of **GEORGE S. ODUOR VS PLAN INTERNATIONAL, Milimani Commercial Courts**, Civil Case No. 464 of 2001. In that case an advocate had deposed to contested matters of fact and the court struck out the affidavit and the application since it had no material to support it.

Mr. Wahome further submitted that there was nothing to show that the respondent was not able to refund the decretal sum in the event that the same was paid to her and the appeal was successful. He pointed out that the plaintiff had a monetary decree in her favour and that it was not normal for an appeal against such a decree to be rendered nugatory. No special circumstances had been shown to exist as would cause the appeal to be rendered nugatory, he added. He cited the Court of Appeal decision in ***KENYA SHELL LTD VS BENJAMIN KARUGA KIBIRU & ANOTHER, (1982-88) 1 KAR 1018***. He urged the court to dismiss the application.

I have taken into account all the submissions by both counsel. In considering an application for stay of execution pending hearing and determination of an appeal, the court has to consider whether the applicant is likely to suffer substantial loss if stay is not granted. The court will also consider whether the application has been made without undue delay and whether the applicant has provided or offered to provide sufficient security for the due performance of such decree as may ultimately be binding on him.

There is no allegation that the application herein was filed belatedly. The applicants' insurers have also offered to deposit the entire decretal amount in an interest earning account in the joint names of the advocates for the parties. The only issue that remains for my determination is whether the defendants/applicants have demonstrated that they are likely to suffer substantial loss if the orders sought are not granted. But before I determine that issue, I have to consider the objections raised by Mr. Wahome regarding the affidavit that was sworn by Mr. Mahida in support of the application for stay of execution. I do not think that Mr. Mahida deposed to contested matters of fact and which are not within his knowledge and belief. It is a fact that is clear from the plaint that the suit was filed by the plaintiff for her benefit and that of seven other beneficiaries of the late John Thuo Kabai. It is therefore common knowledge that if the decretal sum is paid it has to be distributed amongst all the beneficiaries, although some are still minors and their portions may have to be held in trust by the plaintiff. Mr. Mahida's contention that it will not be easy to recover the money if the appeal is successful is not without basis. The decretal sum is substantial.

In determining this application, I have to bear in mind that the defendants have a constitutional right of appeal and that my decision is not infallible, the Court of Appeal will have the final say on the matter. In ***ERINFORD PROPERTIES LTD VS CHESHIRE COUNTY COUNCIL*** [1974] 2 ALL E.R. 448 at page 454, Meggery J stated as follows:-

“A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognize that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal.”

Although this is not an application for an injunction pending appeal, the principle stated therein is applicable in an application such as the one before this court.

In the circumstances of this matter, I allow the defendants' application for stay of execution pending hearing and determination of their appeal. The stay is granted on condition that the decretal sum is deposited in an interest earning account in the joint names of the advocates for the parties herein. That should be done within the next thirty (30) days from the date hereof. The advocates shall agree on the bank to which the deposit shall be made. The defendants shall bear the costs of this application.

DATED at Nakuru this 20th day of December, 2007.

D. MUSINGA

JUDGE

Ruling delivered in open court in the presence of Mr. Mahida for the applicant and N/A for the

respondent.

D. MUSINGA

JUDGE