



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 397 OF 2000

GEOFFREY NJENGA NJOROGEAPPLICANT

VS

BONIFACE NJAURESPONDENT

R U L I N G

The application subject to this ruling is for stay of execution pending the hearing and determination of appeal filed herein on 8th August, 2000.

It is supported by the grounds stated on the body thereof and the averments in the supporting affidavit.

The grounds on the body of the application are that there is no lower court record of the proceedings and judgment and that the appeal filed herein has overwhelming chances of success.

The averments in the supporting affidavit are that the plaintiff was in the process of executing; and that if the execution is carried out the applicants will be prejudiced in case the appeal filed herein is allowed.

The respondent filed grounds of opposition to oppose the application stating that the application was bad in law, that it was fatally defective and ought to be struck out with costs to the respondent, that it is an abuse of the court process by the appellants, that the appellants were guilty of laches as there was a long and unexplained delay on their part, and that the application was unprocedural (scandalous and frivolous).

The application was heard in court on 18th February 2003 when counsel for the parties submitted them

. Counsel for the applicant submitted that the grounds giving rise to the same are that there is an appeal pending and that if execution is carried out the appeal, which has high chances of success will be rendered nugatory. That the lower court file is missing and that it is in the interest of justice that an order of stay of execution be granted.

Counsel for the respondent opposed the application and stated that the applicant had already started paying the decretal sum by instalments and that the first instalment of Kshs.29,300/= had been received.

She stated further that the application was an abuse of the court process as the judgment was delivered on 17.7.2000 and the application made on 17.10.2002.

That though the advocate who appeared for the applicant up to the judgment date was different, the current one had not obtained the court leave to come on record as is required by order III Rule 9(a) of the Civil Procedure Rules; hence this advocate was not properly on record.

She prayed that the application be dismissed with costs. An order for stay of execution can or not be

granted at the discretion of the court and that considerations for it are set out in order XLI Rule 4 of the Civil Procedure Rules.

In the main, the applicant should show he will suffer substantial loss if an order of stay is denied, or that if the order is refused and execution proceeds, the applicant will not be able to recover the decretal sum if the appeal succeeds. The applicant should also undertake to furnish security for the decretal sum.

There is no averment or submission by the appellant on any of these 3 important conditions necessary for the grant of this application for stay of execution.

This being the case there is no basis upon which this court should consider granting this application for stay of execution.

And if the appellant himself avers the lower court record is missing, both in the supporting affidavit and the submissions in this court where then will the court get the relevant information to be able to issue the respondent with the execution process, which they allege is imminent? They give no sufficient information on this.

Added to this, counsel for the applicant is not properly on this record for lack of leave from the court to act.

There is also no explanation why this application for stay should have been filed in this court over 2 years after the judgment was delivered.

Moreover, if the respondent has not carried out execution for the 2 years since the judgment was delivered, where has the appellant got the idea the said respondent is about to execute? There is no indication.

I agree with counsel for the respondent that this application is an afterthought, after the appellant had agreed to pay the decretal amount by instalments.

This application has either no merit or it is incompetent.

In the ultimate result, I strike it out and/or dismiss the same with costs.

Delivered this 5th day of March 2003.

D.K.S. AGANYANYA

JUDGE