



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC APPEAL NO.ELCA/E032 OF 2021

JAMES G WATHIGO.....APPELLANT

=VERSUS=

DR. ZULFIKARALI RAJABALI SHIVJI VIRANI.....RESPONDENT

RULING

1. This is a ruling in respect of a notice of motion dated 6th May 2021 in which the Appellant / Applicant seeks stay of execution pending Appeal. The Applicant contends that judgement was entered against him on 14th April 2021 in which he was ordered to pay KShs.6,319,000/= together with costs and interests.
2. The Applicant argues that if he is made to pay the decretal sum before the Appeal is heard and determined, the Appeal will be rendered nugatory. The Applicant prays that there be stay of execution pending hearing and determination of his appeal.
3. The Applicant's application is opposed by the Respondent based on a replying affidavit sworn on 14th June 2021. The Respondent contends that the Judgement in his favour is a money decree which will not render the Appeal by the Applicant nugatory. The Respondent argues that he is a medical doctor practicing in Kenya and that even if the Applicant pays the decretal sum and the appeal succeeds, he is capable of refunding the decretal sum to the Applicant.
4. The parties were directed to file written submissions. The Applicant filed his submissions dated 6th August 2021. The Respondent filed his submission dated 5th August 2021. I have considered the Applicant's application as well as the opposition to the same by the Respondent. The only issue for determination is whether the Applicant has met the threshold for grant of stay of execution pending Appeal.
5. Under Order 42 Rule 6(2) an Applicant is supposed to bring the application without unreasonable delay; demonstrate that he will suffer substantial loss should stay be declined and offer such security as may ultimately be binding upon him in the decree.
6. In the instant case, the judgement which is being appealed against was made on 14th April 2021. The application for stay was filed on 6th May 2021. There is therefore no unreasonable delay. On whether the Applicant will suffer substantial loss, the background of the decretal sum should be considered. The Respondent intended to purchase land which the Applicant was offering for sale in Naivasha.
7. The Respondent paid a total of KShs.6,319,000/= towards the purchase of the plot in the year 2014 . It then turned out that the plot was not available as the Applicant had sold it to another person. There was no refund made. The Applicant offered to refund the amount he received in six equal instalments. The offer was accepted but the Applicant did not pay prompting the Respondent to file a suit for recovery.
8. The Respondent then made an application for summary judgement on admission. Judgement was accordingly entered for the Respondent. This being a money decree from a sum that has been admitted, I do not think that the Applicant's appeal will be rendered nugatory should he pay the decretal sum and he succeeds in the Appeal. The Respondent is a medical practitioner and there is no evidence that he will not repay the decretal sum if the Appeal succeeds. In other words, the Applicant has not demonstrated that he will suffer substantial loss should stay not be granted.
9. In the case of **Kenya Hotel Properties Limited Vs Willesden Investment Limited (2007) e KLR** the Court of Appeal held that where the decree is a money decree, the Appeal will not be rendered nugatory unless the Applicant can demonstrate that the Respondent would not be in a position to refund the decretal sum should its Appeal be successful.
10. The issue of security can only be addressed in a case where there is demonstration of substantial loss. There being no demonstration of substantial loss, I find that the Applicant's application lacks merit. The same is dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 28TH DAY OF OCTOBER 2021

E.O.OBAGA

JUDGE

In the Virtual Presence of :-

Mr Makori for Respondent

Court Assistant: Mercy

E.O.OBAGA

JUDGE