



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 112 OF 2019

BOLPAK TRADING COMPANY LIMITED.....APPELLANT

VERSUS

MONICA AWUOR AYIEKO.....RESPONDENT

RULING

The application before me was brought by **MONICA AYIEKO** who was the Respondent in the substantive appeal herein.

1. On 13th October 2020 I delivered the Judgment, through which I allowed the appeal.
2. Whilst the trial court had held the Defendant liable to compensate the Plaintiff, this court set aside the trial court's finding on liability. This court then proceeded to order that the Plaintiff's suit be dismissed.
3. The Plaintiff has now lodged a Notice of Appeal at the Court of Appeal, as she is determined to challenge the Judgment delivered on 13th October 2020.
4. Having commenced the process of appeal, the Plaintiff has now brought an application seeking an order for stay of execution of the Decree.
5. The Plaintiff specifically sought an order that would stop a process through which the Defendant would demand the refund of the sum of Kshs 500,000/= which had been paid to her earlier.
6. It was the Plaintiff's case that if she were compelled to pay back the said amount to the Defendant, she would suffer serious loss and damage; and the appeal would be rendered nugatory.
7. The Plaintiff submitted that the appeal was arguable. In the circumstances, whilst the appeal was still pending, the Plaintiff reasoned that it would only be fair and just that she should not be compelled to refund the money to the Defendant.
8. In answer to the application, the Defendant submitted that the Plaintiff had failed to satisfy the conditions upon which the court could exercise its discretionary powers in favour of the Plaintiff.
9. Pursuant to **Order 42 Rule 6 (2)** of the **Civil Procedure Rules**, no Order for stay of execution shall be made 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.

10. When canvassing the application, the Applicant submitted that the appeal would be rendered nugatory unless this court grants the order for stay of execution.

11. I find that the Applicant did not demonstrate to the court how her appeal would be rendered nugatory.

12. In my considered opinion, if the intended appeal was determined in favour of the Applicant, it would mean that the Respondent would, once again, become liable to compensate the Applicant. In that event, the Applicant would become entitled to receive payment from the Respondent.

13. There is absolutely no suggestion that the Respondent might be incapable of compensating the Applicant, if the intended appeal were ultimately successful.

14. The second answer given by the Respondent was that there was no Decree that is capable of being executed; and therefore an order for stay of execution would be in vain.

15. In the case of **WESTERN COLLEGE OF ARTS AND APPLIED SCIENCES Vs E. P. ORANGA & 3 OTHERS [1976] KLR 63**, Law V.P. had the following to say in his Judgment;

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs.

In Wilson Vs Church [1879] 11 Ch D 576 the High Court had ordered the trustees of a fund to make payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment, for this court, in an application for a stay, to enforce or to restrain by injunction.”

16. To my mind, that reason is applicable to this case, subject to the minor modification, so that instead of referring to an order for an injunction to restrain the Respondent, we now refer to an order for stay of execution.

17. In the case of **GEORGE OLE SANGANI & OTHERS Vs KEDONG RANCH LIMITED, CIVIL APPLICATION NO. NAI 155 OF 2015**, the Court of Appeal pronounced itself as follows;

“In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as proprietors of the suit land on the basis of the doctrine of adverse possession.

The dismissal order cannot be enforced and is not capable of execution.

It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief

.....

It was not capable of execution or enforcement.

The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit, it cannot be granted.”

18. On the strength of that authority, I need not say anything more.

19. Therefore, the application which seeks the stay of execution of a judgment that had dismissed the Applicant’s suit is not sustainable. It is therefore dismissed, with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISUMU

This 4th day of March 2021

FRED A. OCHIENG

JUDGE