



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E0380 OF 2020

STANLEY NG'ANG'A WAINAINA.....APPELLANT

-VERSUS-

ELIKANAH MUTURA MUCHINA.....1ST RESPONDENT

(Suing as the legal representative of the estate of

DAVID MUCHINA MUTURA (Deceased)

MOSES GACHATHI MATHERI.....2ND RESPONDENT

JOSEPH KARIUKI KAMAU (Suing as the

Legal representative of the estate of

BERNARD KAMAU MUGO (deceased).....3RD RESPONDENT

RULING

- 1) The subject matter of this ruling is the motion dated 5/3/2021, in which the appellant substantially is seeking for an order for stay of execution of the judgment/decree of the trial court pending the hearing and determination of this appeal.
- 2) The motion is supported by a supporting and further affidavit sworn by the appellant. The respondents filed the replying affidavit sworn by Joseph Kariuki Kamau to oppose the application.
- 3) Learned advocates appearing in this matter made oral submissions to support their positions.
- 4) I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the motion. The appellant avers that the trial court proceeded to render a judgment dissolving the partnership with the respondents and that he is aggrieved with the trial court's decision hence this appeal.
- 5) It is argued that unless the decree of the trial court is stayed the respondents are likely to have it executed and have the partnership dissolved thus the appeal will be rendered nugatory.
- 6) The respondents are of the submission that the learned trial magistrate did not err in her finding that there was a partnership between the appellant and the respondents. The respondent pointed out that they produced documentary evidence to establish the existence of a partnership while the appellant failed to tender any documentary evidence.
- 7) The respondents further stated that the appellant misrepresented facts to this court to obtain unmerited orders. They further pointed out that the application was filed after undue delay of three months.

8) In response, the appellant stated that the court file went missing and upon its discovery it took time for the proceedings to be typed. It was also stated by the respondents that due to the outbreak of Covid 19 pandemic, the physical file could not be accessed hence the delay.

9) The principles to be considered in an application for stay are clearly spelt out in Order 42 rule 6 of the Civil Procedure Rules. **First** an application for stay must be filed without unreasonable delay. **Secondly**, the applicant must show the substantial loss he would suffer if the order for stay is declined. **Thirdly**, the provision for security for the due performance of the decree should be taken into account.

10) On the **first principle**, it is not in dispute that there was a delay of three months from the date of judgment on the part of the applicant before filing the application for stay. However, the appellant offered reasons for the delay. First, it is stated that the court file could not be traced. Secondly, that due to the break out of Covid 19 pandemic, parties could not access the court's physical file.

11) The respondents did not controvert the facts deponed by the appellant in the further affidavit. I am therefore convinced the cause for the delay was hence excusable.

12) In respect of the **second principle**, the appellant has stated that he would suffer substantial loss if the partnership is dissolved pursuant to the decision of the trial court. I am convinced that if the partnership is dissolved, the partnership property may be sold thus making it out of reach for the parties thus rendering the appeal as nugatory.

13) The **third** and final principle is in respect of security. In the circumstances of this dispute, it may not be appropriate to direct the appellant to provide security for the due performance of the decree. The order for stay in itself will preserve the status quo and the suit property pending appeal.

14) In the end, I find the motion dated 5/3/2021 to be meritorious.

Consequently, an order for stay of execution of the decree of the trial court pending appeal is granted. Costs of the application to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 13TH DAY OF MAY, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the 1st Respondent

..... for the 2nd Respondent