



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 425 OF 2019

PETER NYAGA NJOKA.....1ST APPELLANT/APPLICANT

SOLOMON MUGO MURIUKI2ND APPELLANT/APPLICANT

VERSUS

JOSEPH BATASI ONYIENGO (The legal and personal representative of estate

of the late CAREN NYABOE ONYIEGO (DECEASED)).....RESPONDENT

RULING

1. On 7/8/2020 the appellants/applicants filed a notice of motion seeking stay of execution of the consent order this court issued on 17/7/2019 and for the applicants be allowed to deposit ksh. 1,226,875 in court instead of a joint interest earning account.

2. The application was resolved by consent where the parties compromised that the applicant deposits half of the decretal sum that is Kshs. 1,226,75 in a joint interest earning account and for the balance to be paid to the respondent.

3. The appellant/applicant has now taken out the motion dated 23/4/2021 brought pursuant to the provisions of *Section 3A, 79G and 5 of the Civil Procedure Act (Cap 21), Order 22 rule 22, Order 42 Rule 4, 6 and 7 Order 50 rule 6 and Order 51 Rule 1 and 3 of the Civil Procedure Rules 2010* seeking the following orders

a. Spent

b. Spent

c. That this honorable court be pleased to order a stay of execution of the consent order recorded in court on 14/9/2020 pending the hearing and determination of the intended appeal

d. That the honorable court be pleased to vary the order by the court and allow the appellants/ applicants to provide a Bank Guarantee for the decretal sum balance within a period of 45 days

e. That the costs of this application abide the outcome of the appeal

4. The application is based on the grounds on the face of it and on the facts deponed in the supporting affidavit of Peris Gichohi. In it she deponed that as per the consent recorded in court on 14/8/2020 the applicants within 21 days deposited half the decretal sum to the respondent's advocates account but the applicant was unable to deposit the other half in a joint interest earning account as the respondent have failed to avail themselves to open the joint account even after sending numerous letters.

5. The motion is opposed by the respondent who filed the replying affidavit of Julian Ochoki who averred that pursuant to the consent order, on 29/10/2020 forwarded to the applicants the duly executed joint account opening form from co-operative bank for their execution but the applicants however, have since then never reverted or informed him why they failed to open the account. The applicants are therefore in breach of the terms of the consent and have not advanced any plausible ground to justify the setting aside of the consent order.

6. I have perused the application the affidavits and the record in it entirety and the issue which arose for determination is **whether to grant**

the order for stay of execution of the consent order recorded in court on 14/9/2020 pending the hearing and determination of the intended appeal?

7. The principles guiding the grant of an order for stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules which provides inter alia as follows:

No order for stay of execution shall be made under sub rule (1) 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.

8. On inspection of the file what comes out is that the parties have failed to agree on where to open the joint account. It is the applicant's argument that the respondent did not wish to open a joint account at NCBA Bank for personal reasons. On the other hand, the respondent argued that they sent the applicants duly executed forms to open a joint account at co-operative bank but he has never heard from the applicants.

9. In the case of **Stephen Wanjohi v Central Glass Industries Ltd, Nairobi HCC No.6726 of 1991**, the Court held that: -

“For the court to order a stay of execution there must be: -

a. Sufficient cause

b. Substantial loss

c. No unreasonable delay

d. Security and the grant of stay is discretionary”.

10. It is therefore well settled that the power to grant orders for stay of execution pending appeal is a discretionary power and must be exercised judiciously. It is therefore upto the applicant to show that they approached the court timeously and demonstrate the likelihood that they would suffer substantial loss if the order is denied.

11. Reverting to the application, the consent order was issued on 17/7/2019 where the applicant was to pay the respondent half of the decretal sum while the other half was to be deposited in a joint interest earning account. This however did not happen and the applicant has approached this court more than 8 months after the said consent order claiming that the respondent's advocates have failed to open an account. In the circumstances this court can infer that the applicants are not being genuine in their claims. They waited for a long period to file this application. In other words the application for stay was filed after unreasonable and unexplained delay.

12. In light of this I find that the application for stay lacks merit. The same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 4TH DAY OF JUNE, 2021

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent