



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E155 OF 2020

KASA AIDE.....APPELLANT/APPLICANT

VERSUS

HENRY MAINGI NGARUIYA.....RESPONDENT

RULING

1. This ruling relates to the Notice of Motion dated 23rd March, 2021 taken out by the appellant/applicant and supported by the grounds set out on its face and the facts stated in the affidavit of advocate Erick Ochieng. The applicant sought an order for a stay of execution of the default judgment and decree in Kandara PMCC NO. 48 OF 2020 pending the hearing and determination of the appeal against the ruling and order issued on 4th March, 2021 in the aforesaid case.
2. In response to the said Motion, the respondent filed the replying affidavit of advocate Joseph Njoroge Mungai.
3. The instant Motion was canvassed through the filing of written submissions.
4. I have considered the grounds set out on the face of the Motion, the facts deponed in the supporting and replying affidavits, and the respective submissions together with the authorities cited. It is noteworthy from the respective submissions that the parties were essentially arguing the appeal rather than the instant Motion. Consequently, I am unable to place much reliance on the submissions at this stage.
5. A brief background of the matter is that a default judgment was entered in favour of the respondent and against the applicant in the suit, thereby prompting the applicant to lodge an application seeking to set aside the said judgment. Upon hearing the parties on the application, the trial court in its ruling delivered on 4th March, 2021 agreed to set aside the default judgment on the condition that the applicant deposits the decretal sum in a joint interest earning account within 30 days from the date of the ruling. The aforementioned ruling is the subject of the appeal.
6. The guiding provision when it comes to applications seeking an order for a stay of execution is Order 42, Rule 6(2) of the Civil Procedure Rules which sets out the conditions to be satisfied for such an order to be granted.
7. The first condition states that the application must have been made without unreasonable delay. The impugned ruling was delivered on 4th March, 2021 while the instant Motion was brought on or about the 24th day of March, 2021. In my view, there has been no unreasonable delay in filing the Motion.
8. The second condition touches on substantial loss to be suffered by an applicant. Upon considering the unique circumstances of the matter at hand, I am satisfied that unless an order for a stay is granted, the appeal if successful will be rendered nugatory thereby likely causing the applicant substantial loss.
9. Under the final condition which is the provision of security for the due performance of such decree or order, in his supporting affidavit, Erick Ochieng states that the applicant has no means or ability at this stage to comply with those conditions, since they are onerous and prohibitive in nature. In response, Joseph Njoroge Mungai through his replying affidavit avers that the conditions set by the trial court are valid and it ought to be upon the applicant to comply accordingly.
10. Upon considering the above sentiments, I find that since the appeal is yet to be heard and determined, the provision of security commensurate to the decretal amount ought to be made by the applying party.
11. Consequently, I will allow the Motion dated 23rd March, 2021 in terms of prayer 3 and hereby order that there shall be a stay of execution of the judgment and decree in Kandara PMCC NO. 48 OF 2020 on the condition that the applicant deposits the entire decretal sum in an interest earning account to be held in the joint names of the parties' advocates/firm of advocates within 45 days from today, failing which the order for stay shall automatically lapse. Costs of the application to abide the outcome of the appeal.

Dated and signed at Nairobi this day of, 2021.

A. MBOGHOLI MSAGHA

JUDGE

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 7TH DAY OF JULY 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

Ochieng for Ataka for the Appellant

Opwanya for respondent