



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 26 OF 2020

ELIZABETH NYARUAI MUNGAI..... APPLICANT

VERSUS

DAVID NDIRANGU NJOGU.....1stRESPONDENT

PROVIDENCE AUCTIONEERS.....2ndRESPONDENT

RULING

1. A brief outline of the matter was that the respondent had filed a suit against the appellant seeking special damages, general damages plus costs and interest; despite being duly served the appellant never participated in hearing which then proceeded ex-parte and on 22/08/2017 judgment was entered in favour of the respondent; the appellant being dissatisfied with the judgment the appellant filed an application seeking orders for Stay of Execution of the ex-parte judgment and that an Interested Party be enjoined as a party to the proceedings;

2. On 24/09/2019 a Ruling was delivered and the application was allowed on condition thrown away costs assessed at Kshs.30,000/- payable within 14 days; the decretal sum be deposited in court also within 14 days and the auctioneers fees paid within the same time frame; in default the stay orders stood vacated;

3. The applicant being dissatisfied with the Ruling filed a Memorandum of Appeal and the instant Notice of Motion dated 13th August, 2020 brought under the provisions of Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A,1B, 3 and 3A, 79G and 95 of the Civil Procedure Act; the applicant relied on the grounds on the face of the application and on the Supporting Affidavit and prayed for the following Orders;

(i) Spent;

(ii) The Honorable Court be pleased to stay further proceedings and execution of the decree pursuant to *exparte* judgment delivered on 22/08/2017 in Nyeri CMCC No.228 of 2016 and all other consequential orders arising there from *interalia* the orders b, c and d issued pursuant to the ruling delivered on 24/09/2019 pending the hearing and determination of this application and or appeal filed herein or further orders of this court;

(iii) The Honorable Court be pleased to exercise its inherent powers and issue any other in the interest of justice; and

(iv) Costs of this application be borne by the respondents.

4. At the hearing hereof the parties were directed to file and exchange written submissions; hereunder is a summary of their rival submissions;

APPLICANT'S CASE

5. The applicant submitted that she would suffer substantial loss if the application was disallowed; that she was an aged lady of 95years and the conditions for the stay were cumbersome and not affordable to her due to her age and therefore denied her access to justice as provided by Articles 50 and 159(2)(c) of the Constitution; that she had already deposited the sum Kshs.250,000/- into court and that her appeal had arguable grounds of appeal with great chances of success and if the application was to be dismissed the appeal would be rendered nugatory;

6. Case law relied upon; **In Superior Homes(Kenya) Limited versus Musango Kithome (2018) eKLR.....Civil appeal Number 91 of 2017 the High Court in Machakos stated that;-**

“... Stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The power to grant an application for stay of execution pending appeal is a discretionary one on sufficient cause being shown, where the applicant may suffer substantial loss; the application is made without unreasonable delay and on provision of such security as the Court may impose. To grant or refuse an application for stay of execution pending appeal is discretionary in that the Court when granting stay has to balance the interests of the Appellant with those of the Respondent.

7. **I will apply the said conditions of stay of execution in this case. On whether the appellant will suffer substantial loss. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein versus Chesoni (2002)1 KLR 867 issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory..”**

8. She prayed that in the interests of justice that it be allowed.

RESPONDENTS CASE

9. In response the respondent opposed the application and submitted that it was trite law that an application for stay of execution pending appeal cannot be entertained when there was no substantive appeal filed; the applicant had failed to satisfy such conditions and therefore the application should not to be considered and ought to be dismissed with costs;

10. Case law relied on; **In Tassam Logistics Ltd v David Macharia and another (2018) eKLR... Miscellaneous Application Number 1 of 2018 the High Court in Makeni relied on;- In the case of MOHAMMED SALIM T/A CHOICE BUTCHERY –vs- NASSERPURIA MEMON JAMAT (2013) eKLR, The court upheld the decision of M/S PORTREITZ MATERNITY –vs- JAMES KARANGA KABIA CIVIL APPEAL NO.63 of 1997 and stated that:**

“That right of appeal must be balanced against an equally weighty right that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of the right” In the case of METEINE OLE KILELU & 10 OTHERS –vs-MOSES K. NAILOLE CIVIL APPEAL NO.340 OF 2008, the court opined that where the decree appealed against is a monetary decree, the applicant has to show that either once the execution is done, after refusal of the application, the applicant may never get back that money even if his appeal succeeds or that the decretal sum is so large vis a vis his status, or business that the execution would in itself ruin his business or threaten his very existence.”

ISSUES FOR DETERMINATION

11. After reading the parties respective written submissions this court framed only one issue for determination whether the Stay of Execution pending the hearing and determination of the appeal is merited;

ANALYSIS

12. The applicable law is found at Order 42 Rule 6 of the Civil Procedure Rules which gives the court fettered discretion to grant the order for Stay of Execution if applicant demonstrates that application was brought without unreasonable delay and that they may suffer substantial loss if the orders are not granted and the court may impose such security as it deems fit; in court granting such orders the court must balance the interests of the applicant with those of the respondent to enjoy the fruits of the judgment in his favour;

13. The first issue is to determine whether the application was brought without unreasonable delay; the impugned ruling was delivered on the 26/09/2019 and the applicant filed her Memorandum of Appeal on 2/07/2020 and then proceeded to file the instant application on the 13/08/2020; it shall be presumed that the applicant had to first seek leave of the court to file an appeal against the ruling which would then be a satisfactory explanation on the delay in filing the instant application;

14. On the issue of suffering substantial loss the court record reflects that the respondent is in the process of recovering the decretal sum by selling the applicants property by public auction and have been issued with warrants of attachment and a Notice of Sale of the property known as Parcel No. Thegenge/Karia 315; it goes without saying much that if the property is sold at this stage and the appeal is successful the applicant would not be able to retrieve her property and this court is satisfied that she would definitely suffer substantial loss and the respondent has not demonstrated the prejudice he would suffer if the '*status quo*' is maintained pending the outcome of the appeal;

15. The last issue relates to the security the court may impose for due performance of the decree; the applicant submits the terms imposed by the trial court was not reasonable and have hindered her right to justice as envisaged in the Constitution;

16. It is trite law that the court in allowing or refusing to grant the order sought has to balance the rights of both parties for justice to be rendered with utmost fairness; the applicants rights may be protected under the Constitution but the same rights cannot be protected to the extent of violating those accruing to the respondent;

17. The applicant may argue that the terms of the stay were onerous but it would have been improper for the lower court to have granted stay orders without security; the respondent is said to be a farmer but the applicant did not make any submissions on the respondents possible inability to refund the decretal sum in the event the sale of the applicants property is effected; likewise the respondent had not made any submissions on the issue of refund; the court is therefore left to make its own determination on the respondents impecunious status;

18. Whilst taking into consideration the age of the applicant and her attempts to fulfill the conditions for stay this court reiterates that it would not be proper for this court to grant stay of execution orders without taking into consideration the issue of security for due performance and will therefore only make a variation on the amount to be deposited into court;

19. In the circumstances the application is found to have merit and it is hereby allowed upon the conditions stated in the determination.

FINDINGS AND DETERMINATION

20. For the forgoing reasons the court makes the following findings and determinations;

- (i) This court finds that the explanation given for the delay is reasonable and excusable;

(ii) The application for stay of execution pending the hearing and determination of the appeal is found to have merit and it is hereby allowed on the following terms and conditions;

(iii) The applicant pays thrown away costs of Kshs.30,000/- and the auctioneers fees be paid as directed;

(iv) The order directing the applicant to deposit the full decretal sum into court is hereby set aside and substituted with an order that the applicant deposits half the decretal sum into court within thirty (30) days of today's date; the balance due and payable being Kshs.479,026/50 (which is made out as follows Kshs.729,026.50 less paid Kshs.250,000/- equals 479,026/-)

(v) In default the stay orders stand vacated; and the Decree Holder is at liberty to execute the Decree.

(vi) The applicant to set down the remainder of the appeal for hearing within 45 days from today's date;

(vii) The costs of this application shall abide the outcome of the appeal.

Orders accordingly.

Dated, Signed and Delivered Electronically at Nyeri this 8th day of September, 2021.

HON.A.MSHILA

JUDGE