



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC. APPL. NO. E232 OF 2021

DAVID OCHIENG OTIENO1ST APPLICANT

TSUSHO CAPITAL KENYA LIMITED.....2ND APPLICANT

MBUKINYA SUCCESS (K) LIMITED.....3RD APPLICANT

VERSUS

IRENE AWOUR CALEBRESPONDENT

RULING

1. The Application dated 18th May, 2021 principally seeks orders that

this Honourable Court be pleased to grant leave to the Applicants to appeal out of time against the judgment of the Hon P. Ngare Gesora in Milimani CMCC No. 6607 of 2016 delivered on 30th April, 2020.

2. Secondly, **this Honourable Court be pleased to stay execution of the judgment and/Decree in Milimani CMCC No. 6607 of 2016 pending herein and determination of the intended appeal.**

3. Thirdly, **that the annexed Memorandum of Appeal be admitted and be deemed as to be filed within time.**

4. The Applicants are aggrieved by the judgment of the trial court and wish to file an appeal. The delay is blamed on the delivery of the judgment without notice to the Applicants. It is averred that the auctioneers have already served the 3rd Applicant with a Proclamation of attachment of its property. That the Applicants stand to suffer irreparable loss and paralysis of their businesses. It is further stated that there is a likelihood that the Applicants will not be able to recover the decretal sum if the execution is allowed and the money released to the Respondent. That the appeal is merited, arguable and raises pertinent points of law. The Applicants have offered to furnish security for the due performance of the decree.

5. In a replying affidavit filed in opposition to the application, it is stated that the Applicants' first filed an application dated 16th April, 2021 before this court which they withdrew after they failed to obtain *ex-parte* orders. That the Applicants were aware of the delivery of the judgment as they were informed of the same by the Respondent's advocates. That the Applicants only moved the court after the auctioneers took out the warrants of attachment and sale. That the instant application has not been made in good faith and is aimed at delaying the Respondent from enjoying the fruits of her judgment.

6. It is further stated that the application has been brought after inordinate and inexcusable delay and has no chances of success. That the Respondent is a business lady with a steady income and in a position to refund the decretal sum in the unlikely event that the intended appeal is successful. It is further stated that the Applicants have not furnished or offered any security for the decretal sum.

7. I have considered the application, the response to the same and the rival submissions filed.

8. The well settled principles guiding the grant of a stay of execution pending appeal are provided under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows:

No order for stay of execution shall be made under subrule (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.

9. The judgment of the trial court was delivered on 30th April, 2020. The application herein was filed on 19th May, 2021. The delay is inordinate. Although the Applicants have stated that they had no notice of the judgment, there is uncontroverted evidence from the Respondent that they informed the Applicants of the delivery of the judgment vide letter dated 6th May, 2020.

10. On whether the Applicants will suffer substantial loss the evidence by the Respondent that she is able to refund the decretal sum is not supported by any documents in support thereof. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UR 144/2005) National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another:**

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

11. The Applicants have offered security for the decretal sum. To balance the competing interests of the parties, the application is allowed on condition that the Applicants do deposit the decretal sum in a joint interest earning bank account of the Advocates for the parties or in court within 30 days from the date hereof. The Appeal to be filed within 14 days from the date hereof.

Dated, signed and delivered at Nairobi this 17th day of Nov., 2021

B.THURANIRA JADEN

JUDGE