



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KIAMBU
CIVIL APPEAL NO. 116 OF 2020

BETWEEN

WATERCORE SERVICES LIMITED.....APPELLANT

VERSUS

KINYORI & ASSOCIATES.....RESPONDENT

RULING

1. **WATERCORE SERVICES LIMITED**, the appellant, had default judgment entered against it before the Senior Principal Magistrate's Court at Ruiru in the case filed by **KINYORI & ASSOCIATES**, the respondent. That judgment was for principal sum of Kshs.133,400.00 plus interest and costs. The appellant filed an application before the Ruiru court seeking to set aside that default judgment. The Ruiru court by its Ruling dated 22nd September, 2020 dismissed the application. This appeal before this Court is against that dismissal.

2. The appellant's application is supported by the affidavit of its director, Patrick Wamae. That director deponed that if stay of execution of the trial court's decree is not granted, the appellant's appeal would be rendered nugatory and the appellant would suffer substantial loss.

3. The application is opposed by the respondent through the affidavit of *Patrick Kariuki Kinyori*. In the deponent's view, the appellant's application for stay of execution of the decree is frivolous and abuse of the court process. Further, that the appellant had written a letter dated 6th February, 2014 forwarding cheques to the respondent in respect of the debt the subject of this appeal. For that reason, the respondent termed the application as a waste of court's time.

ANALYSIS

4. Appellant needed to meet the conditions for granting stay of execution set out in **Order 42 Rule 6(2)** of the Civil Procedure Rules, which reads as follows:-

“(2) 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.”

5. Appellant without expounding stated it would suffer substantial loss if stay of execution of decree is not granted. The decree of the trial court is a money decree. The respondent is entitled to enjoy the fruits of its judgment. That right can only be interrupted where a party proves it will suffer substantial loss. What is substantial loss was discussed in the case **HENRY SAKWA MALOBA VS. BONFACE RAPANDO TSABUKO (2020) eKLR** as follows:-

“5. As to what substantial loss is, it was observed in **JAMES WANGALWA & ANOTHER VS. AGNES NALIKA CHESETO [2012] eKLR**, as follows:-

‘No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so

because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. ... the 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.”

6. The application will fail because the court is not satisfied that it has been shown the appellant will suffer substantial loss if stay is not granted.

DISPOSITION

7. The notice of motion dated 28th September, 2020 for reasons set above is dismissed with costs.

RULING DATED AND DELIVERED AT KIAMBU THIS 4TH DAY OF NOVEMBER, 2021

MARY KASANGO

JUDGE

Coram:

Court Assistant: Nancy

For the Appellant: No appearance

For the Respondent: Ms. Nyaguto

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE