



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CIVIL APPEAL NO. 68 OF 2019

ANNAH NJOKI CHEGE.....APPELLANT/APPLICANT

VERSUS

BENARD KITUVA NGANGA.....RESPONDENT

RULING

1. This ruling is with respect to the Notice of Motion application dated 28/08/2019 and an undated Preliminary Objection (P.O) filed on 23/09/2019. The application is brought under section 1A, 1B &3A of the Civil Procedure Act, Order 42, Rules 6(1), (2) of the Civil Procedure Rules, 2010, Article 159 (2) of the Constitution of Kenya, 2010 and all other enabling provisions of the law. It seeks the following orders;

- a) **That** this Honorable court be pleased to grant a stay of execution against the judgment, orders and decree of in Civil case number 5 of 2017 pending the hearing and determination of Civil Appeal No. 5 of 2019.
- b) **That** the Honorable court be pleased to make such further orders as are necessary for the ends of justice in the matter.
- c) **That** the costs of this application be in the cause.

2. The application is supported by the grounds on its face and the Applicant's supporting affidavit of Annah Njoki Chege sworn on the same day. Basically, the Applicant is apprehensive that the Respondent will commence execution to her detriment in that the appeal will be rendered nugatory as the Respondent would not be in a position to refund the decretal amount.

3. There is a replying affidavit from the Respondent dated 13/09/2019 in which he has deposed that the decree dated 05/08/2019 was served upon the Appellant on 28/08/2019. He then proceeds to challenge the memorandum of appeal instead of responding to the application.

4. The P.O was filed by the Respondent and the grounds are stated as follows;

- a) **That the claim against Respondent is time barred.**
- b) **That the judgment was delivered on 3rd July 2019.**
- c) **That the stay of execution was granted for 30 days from 3rd July 2019.**
- d) **That the Applicant filed the application on 30th August 2019.**
- e) **That from 3rd July to 30th August 2019 is 59 days minus 16 days weekend balance of 43 working days.**
- f) **That she didn't tell when vacation started and when it ended so that the vacation can be the reason for delaying the application.**
- g) **That the appeal/application's suit is scandalous and an abuse of the process of court.**

5. The Appellant filed the followings grounds of opposition against the P.O;

- a) **The P.O is improperly filed as it is undated and therefore fatally defective and incompetent.**

- b) *The P.O is frivolous, premature and should not be entertained.*
- c) *The P.O does not raise any substantial issues of law.*
- d) *The P.O is a waste of this Honorable court's valuable time as it is unclear, undated and an abuse of the court process.*
- e) *The P.O lacks any merit whatsoever, is defective in form and substance for failure to comply with the provisions of the law.*
- f) *The application raises weighty issues and ought to be heard on merit to its logical conclusion.*
- g) *The P.O is premature as this Honourable court is clothed with jurisdiction to handle the issues raised in the application and main appeal.*
- h) *The P.O only serves to delay the hearing of the application and main appeal.*

6. The application and P.O were canvassed by way of written submissions.

The Preliminary Objection

7. The only submission from the Respondent addressing the P.O is that the Appellant did not seek the leave of the court to file the appeal out of time.

8. On her part, the Appellant submits that the P.O offends the Civil Procedure Act (*the Act*) and Rules for being undated and should therefore be struck out.

9. Relying on the case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696** she submits that a P.O must be on a pure point of law and contends that the P.O herein is a mixture of arguments and narrative. It is also her submission that the overriding objective in the Act mandates the court to render substantive justice to all parties.

10. She submits that the appeal was filed within the time frame provided in section 79G of the Act and as such, the allegations in the P.O are factually incorrect.

Analysis and determination

11. Section 79G of the Act provides as follows;

“Every appeal from a subordinate court to the High court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the decree or order. (emphasis mine)

Provided that an appeal may be admitted out of time if the Appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

12. The subordinate court delivered its judgment on 03/07/2019 and the appeal was filed on 05/08/2019. The statutory period within which to file an appeal lapsed on 03/08/2019 which was a Saturday. **Order 50 Rule 3** of the Civil Procedure Rules provides as follows;

“Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.”

13. Since the courts do not work on weekends, the appeal was filed on the next working day which was 05/08/2018 and as such, the same was filed within time. Evidently, the P.O lacks merit and is dismissed.

Submissions on the application

14. The Applicant submits that there is a notice to show cause as to why she should not be committed to civil jail which was slated for hearing on 18/09/2019 but it was halted by the intervention of this court. She contends that if the stay sought is not granted, she will be prejudiced as she will be committed to civil jail despite the existence of the appeal.

15. She also submits that the application was filed without unreasonable delay upon the threat of execution becoming real. It is also her submission that the Respondent is a man of straw and will not be in a position to refund the decretal amount if the appeal succeeds. She relies *inter alia* on the case of **National Industrial Credit Bank Ltd –vs- Acquinas**

Francis Wasike & Anor (UR) where the Court of Appeal stated;

“This court has stated before and 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 the Respondent or lack of them. Once an Applicant expresses 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.”

16. The Respondent submits that for an order of stay to be granted, the Appellant must deposit the decretal amount into the joint names of the Appellant and Respondent.

17. Having considered the application, the supporting affidavit, the replying affidavit and the rival submissions, it is my considered view that the only issue for determination is whether grant of stay of execution is merited.

18. The conditions which should guide the court in determining whether to grant stay pending appeal are; whether substantial loss will occur if stay is not granted, whether the application has been filed without unreasonable delay and furnishing security for the due performance of the decree.

19. The judgment being challenged was delivered on 03/07/2019 and 30 days' stay granted by the trial court. The appeal was filed on 5th August, 2019 while this application was filed on 30/08/2019. It is not explained why the application was not filed together with the appeal even though the court was on vacation.

20. As for substantial loss, I have looked at the memorandum of appeal and noted that the Appellant is challenging the entire judgment. The relationship giving rise to the cause of action was that of a landlord and tenant where the Appellant was found to have unlawfully evicted the Respondent hence ordered to pay damages, loss of profit and rent in lieu of notice.

21. The Appellant is apprehensive that the Respondent is not in a position to refund the decretal amount if the appeal succeeds and the Respondent has not allayed that apprehension. He neither deposed nor submitted about his liquidity and my view is that the Appellant's apprehension is not idle. Having to file a suit for recovery in the event of a successful appeal will obviously cause some hardship to the Appellant.

22. The trial court heard the parties and arrived at the judgment it did. The Appellant/Applicant owes the amount claimed since the judgment has not been displaced. He needs to be cushioned even as the appeal is heard and determined.

23. I therefore allow the application for stay of execution, on condition that the Applicant deposits in court a sum of Kshs.200,000/= as security within 14 days.

24. This appeal must be fast tracked to avoid unnecessary delays and any hardship.

25. Cost in cause.

Orders accordingly.

Delivered, signed & dated this 12th day of February 2020, in open court at Makueni.

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H. I. Ong'udi

Judge