



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.17 OF 2018

BETWEEN

PETER AKELLO NYANJAAPPELLANT

AND

1. WANYAMA DAVID

2. GEORGE OWADE WABWIRE

(suing for and on behalf of the estate of the late Hannington Wabwire)RESPONDENTS

RULING

1. The appellant herein, moved the court by way of Notice of Motion dated 6th December 2018. The application is brought under sections 1, 1A, 1B, 3, 3A of Civil Procedure Act and Order 42 Rules 4, 5, and 6 of the Civil Procedure Rules and Article 159 (2) of the Constitution of Kenya. He is seeking the following orders:

2. The application is premised on the following grounds:

- a) That this application be and is hereby certified as urgent and heard ex-parte in first instance. (Spent)
- b) That pending hearing and determination of this application inter partes there by and is hereby issued temporary order of stay against execution of judgement and decree in Busia Civil suit No.321 of 2016 passed on 4.12.2018. (Spent)
- c) That pending hearing and determination of the appeal filed herein there be issued and it is hereby issued stay of execution of judgement and decree passed in Busia Civil suit No.321 of 2016 at Busia Chief Magistrate's court.
- d) That the Honourable court to issue any and all such orders necessary to preserve status quo ante the decree and judgement of 4.12.2018 pending determination of appeal herein.
- e) That costs of this application abide with determination of appeal herein filed.

3. The application was opposed on the following grounds:

- a) That the appellant/applicant is aggrieved with judgement passed against him and has preferred this appeal.
- b) That execution process may begin any time if stay is not issued.
- c) That the judgment and award sought to be executed for is for the benefit of a deceased estate who is a Ugandan national and legal representatives may not account for any sum paid if appeal succeeds which shall.
- d) That the applicant has already preferred an appeal and can prepare record of appeal within the next 14 days and fix same for hearing. That the respondent are Ugandans and recovery of any proceeds paid out of challenged judgement will be difficult to achieve if stay is not granted.
- e) That the grounds cited in the appeal are on issues of law that are arguable with high chances of success as demonstrated in the copy of memorandum of appeal annexed.

4. The application was opposed on the following grounds:

- a) That the appeal is premature for the applicant has not extracted any decree.
- b) That the application is frivolous, vexatious and an abuse of the process of the court.

5. Order 42 Rule 6(2) of the Civil Procedure Rules provides:

(2) No order for stay of execution shall be made under sub rule (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.

In the instant case the only issue the applicant has raised is that the respondents are Uganda Nationals and that should his appeal succeed, he may suffer loss due to the difficulties of recovery. This may be true but the applicant has not offered any security.

6. I have been urged to decline the orders sought for the applicant has not extracted a decree. This is so. The memorandum of appeal had only a copy of judgment attached to it.

7. In spite of the shortcomings of the application, in the interest of justice I will grant a stay of execution pending the hearing and determination of this appeal subject to the following orders:

- a) That the applicant deposits the entire decretal amount and costs in a joint interest earning account in the names of both advocates on record within 30 days.
- b) That the applicant prepares and serves the record of appeal within 30 days.

Failure to meet these conditions, the stay orders will be automatically vacated.

8. The costs of this application will abide with the outcome of this appeal.

DELIVERED and SIGNED at BUSIA this 6th day of February, 2020

KIARIE WAWERU KIARIE

JUDGE