



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL CASE NO. 40 OF 2019

DANIEL TUKERO..... DEFENDANT/APPLICANT

VERSUS

TALEO KULAMOYO.....1ST PLAINTIFF/1ST RESPONDENT

NDISUAKO NASINTO.....2ND PLAINTIFF/RESPONDENT

HEZRON GETUMA ONSONGO T/A

HEGEONS AUCTIONEERS.....3RD RESPONDENT

(Being an application from the ruling and decree of Hon. R.M. OANDA, PM, delivered on 11/7/2019 in the

Principal Magistrate's Court AT Kilgoris in Civil Suit No 55 OF 2016, Taleo Kalamoyo and Ndsuako & Daniel Tukero)

RULING

THE CASE FOR THE DEFENDANT/APPLICANT.

Pursuant to the provisions of Order 42 Rule 6, Order 51 Rule 1 of the 2010 Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21) Laws of Kenya, the defendant has applied for the following orders.

- 1) *spent*
- 2) An order to stay the execution of the judgement of the defendant's properties pending the hearing and determination of the appeal.
- 3) An order to issue directing the 3rd respondent to release the subject tractor forthwith.
- 4) That the costs of this application be provided for.

The application is supported by five (5) grounds that are set out on the face of the notice of motion. The major grounds are as follows. The defendant being aggrieved by the ruling of the trial court's ruling dated 1/3/2019 has filed a memorandum of appeal in this court. The trial court refused to issue an order of stay of execution, thereby exposing the defendant to substantial loss if the plaintiffs execute judgement. The appeal has overwhelming chances of success and the appeal will be rendered nugatory unless stay is granted.

In addition to the foregoing grounds in support of the application, the defendant has deponed to an 11 paragraphs supporting affidavit. The major averments are as follows. The judgment appealed against was rendered by the trial court on 1/3/2019 following a formal proof of the matter. The judgment was contrary to the evidence. The defendant instructed his advocates to file an appeal, which is annexed to the affidavit as annex marked as "DT 2." The appeal has overwhelming chances of success and that the application has been made without unreasonable delay. The deponent has deponed that unless an order of stay is granted the appeal will be rendered nugatory. And unless an order of stay of execution is granted the defendant will suffer substantial loss as the decree involves a sum of over Kshs 2,500,000/=

THE SUBMISSIONS OF THE DEFENDANT/APPLICANT.

Ms Saika, counsel for the defendant has filed submissions citing Order 42 rule 6 (2) of the 2010 Civil Procedure Rules, in support of his application for stay of execution pending being granted leave to appeal out of time and the memorandum of appeal and the record of appeal lodged be deemed as duly filed. Additionally, the defendant also seeks an order of stay of execution of the decree pending the hearing and determination of the appeal. Counsel has submitted that unless stay of execution is granted the defendant will suffer substantial loss and that

the appeal will be rendered nugatory. Additionally, she has submitted that the application was made without unreasonable delay citing the case of **Butt V Rent Restriction Tribunal [1982] KLR 417** in support of her submissions.

THE CASE FOR THE PLAINTIFF/RESPONDENTS.

The first plaintiff has with the authority of the co-respondents deponed to a 16 paragraphs replying affidavit on behalf of all the respondents. The major averments are as follows. The first and second plaintiffs filed a suit against the defendant in the Kilgoris Magisterial Court, being Civil Case No 55 of 2016. The suit proceeded undefended owing to the defendant's failure to file a defence to the claim. As a result, the plaintiffs obtained a judgment from which a decree was extracted.

They then proceeded to execute the decree by attaching the properties of the defendant including his tractor registration No. KTBC 742 N; which tractor is in the custody of the 3rd respondent. The defendant filed an application in the magisterial court seeking a stay of execution and setting aside of the judgment; which was dismissed by that court.

Up to now the defendant has not filed an appeal. The deponent has finally deponed that were this court to grant an order of stay pending appeal to allow the defendant to ventilate his appeal; then such an order being discretionary should be conditional that the defendant does deposit the entire decretal sum cost in an interest bearing account in the names of the advocates for both parties.

The deponent has deponed that there is no need to seek leave to appeal out of time as the defendant is within the period allowed for filing the appeal. He also has deponed that the application is so jumbled up that it is not clear what remedy the applicant is seeking from the court.

The application is incompetent, vexatious and frivolous and is only aimed at further delaying the enjoyment of the fruits of his judgement. He therefore prays that the application be struck out with costs.

ISSUES FOR DETERMINATION.

I have considered the affidavit evidence of both parties and the submissions of the defendant in the light of the applicable law. I find the following to be the issues for determination.

1. Whether or not the defendant has made out a case for the grant of the orders sought.
2. Who bears the costs of this application.?

ISSUE 1

I find that unless an order of stay of execution is granted the defendant's appeal will be rendered nugatory. The appeal filed is Civil Appeal No 4 of 2019 between the defendant as the appellant and the respondents. I further find that unless an order of stay of execution is granted the defendant will suffer substantial loss.

I also find the application of the defendant is not frivolous and is not incompetent as deponed to by the plaintiffs. I further find that it is clear that the defendant is seeking an order of stay of execution pending the hearing and determination of his matter. Although the language used by the defendant in his application is not perfect, it is no ground to deny him the orders sought.

ISSUE 2

I have considered the issue of costs. I find that it is in the interests of justice that costs of the application will be costs in cause.

In the premises, the defendant's application succeeds with the result that only prayers number 2 and 4 of the notice of motion dated 15th July 2019 are hereby granted on condition that the defendant's deposits in this court the decretal sum of Kshs. 2,228,296/= within thirty (30) days failing which this order will lapse. The other prayers are hereby rejected.

Judgment signed, dated and delivered at Narok this 21st day of May, 2020 in the absence of both counsel via posting the ruling in the e-mail addresses of both counsel.

J. M. BWONWONG'A.

J U D G E

21/05/2020