



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO 29 OF 2019

PAUL NCHORE MOGENI.....APPELLANT/APPLICANT

VERSUS

DRUSCILLAH OREMO.....RESPONDENT

(Being an application from the judgement and decree of Hon W. Juma, Chief Magistrate, delivered on 23rd October 2019, in the Chief Magistrate's Court at Narok, in Civil Case No. 148 of 2015, Druscillah Oremo v Paul Nchore Mogeni)

RULING

Introduction

The case for the applicant

Pursuant to the provisions of Order 50 Rule 1, Order 22 Rule 22 of the Civil Procedure Rules, 2010, the applicant has applied for the following orders.

- 1) *spent*
- 2) an order of stay of execution of the magisterial judgement/decree pending the hearing and determination of the instant application.
- 3) an order of stay of execution of the magisterial judgement/decree pending the hearing and determination of the appellant's appeal, being Narok High Court, Civil Appeal No. 29 of 2019.
- 4) an order to make provision for costs.

The application is supported by seven grounds that are set out on the face of the notice of motion. The major grounds are as follows. First, the applicant, being aggrieved by the said judgement /decree filed an appeal in Narok High Court, being Civil Appeal No. 29 of 2019. Second, the applicant filed an application for stay of execution in the magisterial court, which was dismissed on 10th December 2019. Third, the respondent may execute any time. Fourth, unless an order of stay of execution is granted the applicant will suffer irreparable damage and the appeal will also be rendered nugatory. Fifth, the applicant is willing to furnish such reasonable security as may be ordered by the court.

Furthermore, the applicant through his claims manager (Isabella Nyambura, of Direct line Assurance Co. Ltd), deponed to a fifteen paragraphs supporting affidavit. The major averments are as follows. The applicant has replicated in her affidavit the major grounds that are set out on the face of the notice of motion, which I do not intend to reproduce them herein; except for the following averments. Being aggrieved by the judgement/decree of the magisterial court she instructed her counsel (Messrs Kairu & McCourt, Advocates) to file an appeal, which was duly done. She also has deposed that the applicant may not recover the decree amount of money from the respondent on a successful appeal in the event the execution process is completed and will suffer substantial loss. She also deponed that the application and the appeal are both meritorious. The respondent will not suffer any prejudice.

In her further supporting affidavit dated 6th April 2020 filed with leave of the court, the deponent has deponed to the following major matters. Following advice from her counsel, which she believes the respondent was awarded Kshs 4,250,918/= by the trial court. Additionally, she has averred that following advice from her counsel, which she believes the lower court judgement is yet to be typed and that her counsel have written to the court requesting for a copy of the judgement.

The case for the respondent.

The respondent was served with notice of hearing of this application according to the affidavit of service dated 25th April 2020. The

respondent did not file any replying affidavit. She also did not take part in these proceedings. I find that the respondent had adequate notice of the hearing of this application. The hearing of this application therefore rightly proceeded in her absence.

Issues for determination

I have considered the affidavit of the applicant, the memorandum of appeal in the light of the applicable law. As a result, I find the following to be the issues for determination.

- 1) Whether the applicant has made out a case for the grant of an order of stay of execution pending the hearing and determination of both the application and appeal in the instant application.
- 2) Who bears the costs of this application?

Issue 1.

The application is unopposed. I find that the application has been prosecuted without unreasonable delay. I also find that the applicant has an arguable appeal. Furthermore, I find that the applicant will suffer substantial loss and the appeal will be rendered nugatory unless an order of stay of execution is granted.

Issue 2.

This an interlocutory application and for that reason costs of this application will be costs in cause.

In the premises, the applicant's application succeeds and is hereby allowed in terms of prayer Nos. 2,3 and 6 of the notice of motion dated 26th January 2020.

The grant of the foregoing orders will be subject to the applicant depositing in this court a sum Kshs 4,250,918/= within 30 days from the date of this ruling, failing which these orders will lapse.

Ruling signed, dated and delivered in open court at **Narok** this **14th** day of **May 2020** in the absence of both counsel namely Messrs Kairu & McCourt and Auta Nyakundi & Co. by posting to their e-mail addresses

J M Bwonwong'a

Judge

14/05/2020