



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 186 OF 2016

EDWARD MWANGI MACHARIA.....APPELLANT

-VERSUS-

MAINA & MAINA ADVOCATES.....RESPONDENT

RULING

1) The subject matter of this ruling is the Chamber Summons dated 18th March 2019 taken out by the appellant in which he is seeking for the following orders *interalia*:

i. That this matter be certified as urgent and service be dispensed with in the first instance.

ii. That there be stay of execution in this case pending hearing and determination of Civil Appeal No. 348 of 2018 filed at the Court of Appeal at Nairobi arising from this case.

iii. That pending hearing and determination of Civil Appeal no. 348 of 2018 filed at the Court of Appeal at Nairobi relating to this case and concerning the parties herein. There be stay of further proceedings before his honourable court in this case.

iv. That costs of this application be provided.

2) The appellant filed an affidavit he swore in support of the aforesaid application. When served with the summons, the respondent filed the replying affidavit sworn by Gideon Mutai to oppose the application.

3) When the aforesaid summons came up for interpartes hearing, this court gave directions for the summons to be disposed of by written submissions.

4) At the time of writing this ruling, the appellant was the only party who had filed his written submissions.

5) I have considered the grounds set out on the face of the Chamber Summons dated 18.3.2019 and the facts deponed in the affidavits filed in support and in opposition. I have also considered the written submissions of the appellant/applicant. The main prayers sought are twofold. First, is an order for stay of execution of the decree pending the hearing and determination in the Court of Appeal of Civil appeal no. 348 of 2018. Secondly, an order for stay of further proceedings before this court.

6) It is the submission of the appellant that the respondent intends to execute the decree against him yet he has filed Civil Appeal no. 348 of 2018 which is still pending before the Court of Appeal. He argued that his appeal will be overtaken by events and he will suffer great prejudice if the respondent is allowed to proceed to attach his properties to satisfy the decree.

7) The appellant further stated that his appeal has strong grounds with overwhelming channels of success and that the respondent will not suffer prejudice if the order for stay of further proceedings and execution in this case is granted.

8) The respondent filed the replying affidavit sworn by Gideon Mutai to oppose the appellant's application. The respondent stated that it has commenced the process of execution to recover taxed costs since there was no order for stay and the appeal having been struck out.

9) It is also pointed out that the application does not meet the conditions set out under Order 42 rule 6(2) of the Civil Procedure Rules to be entitled to a grant of the order for stay of execution pending appeal. The respondent further stated that the appeal will not be rendered nugatory since the respondent is capable of refunding the decretal sum should the appeal turn successful.

10) Having considered the material placed before this court together with the submissions, it is clear that under Order 42 rule 6(2) of the

Civil Procedure Rules, that the following principles should be met before an order for stay of execution pending can be granted. **First**, an applicant must show that the application for stay was made without unreasonable delay.

Secondly, that an applicant must show the substantial loss he would suffer if the order for stay is denied.

Thirdly, that the provision for security for the due performance of the decree must be considered.

11) Before determining the application, it is important to give a brief background of this dispute. The respondent's firm of advocates was instructed in the month of July 2018 by the appellant to appear for him in place of the firm of Waiganjo & Co. Advocates in Nairobi H.C Misc. Application no. 426 of 2006, a Judicial Review Application where the applicant had sought for the orders of mandamus and prohibition against the Registrar General. The respondent later filed an advocate-client bill of costs dated 4th July 2013.

12) The appellant on his part filed the motion dated 10th April 2014 in which the appellant sought for the advocate-client bill of costs to be struck out. The two matters were heard by Hon. Makungu, learned Taxing Officer and in the end the appellant's motion dated 10th July 2014 was dismissed and the respondent's bill of costs proceeded to hearing without the appellant filing any objection. In the end the advocate-client bill was taxed at ksh.232,690/=.

13) The appellant being dissatisfied filed this appeal seeking to challenge the aforesaid rulings. The respondent filed a notice of preliminary objection against the appellant's appeal. This court heard and upheld the preliminary objection vide its ruling delivered on 8th December 2017. Being dissatisfied, the appellant filed a notice of appeal to challenge this court's decision to strike out this appeal before the Court of Appeal.

14) I have already set out hereinabove the orders sought by the appellant. I have also outlined the principles to be considered in determining an application for stay of execution of the decree and the proceedings pending appeal. I have equally taken into account the rival arguments put forward by the parties.

15) The first condition is whether the appellant's application for stay was filed without an unreasonable delay. None of the parties addressed this court on this condition. I will therefore deduce from the court record and make a finding. The decision sought to be impugned on appeal was made on 8th December 2017. On 25th July 2018, the appellant was granted leave of 7 days to file a notice of appeal to commence the process of appeal against the decision of this court. On 26th July 2018, the appellant eventually filed a notice of appeal.

16) However, the application seeking for stay of execution and proceedings was filed on 18th March 2019 about seven (7) months from the date of filing a notice of appeal and about two (2) years two (2) months from the date of delivery of this court's ruling. In my view, I find the delay of 7 months to be unexplained and hence unreasonable.

17) The second condition to be considered is whether the appellant/applicant has shown the substantial loss he would suffer if the order for stay of execution is denied. The appellant has basically stated that his appeal will be rendered as overtaken by events if the order of stay is not granted. The appellant has not shown how the appeal will be rendered useless if the execution process is not halted. It has not been stated that the respondent will be unable to refund the decretal sum if the appeal turns out to be successful. The appellant has failed to discharge the burden of proving the substantial loss.

18) The final principle to be considered is the provision of security for the due performance of the decree. The respondent has correctly pointed out that the appellant has not offered any form of security. It should be noted that notwithstanding the lack of such an offer, it is within the discretion of the court to give directions on what sort of security should be provided as a condition for the grant of stay. Having failed to establish the substantial loss which is the cornerstone of an application for stay, the appellant is not entitled to a grant of the order for stay. In the circumstances the order for the provision of security is not necessary to make.

19) In the end, the appellant's summons for stay of execution and proceedings is found to be without merit. It is dismissed with costs to the respondent.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 6th day of November, 2020.

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J. K. SERGON

JUDGE

In the presence of:

.....**for the Appellant/Applicant**

.....**for the Respondent**