



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL APPEAL NO. 62 OF 2020**

**LILIAN SITATI.....APPELLANT**

**VERSUS**

**GEORGE WASIKE.....RESPONDENT**

**RULING**

1. The applicant cited his notice of motion application urgent for the reason that the appeal would be rendered nugatory should the suit proceed to hearing. The applicant is seeking stay of proceedings in Eldoret CMCC no. 1147 of 2017 pending the hearing and determination of the appeal. The grounds in support of the application are that the respondent alleges the appellant/applicant authored and signed the Petty cash voucher dated 30.9.2016 and the handwritten note dated 20.1.2016 which bind her to a sum of ksh.683,000/= which amount is the subject matter to the suit in Eldoret CMCC no. 1147 of 2017. The appellant denies these allegations and avers that the original documents were in the custody and control of the respondent and the same were produced as exhibits.

2. Further the appellant/applicant averred that she made an application for the said documents to be subjected to forensic examination but the said application dated 11.8.2020 was dismissed on 24.8.2020 and a hearing date of 8.9.2020 was given.

3. The supporting affidavit was sworn by Lilian Sitati who deposed that she was the defendant in the trial suit and she preferred an appeal when her application to have the documents subjected to forensic examination was dismissed. It is her case that she may suffer irreparable damage should the suit proceed and judgment is delivered. She is willing to abide by any conditions that the court may set as a condition to grant stay of proceedings. Further that this court had the discretion to grant the said orders and it would be in the interest of justice that the application is allowed.

4. A replying affidavit was sworn by George Wasike, the respondent herein. He deposed that the documents the appellant was referring to had already been produced as evidence in court during the hearing of the case on 22.3.2018. The appellant had failed to have the documents examined during or prior to production as provided by *Order 11* of the *Civil Procedure Rules*. The application, subject of the appeal, was filed a day to defence hearing when the appellant had been given a last adjournment.

5. The appellant is further delaying the defence case. The handwriting expert could still testify as an expert witness in the event the appeal is allowed.

6. Further that he would not suffer any irreparable harm if stay was denied since the expert witness would testify as a guide to the court. The memorandum of appeal raises grounds that do not arise out of the said ruling and that the application is made in bad faith.

7. Lastly, he deposed that the application be dismissed and the suit proceeds to hearing pending the determination of the appeal.

**Submissions**

8. Parties agreed to canvass the application by way of written submissions.

**Applicant's submission**

9. It was their submission that in-order to grant stay of proceedings, she was required to fulfill the conditions set out in *Order 42 rule 6* of the *Civil Procedure Rule 2010*, which include: substantial loss may result, the application has been made without unreasonable delay and such security as the court orders for the due performance of the decree has been given by the applicant. This court has the power to exercise its inherent jurisdiction as provided by *Section 3A*.

10. Further it was urged that the court needs to be careful so that it does not determine the appeal itself but to grant stay of the proceedings.

11. This application was made within time.

12. On substantial loss, it was urged that the applicant is being bound to an amount of ksh.683,000/= which is the cornerstone of the trial suit and which she is asking the court to refer the said documents for forensic examination. In ***James Wangalwa &anor v. Agnes Naliaka Cheseto***, the court held that, “***substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory***”

13. On security she averred that she was willing to abide by any condition set by the court. The court was urged to allow the application.

#### **Respondents’ submission.**

14. This court was urged that the Civil Procedure Act did not provide for stay of proceedings save for *Section 3A* which gives the court inherent power to make such orders necessary for the ends of justice or to prevent abuse of the court process. The application was filed in a timely manner but the applicant had failed to establish a prima facie case. The applicant could not ask the court to order for forensic examination of documents which had already been produced in court and the plaintiff’s case had already been closed. The failure to challenge the same during trial could not be remedied by appeal, as it would amount to gross injustice.

15. The applicants argument that she had been precluded from raising procedural issues during pre-trial conference, should fail since due process was followed and it was the core principle on the rule of law.

16. Further that ground 7 of the memorandum of appeal had already been dealt with during hearing of the application and the same was not pleaded in the application subject of the appeal.

17. Lastly the court was urged to dismiss the application with costs.

18. The issue that arises for determination is whether the reliefs being sought can be granted in the circumstances.

19. The application is premised on *Order 42 rule 6* of the *Civil Procedure Rules* that provides the circumstances under which the trial court or an appellate court may grant stay of execution of a decree or order pending an appeal. The applicant needs to satisfy the court that she stands to suffer substantial loss if stay of execution is not granted, the application was filed without undue delay and that she is willing to offer such security as may be ordered by the court.

20. The applicant avers that the amount in question is ksh. 683,000/= and she stands to suffer substantial loss since the documents bind her to that sum of money which is so much at this time when covid-19 has affected the economy.

21. The applicant filed the application on time and on security the applicant urged this court to set any condition and she shall abide by it. She has not however given any proposal to this court on security.

22. In ***Global Tours & Travels Ltd, Nairobi HC Winding up cause no. 43 of 2000 Ringera J*** (as he then was) opined as followed

***“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice. the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”***

23. The applicant asked this court to exercise its inherent power to grant stay of execution of the proceedings in Eldoret CMCC no. 1147 of 2017. The court shall delve on whether the applicant has an arguable appeal or not in order to exercise its discretion in the interest of justice for both parties. The applicant had filed an application in the trial court seeking to have the documents already produced as exhibits to be subjected for forensic examination. The respondents strongly opposed this.

24. *Order 11* of the *Civil Procedure Rules* gives the parties time and notice to go through the documents they shall all be relying on. This is the time parties’ raises queries over the documents and brings it to the attention of the court. The matter proceeded to hearing, an indication that the applicant was comfortable with the matter proceeding as it was and the documents to be relied on by the Respondent. Further during the hearing, the applicant had an opportunity to object to the production of the said documents and have them subjected to the desired examination. The applicant at paragraph 3 and 4 of the memorandum of appeal, agrees that the petty cash voucher dated 30.9.2016 and hand written note dated 20.1.2016 had been produced as exhibits by the time they made their application.

The Respondents have already closed their case and subjecting the documents to forensic examination at this stage would heavily prejudice their case.

25. The Application for stay of proceedings pending an Appeal on the issue therefore lacks merit and is hereby dismissed with costs to the Respondent.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 3<sup>rd</sup> day of November, 2020.**

In the presence of:-

Mr. Aseso for the Applicant (absent)

Mr. Bett for the Respondent

Gladys - Court Assistant