



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 255 OF 2018

JOHN KURIA WANJOHI.....1ST APPELLANT/APPLICANT

JOSEPHAT WANJOHI.....2ND APPELLANT/APPLICANT

-VERSUS-

MARY KIOKO NGUKU MAKAU NGUKU

(Both suing as administrators and legal representatives of the

Estate of the late JOHN KIMEU NGUKU.....RESPONDENTS

RULING

1. The appellants have filed a Notice of Motion dated 13th June, 2018. The same is supported by the averments made on the body thereof and the sworn affidavit of *John Kuria Wanjohi*. The substantive order sought therein is a stay of execution in CMCC NO. 5 OF 2005. The said order is sought pending the hearing and determination of an appeal against the ruling delivered by Honourable A.M. Obura (Mrs.) (Senior Principal Magistrate) on 22nd May, 2018.
2. The deponent, namely *John Kuria Wanjohi*, stated inter alia that neither of the appellants were served with summons to enter appearance upon filing of the suit before the lower court and as such, they filed an application seeking to set aside the ex parte judgment entered on 20th February, 2009 and all consequential orders made, but that the same was dismissed on 22nd May, 2018.
3. The deponent further stated that the appellants filed an application seeking a stay of execution of the aforesaid ex parte judgment but the same was not granted. It was the deponent's averment that the appellants have a strong defence and that they were unaware of the existence of the suit prior to the commencement of the execution process and thus, if a stay is not granted, the appellants will suffer substantial loss since the money may not be recoverable from the respondents once paid. The deponent was quick to add that the appellants are ready and willing to abide by any conditions concerning the provision of security.
4. In opposing the Motion, the replying affidavit of *Makau Nguku* was filed. Therein, the deponent largely contended that the appellants were all along aware of the existence of the suit; that the appeal has no chances of success; that the deceased's estate has suffered for too long while the appellants have been evasive since the delivery of the judgment. The deponent added that should the order sought be granted, the same should be conditional upon the deposit of the decretal sum in an interest earning account.
5. Parties made oral arguments. *Mr. Ngugi* counsel for the appellants/applicants made brief submissions

by making reference to the case of *Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR*.

6. *Mr. Musyoki* advocate for the respondents while admitting on his part that the application was filed timeously, argued that substantial loss has not been demonstrated, neither has security been given. The advocate went on to submit that since judgment was entered on 20th February, 2009, the appellants went into a slumber until the execution process commenced and in any event, the appellants were previously given an opportunity to be heard and were represented by an advocate at the time.

7. On the subject of substantial loss, it was *Mr. Musyoki's* firm submission that it has not been shown that the respondents will not be in a position to refund the decretal amount if the appeal eventually succeeds. The advocate was careful to add that the parties had entered into a consent on liability and in this sense, the award on quantum was made proportionately.

8. In response to the above, *Mr. Ngugi* took the stand-point that the respondents have not indicated that they are in a position to refund the decretal sum. As concerns the provision of security, his argument was that the appellants can only afford Kshs.200,000/=.

9. I have considered the averments made in the application and its supporting affidavit, the reply in opposition thereto and the rival oral arguments by the respective parties' counsels. That said, the principles governing a stay of execution are established under *Order 42, Rule 6 (2)* of the Civil Procedure Rules and have been incorporated into numerous judicial findings. In that respect, certain conditions must be met for any application seeking a stay of execution to succeed.

10. The first condition is premised on whether or not the application is timeously filed. It is noteworthy that the ex parte judgment was entered on 20th February, 2009 and thereafter, the appellants sought to have the same set aside and subsequently, sought a stay of execution which was not granted by the lower court. Given the sequence of events, I have no reason to doubt that the Motion has been brought without unreasonable delay.

11. The *second* condition touches on substantial loss. I must point out that this forms the crux of an application for a stay of execution. This was well appreciated by the High Court in *Praxades Okutoyi v Medical Practitioners and Dentists Board [2008] eKLR* whose analysis was drawn from *Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018* in this way:

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”

The court did not rest there, but went ahead to reason that:

“...there is in my judgment no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects.”

12. Likewise, the case of *James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR* referenced in *Masisi Mwita* (supra) shed light on the above in analyzing that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.”

As well as:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”

13. It is my observation that the appellants stood faithful to the argument that execution has commenced and that they stand to suffer substantial loss since the respondents will not be in a position to refund the decretal sum should the appeal succeed and as a result the appeal will be rendered nugatory. On the flip side, the respondents insisted that substantial loss has not been shown.

14. Turning to the abovementioned authority of *James Wangalwa* (supra) it is evident that one is expected to not only aver that substantial loss will occur but establish other factors to back such argument. However, in this instance, the appellants stated that the respondents are likely not to refund the decretal sum.

15. On the third condition of provision of security, the appellants have made it clear that they are ready and willing to comply accordingly.

16. Having taken the above to mind, I find that the Motion has been filed timeously and the appellants communicated a willingness to give security albeit a sum below the actual decretal amount, I am persuaded that they have established substantial loss and that being the case, their application has legs on which to support itself.

17. In light of the foregoing, I find merits in the Motion and move to allow the same with no orders as to costs but on condition that the applicant do deposit half of the decretal sum in a joint interest earning account to be opened in the name of the Advocates for both parties. The money to be deposited within 30 days from today failing which the stay orders shall lapse.

Dated, Signed and Delivered at Nairobi this 7th day of March, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

.....for the Appellants/Applicants

..... for the Respondents