



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CIVIL APPEAL NO. 44 OF 2016

NORMAN MWITL.....1ST APPELLANT

MARTIN BUNDI.....2ND APPELLANT

VERSUS

SIMON WANJOGU KARIUKI

(Suing as the legal Representatives of

FELIX MURITHI WANJOGU- Deceased).....RESPONDENT

RULING

1. On 8th May 2018 this Honourable Court granted a conditional stay of execution in favour of the Appellant provided that the Appellant pays half of the decretal sum to the Respondent and deposits the other half in an interest earning account in the joint names of counsels of the parties within sixty (60) days.
2. On 16th November 2018 the Respondent filed an application seeking for the release of the Kshs. 253,129/= being the half of the decretal sum that was deposited in the joint names of the advocates. The application was supported by an affidavit sworn by **Simon Wnjugu Kariuki**. The major argument was that no appeal had been filed hence the decree holder should be allowed to enjoy the fruits of his lawfully obtained judgement.
3. The application was not replied to and no sufficient reasons were advanced. This Honourable Court allowed the same on 20th December 2018.
4. Subsequently the Appellant/ Applicant filed application dated 23rd January 2019 seeking a stay of execution of the orders issued on 20th December 2018 and/or set aside and vary the Orders issued and grant leave to the applicant to file a response to the application dated 16th November 2018.
5. The application is supported by an Affidavit sworn by **Paul Ngige, advocate practicing in the firm of J.K.Kibicho Advocates**, advocates for the appellant and having conduct of this matter. Their strong point was that the application was served 7 days to the hearing date by which time the advocate needed to have sought instructions from the applicant. At the time the advocate was to undergo an eye operation on 17th December 2018 hence was not able to prepare a response in good time. There is an eminent risk of execution. They urged that mistakes of counsel should not be visited upon an innocent party. He also attached a draft response to the Application dated 16th November 2018.
6. On 31st January 2019 the Court directed parties to canvass the application through written submissions. Both parties have filed their respective submissions. The Applicant relies on the Overriding objectives provided in Sections 3A & 1A of the Civil Procedure Act and his right to be heard. He also relied on numerous cited authorities; **Richard Nchapai Laiyangu vrs I.E.B.C. & 2others [2013] eKLR**, **Wachira Karani vs Bildad Wachira [2016] eKLR**, **Raj Rahadur Raja vs Seth Hirader A/R (1962) AC 527**, **Thomas Edison Ltd vs Bathock 1972 15 C.L.R. 679**, **Roger vs ComptoirD'Escompts De**. The respondent inclined to the prayers he sought in its application dated 16th November 2018, submitted that this Honourable Court is *Functus officio* in the matter hence the appellant ought to pursue the appeal if any in the court of appeal.

Analysis and Determination

7. Stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules which provides as follows :-

(2) No order for stay of execution shall be made under subrule(1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

Unreasonable Delay

8. The orders sought to be set aside were issued on 20th December 2018. At the time the Orders were made the Applicant had a representative in Court. The Court proceedings captured as hereunder;

H/B Wanjohi for the Applicant

H/B Nelima for Munene for the Respondent

H/B Wanjohi – Our application is dated 16/11/2018 is for Hearing. It is for release of money to us. It was served. No replies.

H/B Nelima- Give us time to file reply.

Court: No replies to Application dated 16/11/2018 by the Respondent. There being no reasons advanced, I allow the application.

9. The application herein was made on 24th January 2018. This is almost one (1) month after the orders were made. The delay has not been explained to the satisfaction of the court. The application is premised on a mistake by counsel. Yet, counsel was represented when the orders were made. In the circumstances, the delay is not justifiable.

Substantial Loss

10. The foregoing notwithstanding, has the applicant established substantial loss will occur unless stay is granted? The applicant’s argument on substantial loss is that he wishes to file an appeal in the court of appeal and if the prayers sought are not granted the appeal shall be rendered nugatory. In his draft response to the application dated 16th November 2018 he attached a notice of appeal to prove his assertion. The notice of appeal was filed on 24th October 2017. There is no record or evidence to show any other progress in the filing of the appeal to the Court of appeal.

11. The law does not aid dilatory behaviour of litigants. It is almost two years since the judgement was delivered. However, I am prepared to allow limited stay of execution for only 60 days to enable the applicant file appeal and apply for stay of execution in the appeal. Should the appellants not file the appeal and obtain stay of execution as directed, the stay will lapse automatically. It is so ordered.

12. In light of the order above, I will not determine the request for review.

Dated Signed and delivered in open court this 22nd day of May 2019

F. GIKONYO

JUDGE

IN PRESENCE OF

Gikonyo for Wanjohi for respondent

Kibicho for applicant

F. GIKONYO

JUDGE