



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISC. CIVIL APPLICATION NO. 58 OF 2017

HABIL NANJENDO BUSHURU a.k.a KAROKORO.....APPLICANT

VERSUS

ALEX MUTULL.....RESPONDENT

RULING

1. The applicant has filed a Notice of Motion dated 2nd August, 2017 seeking for orders that:-

1. The instant application be certified urgent and the same be heard Ex-parte in the first instance.

2. Pending the hearing and determination of the instant application inter-parties, the honourable court be pleased to grant interim orders of stay of execution of the Decree issued in Butere PMCC No. 34 of 2014 dated 22nd February, 2017 and sale of the defendant's properties and all the consequential orders.

3. After inter-parties hearing, the stay of execution order be extended pending the filing and determination of the intended appeal.

4. The honourable court be pleased to grant leave and/or permission to the applicant to lodge appeal out of time against the judgment and decree of Hon. C.A.S Mutai, Principal Magistrate, dated 2nd February, 2017 vide Butere PMCC. No. 34 of 2014.

5. Costs of the application be provided for.

2. Prayers No. 2 and 4 were granted by the court ex-parte on the 20th December, 2017. The applicant now says that he has filed the appeal. What is pending now is prayer 3 of the notice of motion which seeks for orders for stay of execution pending the hearing of the appeal. The grounds in support of the application are that the application was made without delay after the applicant learnt of the delivery of the judgment and that the appeal raises triable issues. Further that the respondent will not suffer any prejudice if the prayer sought is granted.

3. The application was opposed by the respondent on the grounds that the applicant did not offer any defence during the hearing at the lower court. That there was inordinate delay in the filing of the application yet there is no certificate of delay. That the applicant has not disclosed the extent of loss of damage he may suffer in the event that execution is exercised. That in the event that the court is inclined to allow the application to order the applicant to deposit in court or joint account of the decretal sum herein.

4. The advocates for the parties made written submissions. The advocates for the appellant, **Amasakha & Company Advocates**, submitted that the appeal raises triable issues. That for the court to decline the orders sought will render the appeal nugatory as the respondent will proceed with execution yet he has not demonstrated that he is capable of paying back the decretal sum in the event that the appeal is successful. That the application was made without unreasonable delay on learning of the judgment and the decree. That the applicant is willing to abide by whatsoever conditions that the court may deem fit and expedient.

5. The advocates for the respondent, **Elizabeth Chunga & Co. Advocates**, submitted that there are no good grounds to warrant orders for stay of execution. That the draft memorandum of appeal does not have arguable prima facie grounds with a probability of success. That the respondent is an international servant working in South Sudan earning some substantial salary. Therefore that there should be no fear that the respondent would have difficulties in recovering the money in the event that the appeal is successful.

Analysis and Determination

6. The grounds under which a court may grant stay of execution pending appeal were set out in the case of **Patani & Another –vs- Patani**

(2003) KLR where the Court of Appeal held that:

“The principles on which this court grants stay are well settled. The applicant must show that he has an arguable appeal and that the same would be rendered nugatory if a stay is not granted”:

7. The conditions for stay pending appeal are stated in order 42 Rule 6(2) of the Civil Procedure Rules which provides that no order for stay shall be made pending appeal 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.

8. These principles were re-stated in **Elena D. Korir -Vs- Kenyatta University (2012) eKLR** where it was held that:

“ The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another –vs- Thornton & Turpin Limited where the Court of Appeal (Gicheru JA, Chesoni & Cockar (AG JA) held that “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions namely: **Sufficient cause, substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay.**

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo –vs- Straman EA Limited (11)(2013) as follows:

“In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”.

9. The judgment of the lower court was delivered on 2nd February, 2017. This application was not filed until December, 2017. The appellant explained the delay in that judgment was delivered in the absence of their advocates and that proceedings were availed to them on 27th July, 2017. The certified copy of the judgment filed with the court indicates that it was certified on 27/7/17. The judgment shows that it was delivered in the absence of the parties. The proceedings do not show the date when the delivery of the judgment was fixed. It is therefore possible that the applicant learnt of the delivery of the judgment and the decree months later. However the delay from the time of receiving the proceedings on 27/7/2017 to the time when the application was filed on 8/12/2017 has not been explained.

10. I have perused the draft memorandum of appeal and the proceedings of the lower court. The suit relates to defamation of character. The main ground of appeal is that there was no proof of the actual words that were uttered and the language they were uttered in. I am satisfied that this is an arguable ground of appeal. The appeal will be rendered nugatory if stay of execution is not granted.

11. According to the warrant of proclamation annexed to the application the decretal sum stands at Ksh. 579,215/=. Though the respondent was said to be well a salaried person working in South Sudan there was nothing filed to prove that he is in a position to refund the decretal sum in the event that the appeal is successful. On the other hand the respondent has a judgment in his favour. The applicant has offered to abide by any terms imposed by the court as condition for stay pending the hearing of the appeal. I am inclined to grant the orders sought on conditions.

12. In the premises prayer number 3 of the application dated 2nd August, 2017 is granted on condition that the applicant deposits a sum of Ksh. 200,000/= into an interest earning account to be opened by his advocate and the advocate for the respondent. In the event that the money is not deposited as ordered within 30 days of the date hereof, the orders granted herein shall stand vacated.

As the delay from 27/7/17 to 8/12/17 was not explained the applicant to bear the costs of the application to the respondent.

Delivered, dated and signed in open court at Kakamega this 12th day of June, 2019.

J. NJAGI

JUDGE

In the presence of:

No appearance for applicant

Miss Mukhwana holding brief Dr. Mukhwana for respondent

Applicant - absent

Respondent - absent

