

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 434 OF 2017

JOSEPH MWANGI NTHIGA.....APPELLANT/APPLICANT

VERSUS

MWANGI GATONYE.....1ST RESPONDENT

KENYA TANNING EXTRACT..... 2ND RESPONDENT

RULING

This is an application by the appellant seeking an order that there be a stay of execution pending the determination of an appeal filed following a ruling of the lower court dated 8th December, 2017 which dismissed the appellants application for stay of execution of the judgment delivered on 28th July, 2017. The application is brought under Order 42 Rule 6 of the Civil Procedure Rules and Sections 3A, 75, 78 and 79G of the Civil Procedure Act. It is supported by an affidavit sworn by the appellant to which there is a replying affidavit sworn by the respondent. Both parties have also filed written submission which I have noted.

There is already a Memorandum of Appeal dated 14th August, 2017, following the Judgment of the lower court delivered on 28th July, 2017.

The relationship between the applicant and respondent was that of a tenant and landlord. The applicant is said to have vacated the premises. The total decretal sum following the lower court judgment is less than Ksh.200,000/-. The applicant has the duty to satisfy the court that, if he pays the said decretal sum he shall suffer substantial loss in the event his appeal eventually succeeds.

With respect, he has not demonstrated so. In any case, he was supposed to also show that in the event he succeeds the respondents will not be in a position to refund the decretal sum if paid. Again, he has not done so. The nature of the claim has to be considered.

The orders sought are discretionary. The lower court dismissed the applicant's application for stay of execution. The reasons advanced by the lower court are as relevant to this court as they were then. In the case of **Stanley Karanja Wainaina & another Vs Ridon Anyango Mutubwa (2016) eKLR**, the court observed as follows: -

“In my view, Order 42 rule 6(1) allows a party to file another application for stay of execution in the High Court whether the application for such stay shall have been granted or refused by the court appealed from. I appreciate the argument by the learned counsel and this court shares the same sentiment that once an application has been dealt with by a court of competent jurisdiction and between the same parties, a similar application cannot be filed before another court as that would be an abuse of the court process or at best, res judicata. Unfortunately that legal provision is part of our laws and until the same has been amended, we have no choice but to leave with it as it is.”

With respect I agree entirely with the said observations.

The applicant has not offered any security. This is one of the conditions that underpin an order under the cited provisions.

Having considered the material presented, I am not persuaded the applicant is deserving of the orders sought. Accordingly, the application is dismissed with costs to the respondents.

Dated, signed and delivered in Nairobi this 4th day of July, 2019.

A. MBOGHOLI MSAGHA

JUDGE