



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO 26 OF 2018

NORTHEWOOD AGENCIES LTD.....DECREE HOLDER/RESPONDENT

VERSUS

RAJ DEVANI.....JUDGEMENT DEBTOR

AND

ADINA DEVANI.....APPELLANT/APPLICANT

RULING

The case for the applicant

1. Pursuant to the provisions of sections 3A, 63 (e) and section 75 of the Procedure Act (Cap 21) Laws of Kenya, Order 42 rule 6, Order 43 rule (2) and Order 51 rule 1 of the 2010 Civil Procedure Rules, the applicant has sought the following major orders. First, an order granting her leave to appeal against the ruling delivered in Narok CMCC No. 17 of 2017, on 6th December 2018. Second, an order granting him stay of execution of the said ruling and consequential orders pending the hearing and determination of both the instant application and the instant appeal.

2. The application is supported by the grounds that are set out on the face of the notice of motion and the supporting affidavit of Maureen Ng'ang'a. The major grounds in support of the application are as follows. Following the dismissal of the applicant's objection on 20th April 2018, the applicant filed an appeal against the said ruling. The applicant has also stated that the appeal has high chances of success and unless the orders sought are granted the appeal will be rendered nugatory. Finally, she has stated that unless stay of execution is granted, the applicant will suffer substantial loss.

3. In her supporting affidavit, Maureen Ng'ang'a, has deponed to the following major matters. The deponent has averred to the same matters that are set out on the face of the notice of motion as grounds in support the application, except for the following matters. The deponent has averred that the order of stay of execution granted by this court will expire on 20th January 2019, thus leaving the judgement creditor at liberty to execute and unless an order of stay is granted her household goods will be sold to settle the decretal amount payable by the judgement debtor to the decree holder. She has also averred that the appellant/applicant, was the wife of the judgement debtor, who have been living separate lives and that the judgement debtor has no claim or legal right over the said household goods, which have been proclaimed. If the proclamation were to proceed the applicant will be prejudiced. It is in those circumstances, that the deponent has deponed that it is only fair that leave to appeal and an order of stay of execution be granted pending the hearing and determination of the applicant's appeal.

Submissions of counsel for the applicant

Counsel for the applicant has filed written submissions in support of the application. They have cited authorities including *Machira v/a Machira & Company Advocates & Another (2002) 2 KLR 391* in support of leave to appeal to this court. Additionally, they have cited Order 42 rule 6 (1) & (2) of the 2010 Civil Procedure Rules in support of an order for stay of execution pending the hearing and determination of the appeal. The applicant has therefore urged the court to allow the application.

The case for the respondent

4. The respondent has filed a 13 paragraphs replying affidavit in opposition to the application. The deponent, who is counsel for the respondent, has deponed to the following major matters. He has deponed that following the dismissal of the objection of the applicant in the magisterial court on 6th December 2018, the applicant ought to have sought and obtained leave of that court in accordance with the provisions of Order 43 of the Civil Procedure Rules, since the applicant has no right of appeal as of right. She ought to have sought leave within 14 days from that court to enable her to appeal the dismissal of her application. He has further deponed that the applicant has not

demonstrated that she will suffer substantial loss and has also failed to provide security for the due performance. He has finally deponed that the order that the applicant intends to appeal against is negative in nature, and is not capable of being stayed as the order she intends to appeal against is negative in nature, and is not capable of being stayed except in costs only.

Submissions of counsel for the respondent.

5. Counsel for the respondent has filed written submissions in opposition to the application. It is counsel's submission that the applicant ought to have sought leave to appeal in the magisterial court in terms of Order 43 rule 1 sub-rule 3 of the Civil Procedure Rules. The provisions of that order are couched in mandatory language and therefore they leave no discretion in the court. The application ought to have been made within 14 days from the date the order appealed was made. Counsel has further submitted that stay should not be granted unless the conditions set out in Order 42 Rule 6 have been complied with. Counsel has cited the case of *Kenya Shell Ltd v Benjamin Karuga Kibiru & Another (1986)Eklr*, which is for the proposition that an applicant for an order of stay of execution has to demonstrate substantial loss. Finally, counsel cited the case of *Kanwal Sarjit Singh Dhiman v Keshavij Jivraj Shah (2008)eklr*, which is for the proposition that an order which is negative in nature is incapable of being stayed. Counsel therefore submits that the instant order, which is appealed is negative in nature and is therefore not capable of being stayed. He has therefore urged the court to dismiss the application with costs to the respondent.

Issues for determination.

6. In the light of the affidavit evidence of the parties and the submissions of both counsel, I find the following to be the issues for determination.

1. Whether or not the applicant has a right of appeal as of right or with leave of the magisterial court.
2. Whether or not the provisions of Order 42 Rule 6 (1) are applicable to this application
- 3 Whether or not the applicant has made out a case for the grant of the orders sought.
4. Who bears the costs of this application?

Issue 1

7. Section 75 of the Civil Procedure Act has set out orders of the magisterial court that are appealable as of right and those that are appealable with leave of that court. According to Order 43 (1) (3) of the Civil Procedure Rules, the order sought to be appealed against must in the first instance, be made to the magisterial court, which was not done in the instant application. The provisions of that order are couched in mandatory language. In the circumstances, I find that the instant application is incompetent. It is not properly before this court.

Issue 2 and issue 3

9. In the light of my finding in respect of issue No.1, I find that it is moot to consider issues 2 and 3.

Issue 4.

10. I find that the respondent has succeeded in this application and is therefore entitled to the costs of this application.

11. In the light of the foregoing, I hereby struck out the applicant's application with costs to the respondent.

Ruling signed, dated and delivered in open court at Narok this 4th day of July 2019 in the presence of Mr. Chege holding brief for Ms Wanjiku for the applicant and Mr. Maina holding brief for Mr. Kiplagat for the respondent.

J. M. Bwonwonga

JUDGE

4/7/ 2019