



IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 8 OF 2018

STEPHEN MWANGI WANJOHI..... APPELLANT

VERSUS

DUNCAN NDEGWA KARIUKI.....RESPONDENT

RULING

FACTS

1. The Applicant who is the appellant herein being dissatisfied with the ruling delivered on the 14th February, 2018 by the Chief Magistrate in CMCC No.432 of 2016 sought redress by filing his Memorandum of Appeal on the 5th February, 2018.
2. The Applicant, filed a Notice of Motion under a Certificate of Urgency dated 19th February, 2018; the application was brought under no specific provisions of the law and prayed for the following Orders;
 - (i) Spent;
 - (ii) That this Honorable Court do order that there be a Stay of Execution of the orders granted on the 14/02/2018 pending the hearing and final determination of the application inter partes;
 - (iii) That there be stay pending the hearing and determination of the appeal;
3. The Applicant relied on the grounds on the face of the application and on the Supporting Affidavit made by Stephen Mwangi Wanjohi and is dated the 19th March, 2018; hereunder is a summary of the applicant's submissions.

APPLICANT'S SUBMISSIONS

4. The applicant was ordered by the trial court to pay the decretal sum of Kshs.50,000/- to the decree holder; and had already paid the sum the total sum of Kshs.70,000/- to the advocates acting for the decree holder;
5. That he was not refusing to settle the decretal sum but due to his current financial position he was unable to pay the monthly instalment of Kshs.50,000/- as it was too high; and efforts to raise the amount were not bearing fruits; that he had proposed a monthly sum of Kshs.20,000/- which the trial court did not take into consideration which he contends is reasonable considering the amount that was outstanding;
6. That if the orders for stay of execution were not granted there was a likelihood of the warrants of arrest being executed pursuant to the order of 14/02/2018.

RESPONDENT'S SUBMISSIONS

7. In response the respondent submits that the applicant's application is misconceived and is an abuse of the court process; that on the 14/02/2018 the applicant proposed to pay the decretal sum in monthly instalments of Kshs.50,000/-; later the applicant sought to have the order of 14/02/2018 reviewed and that he be allowed to settle the decretal sum by monthly instalments of Kshs.20,000/-;
8. That the applicant has not demonstrated why execution of the decree in Nyeri CMCC No. 432 of 2016 should be stayed;

ISSUES FOR DETERMINATION

9. Taking into consideration the above submissions this court has framed only one issue for determination;

(i) Whether this application is a suitable one for this court to exercise its discretion.

ANALYSIS

10. The applicant has moved this court by way of Notice of Motion and even though the application is premised under no specific provision of the law but in essence the applicant who is acting in person is seeking an order for the review of the order made on the 14/02/2018 but brought under the guise of an application for stay of execution;

11. The principles for review of an order or decree of the court are; that there must be discovery of new and important material or evidence, which, after the exercise of due diligence, was not within the knowledge or could not be obtained and produced at the time the order was made; or that there must be a mistake or error apparent on the face of the record; or for any other sufficient reason.

12. After hearing submissions of the applicant and Counsel for the Respondent it is noted that there is no contention of discovery of new and important material or evidence, which, after the exercise of due diligence, was not within the Applicant's knowledge or could not be produced at the time the order was made; there is also no contention of any mistake or error apparent on the face of the record;

13. The reasons advanced by the applicant are the same ones advanced to when the applicant made his application before the trial court; this therefore means that the applicant has tendered no new material or evidence nor is there any contention of mistake or error on the face of the record; this court finds that the application does not qualify for the orders sought of review.

14. This court finds that the applicant has not satisfied the salient requirements for an order for review to enable this court grant such an order.

15. The above notwithstanding the order for stay of execution pending appeal is in the discretion of the court to grant or refuse an order for stay; but the applicant must demonstrate to the court that the appeal has high chances of success and that if not granted the orders sought the appeal will be rendered nugatory or stands to suffer substantial loss and damage; reference is made to the renowned Court of Appeal case of **Butt vs Rent restriction Tribunal [1979] eKLR**;

16. The applicant is found to have filed the application in good time and without delay; but he has not demonstrated to this court that the intended appeal has high chances of success; the claim is for a monetary decree and the applicant himself alluded to the fact that he was willing to pay and indeed had paid the sum of Kshs.70,000/- and stated that the balance outstanding was not substantial;

17. From his averments this court finds that the applicant has demonstrated that he is not apprehensive that the respondent may not be in a position to refund the monies paid out in the event the appeal succeeds; or that he is likely to suffer any prejudice or suffer any substantial loss or damage; these are the key factors that a court takes into consideration when exercising its discretion to grant an order for stay of execution pending appeal;

18. This court finds that the appellant knows that his appeal has no merit and that the only thing moving the applicant is the threat of execution which is by way of arrest and committal to civil jail; this court reiterates that the claim is a monetary decree and that it is trite law that the respondent being the decree holder should not be denied the right to and is entitled to enjoy the fruits of his judgment;

FINDINGS AND DETERMINATION

19. This court finds that this is not a suitable case for it to exercise its discretion in granting an order for stay of execution or review.

20. The application is found lacking in merit and is dismissed;

21. The Respondent shall have costs of this application.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 12th day of July, 2018.

HON. A. MSHILA

JUDGE