



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 221 OF 2018

GIDEON KARIITHI NYAWIRA.....APPELLANT

VERSUS

JANE WANJA MAINA.....RESPONDENT

RULING

1. By his Notice of Motion dated 29th August 2018, the appellant *Gideon Kariithi Nyawira* moved this court principally seeking orders of stay of proceedings in Nairobi CMCC No. 6816 of 2018 pending the hearing and determination of this appeal.
2. The background against which the application was filed is captured in the supporting affidavit sworn on 27th August 2018 by learned counsel for the applicant, *Ms Irene Njoroge*. She deponed that the respondent *Jane Wanja Maina* had filed suit against the applicant in CMCC No. 6292 of 2015 which was determined in favour of the respondent.
3. The applicant was dissatisfied with the trial court's decision. She proffered this appeal and also filed an application for stay of execution in the trial court. Parties compromised the application by recording a consent on 9th August 2018 which was adopted as an order of the court. The consent was to the effect that execution in CMCC No. 6293 of 2015 was to be stayed pending the disposal of the appeal on condition that the applicant paid half of the decretal amount directly to the respondent and the other half was to be deposited in court within 30 days.
4. It is the applicant's contention that while the appeal was pending, the respondent filed a declaratory suit against the applicant's insurer *British American Insurance Kenya Limited* seeking recovery of the decretal amount despite the fact that the applicant had already complied with the conditions of stay pending appeal as ordered by the trial court on 9th August 2018.
5. The applicant contends that the declaratory suit was prematurely filed as the current appeal which challenges the trial court's finding in the primary suit is still pending; that the respondent is keen on prosecuting the declaratory suit since she has applied for striking out of the defence filed in the suit by the applicant; that if stay is not granted as sought, the applicant will suffer substantial loss as he will be forced to prosecute the suit and the appeal at the same time.
6. The application is opposed. The respondent filed grounds of opposition on 10th September 2018. The main grounds taken in opposition to the application are that by the time the declaratory suit was filed, the respondent was not aware of the existence of the appeal as she had not been served with the memorandum of appeal and the orders staying execution in the primary suit had not been issued; that in any event, the applicant has not fully satisfied the conditions attendant to orders of stay of execution; that the application lacked merit as the applicant had not fulfilled the conditions set down under *Order 42 Rule 6 (2)* of the *Civil Procedure Rules* particularly the requirement for demonstration of substantial loss; that if the application was allowed, the respondent will suffer prejudice.
7. To counter the matters raised in the grounds of opposition, *Ms Irene Njoroge*, counsel for the applicant swore a further affidavit on 18th September 2018 basically reiterating the depositions made in the supporting affidavit.
8. The application was prosecuted by way of oral submissions. Learned counsel *Ms Kamau* argued the application on behalf of the applicant while learned counsel *Ms Obaga* represented the respondent.
9. In their submissions, both learned counsel buttressed the positions taken by their respective clients in support and in opposition to the application. *Ms Kamau* in addition admitted that what was paid to the respondent and what was deposited in court excluded the costs of the suit and interest but indicated that the applicant was ready and willing to pay or deposit any additional sums assessed as costs and interest as a condition for stay of proceedings in the declaratory suit.
10. I have carefully considered the application, the affidavits sworn in support, the grounds of opposition thereof as well as the party's rival oral submissions.

11. I note that this application is mainly premised on *Order 42 Rule 6* of the *Civil Procedure Rules* which was also referred to by the parties in their submissions. This provision spells out the conditions that a party seeking orders of stay of execution of a decree or order pending an appeal must satisfy to demonstrate sufficient cause to justify grant of the orders of stay. An analysis of the provision leaves no doubt that it only applies to applications for stay of execution pending appeal but not to applications for stay of proceedings such as the application now before me.

12. It is apparent from the application and the submissions by both learned counsel that they were operating on the mistaken belief that *Order 42 Rule 6* of the *Civil Procedure Rules* also applies to applications for stay of proceedings which is not the case.

13. Having said that, the question that now begs an answer is what guides the court in determining applications for stay of proceedings pending appeal. In *Kenya Power & Lighting Co Ltd V Esther Wajiru Wokabi, [2014] eKLR*, guided by the decision of *Ringera J* (as he then was) in *Global Tours & Travels Limited, Nairobi HC Winding Up Cause No. 43 of 2000*, I laid down three factors which may assist the court in the exercise of its discretion when determining such applications. These are:

- i. Whether the applicant has established that he has a *prima facie* arguable appeal.
- ii. Whether the application was filed expeditiously; and
- iii. Whether the applicant has established sufficient cause to the satisfaction of the court to demonstrate that it would be in the interest of justice to grant the orders sought.

14. Applying the above principles to the present case, I note that in the instant application, the stay orders sought relate to proceedings in a declaratory suit which are different from the proceedings subject matter of the appeal. It is not disputed that the declaratory suit was filed on 26th July 2018. The current application was filed on 27th August 2018 just about a month thereafter. From these facts, I am satisfied that the application was filed without unreasonable delay.

15. Since the proceedings and judgment of the lower court have not been availed to this court, I am not able to form any impression whether or not the appeal is arguable but considering that the declaratory suit seeks to enforce judgment obtained in CMCC No. 6293 of 2015 whose validity is challenged in this appeal and given that it is not disputed that the applicant has already paid half of the judgment sum to the respondent and deposited the other half with the trial court in compliance with stay orders issued by the trial court following a consent recorded by the parties, I find that it would be against the interests of justice to allow the declaratory suit to proceed to hearing during the pendency of the appeal.

16. Since the declaratory suit seeks to enforce the decree issued pursuant to the impugned judgment, it needs to be stayed to await outcome of the appeal. This will ensure that scarce judicial resources are properly utilized and parties are saved from incurring unnecessary costs.

17. Though *Ms Kamau* had offered to top up the payment made to the respondent and deposited in court with the amounts assessed as costs and interest, since there is no evidence to confirm what has been assessed as costs or interest, I find no basis for making any order for additional payments by the applicant as a condition for stay of proceedings in the declaratory suit.

18. For all the foregoing reasons, I find merit in the Notice of Motion dated 27th August 2018 and it is consequently allowed in terms of prayer 3 with the result that proceedings in the declaratory suit are hereby stayed pending disposal of the appeal.

19. Costs of the application to abide outcome of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF OCTOBER, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Ms Musa holding brief for Ms Kamau for the applicant

No appearance for the respondent

Mr. Salach: Court Assistant