



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 110 OF 2019

BETWEEN

JONATHAN KINYANJUI MUIRURI.....APPELLANT/APPLICANT

AND

GEORGE OCHIENG OGUTU.....RESPONDENT

RULING

1. By a notice of motion dated and filed on 09th October, 2019, brought under Order 51 Rule 1 of the Civil Procedure Rules and Section 1A and 1B of the Civil Procedure Act, Appellant/Applicant prays for orders

1) That there be a stay of execution of decree in Kisumu CMCC No. 60 Of 2019 George Ochieng Ogutu versus Jonathan Kinyanjui Muiruri pending the hearing and determination of this appeal

2) Costs be provided for

2. The application is based on the grounds among others that the Applicant has filed an appeal on liability and quantum and is ready to furnish a Bank Guarantee for due performance of the decree.

3. The application is supported by an affidavit sworn on 09th October, 2019 by Caroline Cherotich Kimetto on 06th August, 2019 who describes herself as Head of Legal Services of Britam General Insurance Co. Ltd the Applicant's insurer in which she reiterates the grounds on the face of the application.

4. The application is opposed by of a replying affidavit sworn by the Respondent on 22nd October, 2019 who avers the application is a ploy to delay his enjoyment of the fruits of his judgment.

Analysis and Determination

5. I have carefully considered the notice of motion *vis a vis* the on record.

6. Order 42 (6) of the Civil Procedure Rules provides:

(2) No order for stay of execution shall be made under sub rule

(1) Unless—

a. The court is satisfied that substantial loss may result to the applicant unless the order is made

b. That the application has been made without unreasonable delay; and

c. 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.

i. Unreasonable delay

7. The impugned judgment was delivered on 03rd September, 2019. The notice of motion herein was filed on 09th October, 2019 which is a month and 6 days from the date of the impugned judgment. The Application was in my considered view filed without undue delay.

ii. Substantial loss

8. There are a myriad of cases on what constitutes substantial loss. In Civil Appeal No. 186 Of 2007 Standard Assurance Co. Ltd –Vs- Alfred Mumea Komu the Court stated-

“Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”

9. Similarly in Civil Case No. 41 Of 1995 United Builders & Contractors (Africa) Limited –Vs- Standard Chartered Bank Ltd the Court stated-

“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other suits.”

10. Additionally, the court in ABN Amro Bank N.V. v Le Monde Foods Ltd Civil Application No. Nairobi 15 of 2002 held that:

“Each party bears a specific burden regarding proof of substantial loss in a case such as before us.So all an Applicant in the position of the bank (Appellant) can reasonably be expected to do is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”

11. The Respondent was awarded general damages in the sum of Kshs. 2,000,000/-. The Applicant has not demonstrated that the Respondent is not in a position to refund the said sum in the event that the appeal succeeds. (See Carter & Sons Ltd. vs. Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997).

12. From the affidavit evidence, I am not convinced that the Applicant has demonstrated that it is likely to suffer substantial loss if the order of stay of execution is not granted.

iii. Security

13. Security is a legal requirement under 42 (6) (2) (c) of the Civil Procedure Rules. The Appellant has offered to furnish a Bank Guarantee for due performance of the decree herein pending the hearing and determination of the appeal.

14. While it is not my duty at this stage to determine if the Applicant has an arguable appeal, I am minded, in the interest of justice to exercise this court’s discretion under section 3A of *the Act* to afford the Appellant an opportunity to prosecute his appeal.

15. The upshot of the foregoing is that the notice of motion dated 09th October, 2019 is considered and the same is allowed in the following terms:

1) That there be a stay of execution of proceedings in Kisumu CMCC No. 60 Of 2019 George Ochieng Ogutu versus Jonathan Kinyanjui Muiruri pending the hearing and determination of this appeal on condition THAT:

i.) Kshs. 500,000/- of the decretal sum be paid to the Respondent within 30 days from today’s date

ii.) The balance of the decretal sum be deposited into an interest earning account in the names of the advocates both parties within 30 days from today’s date

2) In default of Order (1) and (2) above, the stay order shall lapse

3) Appellant shall bear the costs in the appeal

DELIVERED AND SIGNED IN KISUMU THIS...14th...DAY OF...November...2019

T.W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - **Amondi/Okodoi**

For Appellant/Applicant - N/A

For the Respondent - N/A