



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

HCCA.NO.16 OF 2019

(Appeal Originating from Nyahururu CM's Court Civ.No.112 of 2016 by: Hon. S. Mwangi – S.R.M.)

RURAL ELECTRIFICATION

AUTHORITY.....APPELLANT/APPLICANT

VERSUS

NICOLAS MUTURI MURATHE.....RESPONDENT

RULING

The appellant's Notice of Motion dated 7/2/2019 and filed in court on the same date is expressed to be brought pursuant to Article 159(2) of the Constitution, Section 1(A), (B) and 3A of the Civil Procedure Act and Order 42 Rule 6 of Civil Procedure Rules. The appellant seeks the following Orders:

(a)spent;

(b)spent;

(c) *That a stay of execution of the whole judgment of the Hon. SRM issued and dated 15/12/2019 in Civil Case 112/2016 be issued pending the hearing and determination of the appeal herein;*

(d) *Costs of the application be provided for.*

The grounds upon which the application is premised are as follows:

(1) *That the award of general and special damages by the trial court are without any legal or factual basis and are based on discredited and expunged documents;*

(2) *That the appellant is aggrieved by the said judgment and has appealed;*

(3) *That the respondent is likely to execute at any time and your order of stay is not granted, the appeal will be rendered nugatory;*

(4) *That the appellant has an arguable appeal.*

Caroline Oluoch, the Manager in Charge of Way Leaves with the appellant swore an affidavit in support of the application and is dated 7/2/2019. She deponed that the Rural Electrification Authority (REA) was established in 2006 by the Energy Act of 2006 and operationalized in July, 2007 and their mandate is to accelerate Rural Electrification; that the impugned judgment was arrived at without basis and that the court relied on expunged documents; that it contradicts the law, good order and good sense; that the judgment is in conflict with the evidence adduced and that is why the appellant has lodged an appeal; that the appeal is not frivolous but has merit and that is why they seek a stay so that execution does not proceed and render the appeal nugatory.

In addition, Ms. Lumallas submitted that during the proceedings, it emerged that some documents were forged and it was agreed that the same be expunged; that the REA being a Government body, there is no requirement for providing security but despite that, the appellant is ready to deposit Kshs.371,760/= as security pending appeal; that in the judgment, though the court stated that the defence was a mere denial, yet the appellant had admitted liability and the only issue that was outstanding was damages; that the court should have relied on gazette rates; that the award of about Kshs.1.2 million is not justified and that if paid to the respondent, he may not be able to refund it in the event the appeal succeeds; that though it is alleged that the respondent has 3 pieces of land, no titles of the same were exhibited.

Nicolas Muturi Murathe, the respondent herein, filed a replying affidavit dated 30/4/2019 in which he stated that the application by the appellant is a delaying tactic to prevent him from enjoying the fruits of his judgment; that the applicant has not demonstrated that the appeal has high chances of success; that the decree is one of liquidated damages and the applicant has not demonstrated that the respondent is a man of straw and will not be able to refund the said money if the appeal is successful. The respondent stated that he has three parcels of land, all developed including the subject land and he can easily refund the money; that the applicant has not furnished security for the due performance of the decree in the event the appeal does not succeed.

Mr. Maina, counsel for the respondent added that the orders sought are discretionary and in the exercise of the said discretion, the court should balance the rights of the parties; that the applicant merely alleged that they will suffer substantial loss if stay is not granted; that the respondent is a person of means with land including the subject land which is not comparable to the decretal sum; that there is no possibility of success on appeal because the applicant admitted to cutting trees and they did not know who owned the property and that is why damages were granted for trespass; that the appellant wants to rely on a report prepared by Ministry of Agriculture but the respondent had a report prepared by a Forest Officer who went to the land and assessed the value of the cut trees as Gazette Notices were not produced.

In balancing the parties' rights counsel cited Civ.Appl.97/1986 Kenya Shell Ltd v Benjamin Karuge Kiburu, where the Court of Appeal held that a successful litigant should be left to enjoy the fruits of the judgment counsel urged that if stay is granted, the respondent stands to suffer.

I have now considered the rival arguments. An application for stay of execution is governed by Order 42 Rule 6 of the Civil Procedure Rules. It must be demonstrated by the applicant:

1. That the application was brought without unreasonable delay;
2. That if the order of stay is not granted, the applicant will suffer substantial loss;
3. That the appellant shall offer security for the performance of such decree or order.

The power of the court to grant an order of stay is discretionary and should be exercised within the abovestated parameters. In exercise of the said discretion, the court has to balance the interests of both parties because whereas the appellant has a right of appeal, the respondent has a right to enjoy the judgment.

In Mohamed Satim T/A Choice Butchery v Nasser Puria Memon Jamat (2013) e KLR the Court upheld the decision in Portreiz Maternity v James Kerange Kabia CA.63/1997 where it is stated:

"The right of Appeal must be balanced against an equally weighty right that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of their right..."

In HCCA.716/2003 Johnson Mwiruuti Mburu v Samuel Macharia Ngure, J. Nyamu stated that "a respondent's possible inability to pay the decretal amount was sufficient to justifying grant of stay of execution pending appeal on the condition that the decretal amount be secured."

On whether the application was made without unreasonable delay, no doubt it was. Judgment was rendered on 15/1/2019 and notice of appeal together with this application were filed on 7/2/2019, a period of about 3 weeks.

Whether the applicant will suffer substantial loss:

Although the respondent contended that this is a money decree and the applicant will not suffer any loss, yet the applicant argues that first, being a Government body, there is no need for it to give security and secondly, that the respondent has not demonstrated that he is a person of means and able to refund about Kshs.1.2 million decretal sum.

The onus of course rests on the applicant to prove that the respondent is a man of straw and not able to refund the decretal sum of the appeal succeeds. In Silverstein v Chesonii (2002) 1 KLR 867, the court held "...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory." See also Mukuma v Abuoga C.App.95/1987.

In Caneland Ltd & 2 others v Delphis Bank Ltd Civ.Appl.Nai.344/1999, the court observed that it may not be possible for the applicant to know the respondent's financial means. What the law expects of an applicant is therefore to swear, upon reasonable grounds, that the respondent will not be in a position to refund the decretal sum if it is paid to him in the event the appeal succeeds.

Although the respondent claims to have 3 pieces of land, no evidence of existence of the two other pieces were availed save the land, the subject of these proceedings. But even if the respondent has this piece of land, there is no guarantee that it can be easily sold for the refund to be made.

I am satisfied that in the event the appeal succeeds, there is possibility that the refund may not be readily available.

This is indeed a money decree and the Court of Appeal said as follows of a money decree in Kenya Hotel Properties Ltd v Willesden Properties Ltd Civ.App.Nai.322/2006.

"The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a "man of straw" but is a person who, on the

success of the appeal, would be able to repay the deretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle of law was not being established at all.”

It therefore follows that the court will not always decline to grant stay on all money decrees but it will depend on the circumstances of each case. I am satisfied that the applicant will suffer substantial loss of the stay is not granted and is deserving of stay of execution pending appeal.

The applicant argued that they have an arguable case. The issues that seem to arise are whether the trial court took into consideration documents that had been expunged from the record and further whether, the proper rates were applied in arriving at the award made. I am satisfied that the applicant has an arguable case. The deposit be made within 7 days from today’s date.

On the question of security, the applicant offered security of the undisputed sum of Kshs.371,790/=. In my view, that is sufficient security which should be deposited in an interest earning account in the names of both counsel pending hearing of the appeal.

Costs of this application to abide the appeal.

Dated, Signed and Delivered at Nyahururu this 12th day of November, 2019.

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R.V.P Wendoh

JUDGE

Present:

Mr. Maina Kairu for respondent/respondent

Mr. Muchangi holding brief for Ms. Lumallas for applicant/appellant

Soi - Court Assistant