



IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 40 OF 2017

WILLIAM N.ONWONGA t/a

BWONWONGA & CO.ADVOCATES.....1st APPELLANT/APPLICANT

PETER MUCHIRI KARIUKI

t/a AIRWAYS AUCTIONEERS.....2ND APPELLANT/APPLICANT

VERSUS

MWANGI MUTAHI RUGA.....RESPONDENT

RULING

FACTS

1. The appellants/applicants brought the instant application dated 23rd September 2019 under the provisions of Order 42 Rule 6, Order 51(1) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya seeking for the following orders;-

i) Spent

ii) That the Honourable Court be pleased to grant an order of stay of execution of its judgment and order/decreed that was delivered and issued on the 4th July, 2019 and the 23rd August, 2019 respectively pending the hearing and final determination of Nyeri Civil Appeal No.228 of 2019.

iii) That the costs of this application be provided for.

2. The application is premised on the grounds on the face of the application and the supporting affidavit of Onwonga William who stated that the appellants/applicants have preferred an appeal to the Court of Appeal, Civil Appeal No.228 of 2019, against the whole of the judgment and orders of this Court given on the 4th July, 2019 and 23rd August, 2019 respectively; the appellants/respondents have filed their submissions in the said appeal; the application has been brought without undue delay; the respondent is a person of unknown means and may not be able to refund the decretal sum of six million shillings if the appeal is successful; the securities by the appellants/applicants are held by the Court and the appellants/applicants are willing to have the same retained by the Court pending determination of its said appeal;

3. The application was disposed of by oral submissions; Mr. Warutere appeared for the appellants/applicants and the respondent appeared in person; a summary of each parties' submissions is as follows;

APPELLANT'S/APPLICANT'S CASE

4. Mr. Warutere stated that the application is anchored on the supporting affidavit dated 23rd September 2019 and sworn by William Bwonwonga; if the orders sought are not granted the appellants/applicants would suffer substantial loss; the respondent has not demonstrated that he will be able to refund the decretal sum if the appeal is successful; there is already a security of Kshs.250,000/- held by the court that the appellants/applicants are willing to have the same retained as security for the appeal;

RESPONDENTS CASE

5. In reply the respondent stated that the application should not be allowed because the appellants/applicants are sitting on his rights; the decretal sum can either be deposited in court or in a joint interest earning account if the appellants/respondents think that he may not be able

to refund it if their appeal succeeds; in any event the appellants/applicants may as well be unable to satisfy the decree;

6. The respondent further stated that he is facing hardships because of delays in conclusion of the matter; the security of Kshs.250,000/- held by the court should be released to him as part of the fruits of his judgment; if the Court will consider the application the appellants/applicants should provide security for the due performance of the decree;

ISSUES FOR DETERMINATION

7. After hearing the evidence of the parties and upon reading their respective written submissions this court has framed the following issues for determination;

- (i) Whether the application was made without unreasonable delay;
- (ii) Whether this court is satisfied that substantial loss may result to the applicant unless the order for stay of execution is granted;

ANALYSIS

Whether the application was made without unreasonable delay:

8. The judgment and orders of this Court were given on the 4th July, 2019 and 23rd August, 2019 respectively; the appellants/applicants have preferred an appeal to the Court of Appeal, Civil Appeal No.228 of 2019, against the whole of the judgment; and on the 23/09/2019 filed this application for stay of execution pending hearing and determination of the appeal;

9. This court is satisfied that the application has been brought without undue delay;

Whether this court is satisfied that substantial loss may result to the applicant unless the order for stay of execution is granted:

10. The applicant had approached the court under a certificate of urgency and obtained interim orders on condition of provision of security for the decretal amount pending the hearing of the application inter-partes; it is noted that the applicant complied with the terms and deposited the sum of Kshs.250,000/- into court within the time stipulated;

11. This court has fettered discretion to grant the orders sought by the applicant who must satisfy this court that the appeal is not frivolous and that he has an arguable appeal; and stands to suffer substantial loss unless the order for stay of execution is granted;

12. Counsel for the applicant did not belabour the issue of whether the applicant had an arguable appeal; nor did the applicant address the question whether or not the appeal would be rendered nugatory if the order was not granted; the applicant only addressed the issue of provision of security for due performance; the applicant's contention was that the decretal sum was substantial and that the respondent had not demonstrated that he would be able to refund the decretal sum to the applicant if the appeal was ultimately successful; in the circumstances the applicant would suffer substantial loss;

13. The respondent in response argued that he could not be denied the right to enjoy the fruits of his judgment; and that the security of Kshs.250,000/- held by the court should be released to him as part of the fruits of his judgment;

14. This court's considered view is that the one and only arguable point for this court to consider is whether the sum of Kshs.6,000,000/- is a substantial sum and whether the applicant is likely to suffer great hardship leading to substantial loss;

15. All this court can state is that the applicant as an advocate has been economical with the material he has placed before the court for it to exercise its discretion; but nevertheless this court opines that the sum of Kshs.6,000,000/- is indeed a substantial sum and that it is probable that if applicant's firm fails to raise the full amount within a stipulated period this would definitely result in the automatic execution of the decree that can negatively impact the applicant and his business;

16. The upshot is that this court is satisfied that unless the application is not granted the applicant is likely to suffer hardship and loss which is not proportionate to the loss the respondent is likely to suffer;

17. The application is allowed subject to the following terms; the applicant to deposit the sum of Kenya Shillings Three Million (KShs.3,000,000/-) within 30 days from the date hereof in an interest earning account in the joint names of the appellant and the Deputy Registrar High Court Nyeri as security for due performance; the sum of Kshs.250,000/- deposited in court be released to the respondent forthwith; in default the respondent be at liberty to execute the decree for the full decretal sum.

FINDINGS AND DETERMINATION

18. In the light of the foregoing this court makes the following findings and determinations;

19. This court finds that the application was brought without undue delay;

20. The application is found to have merit and it is hereby allowed; the applicant is hereby granted an order for stay of execution pending the hearing and determination of Nyeri Civil Appeal No. 228 of 2019 on the following terms;

21. The applicant to deposit the sum of Kenya Shillings Three Million (KShs.3,000,000/-) within 30 days from the date hereof in an interest earning account in the joint names of the appellant and the Deputy Registrar High Court Nyeri as security for due performance;
22. The sum of Kshs.250,000/- deposited in court be released to the respondent forthwith;
23. In default the respondent is at liberty to proceed to executing the decree for the recovery of the full decretal sum;
24. The applicant to bear the costs of application.
25. Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 5th day of December, 2019

HON. A. MSHILA

JUDGE