



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 395 OF 2017

GICHIGI SAMUEL.....1ST APPELLANT/APPLICANT

-VERSUS-

KENNEDY OMONDI OBONYO (Suing as a personal

Representative of the Estate of

CLINTON OTIENO OMONDI (Deceased).....RESPONDENT

(Being an Appeal from the ruling of the Milimani Chief Magistrate Court delivered on 31st July, 2017 in Nairobi CMCC No. 6551 of 2015)

RULING

1. The Applicant has moved this court by way of a Notice of Motion dated the 20th day of December 2017 seeking orders for stay execution of the decree given on the 19th day of April, 2017 in Milimani CMCC No. 6551 of 2015 and all the consequential orders, pending the hearing and determination of the Appeal. He has also sought the costs of the application.
2. The application is supported by the affidavit of Nathan Muthabuku Mwaura and the supplementary affidavit sworn by the same person. It is deponed that the Appellant was the Defendant in CMCC No. 6551 of 2015. That on the 23rd March 2017 parties recorded a consent on liability in the ratio of 80:20 and on the 19th April 2017, judgment was entered for the Respondent for a sum of Ksh.1,280,995 without the Appellant's submissions being on record.
3. The Appellant filed an application for review of the judgement but the same was dismissed on the 31st July 2017 following which he filed an appeal against the said ruling. His application for stay of execution that he had filed before the lower court was dismissed. He avers that he is ready and willing to comply with any order on security. He further depones that the application herein was made without undue delay and that there is imminent risk of execution of the decree by the Respondent. A copy of an email from the Respondent dated 14th December 2017 directing the Applicant to pay the decretal sum failure to which execution shall be levied is annexed to the supporting affidavit.
4. In the supplementary affidavit, the Applicant has sought to clarify that his application for stay of execution before the lower court was dismissed and no condition was given with regard to depositing of the decretal sum as she has deponed in the supporting affidavit.
5. The Respondent filed grounds of opposition and a replying affidavit both of which were filed on the 17th January 2018 but which captures the same facts. In the Replying Affidavit sworn by Salome Muhia Beacco, she depones that before the judgment was entered in CMCC No. 6551 of 2015 the Appellant had been given a chance to file his submissions but he failed and/or ignored to do so. That thereafter he made vexatious applications in the lower court seeking orders of stay of execution but the same were dismissed.
6. It has been averred that the Appellant has not demonstrated what loss he will suffer if the orders are not granted. That he has also not demonstrated that his Appeal has high chances of success to warrant the orders sought. It is also contended that the Appellant has not furnished security for the due performance of the decree and no sufficient cause has been shown.
7. Parties filed submissions in support of their respective positions. The court has duly considered the application and the material before it. This being an application for stay of execution the Applicant must satisfy the following conditions as set out under Order 42 Rule 6 (1) of the Civil Procedure Rules.
 - a) That the application has been made without undue delay.
 - b) 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.

c) That substantial loss may result to the Applicant unless the order is made.

8. On the issue of delay, the documents availed to the court reveals that judgment in CMCC No. 6551 of 2015 was delivered on 19th April 2017 and on 2nd August 2017 the Applicant filed an application seeking stay of execution but the application was dismissed. The delay in filing the present application cannot be said to be unreasonable.

9. On the issue of security, the Appellant has offered to comply with any orders that the court shall give regarding security. My understanding of the provision on security is that it is the court to impose the terms though the Appellant should offer to comply with the terms that the court shall order. In this case, the offer made by the Appellant suffices for purposes of Order 42 Rule 6 (1).

10. The Appellant has to satisfy the court that substantial loss may result if a stay of execution is not granted. In the case of **James Wangalwa & Another Vs Agnes Naliaka, Gikonyo J** explained what constitutes substantial loss in the following terms.

“The Applicant must establish other factors which show that execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal.”

11. There is an Appeal pending before this court which was filed on 2nd August 2017, two days after the ruling was delivered on 31st July 2017. The Appellant submits that if a stay of execution is not granted, the Appeal shall be rendered nugatory. In the interest of justice, the court shall grant a stay of execution on condition that half of the decretal sum is deposited in a joint account to be opened by counsels.

12. The money to be deposited within 30 days from the date of this ruling failing which the orders of stay shall lapse. The costs of the application shall abide the outcome of the Appeal.

Dated, Signed and Delivered at Nairobi this 10th Day of May, 2018.

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L. NJUGUNA

JUDGE

In the Presence of

.....*For the Applicant*

.....*For the Respondent*