



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 109 OF 2017

JACINTA MWENDE KIMANZI.....APPELLANT

VERSUS

BARKER BERNARD WAYNE.....RESPONDENT

RULING

1. The application dated 29th May, 2017 is premised on the provisions of Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Order 40 rule 2, Order 42 rule 6, Order 45 rule 1 and Order 51 rule 1 of the Civil Procedure Rules, 2010 and any other relevant enabling provisions of the laws of Kenya. It seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) That this Honourable Court be pleased to stay execution and/or the setting aside the Judgment and subsequent decree issued by the Honourable F. Kyambia (SRM) on 26th May, 2017 pending the hearing and determination of this appeal;

(iv) That the Honourable court may proceed and any other order it may deem fit in the circumstances (sic); and

(v) That the cost of this application be in the cause;

2. The application is supported by the grounds on the face of it and the supporting affidavit of the applicant herein sworn on 29th May, 2017. The respondent filed a replying affidavit on 21st June, 2017 to oppose the application. The applicant thereafter filed her written submissions on 28th August, 2017 and the respondent filed his on 27th September, 2017.

3. Ms. Mukoya, Learned Counsel for the applicant submitted that the parties hereto are joint owners of bank account No. 1175751804 held at Kenya Commercial Bank (KCB) Nyali branch, Mombasa. She stated that the respondent and the applicant deposited over 6.1 Million in the said account. The applicant withdrew over Kshs. 4 Million leaving over Kshs. 2 Million in the account, which the lower court ordered to be released to the respondent. She cited the case of **HFCK vs Sharok Kher Mohamed Ali Hirji and Another** [2015] eKLR, where the court stated that an application for stay of execution should not be frivolous and the court should ensure that if successful, the appeal shall not be rendered nugatory. The court therein also said that an arguable case does not amount to showing that the appeal will succeed as the existence of one arguable point should suffice.

4. Counsel for the applicant further submitted that refusal to grant orders for stay of execution will lead to substantial loss to the applicant. She stated that the appeal filed by the applicant herein raises arguable points of facts and law. She indicated that this court would have the opportunity to analyze the evidence and arrive at its own conclusion and make a pronouncement on the rights of joint bank account owners.

5. On the principle of the application being made without unreasonable delay, she submitted that the application herein was filed on 29th May, 2017 after delivery of the Judgment on 26th May, 2017.

6. On the issue of deposit of security, Ms. Mukoya argued that the money in issue is in the bank and is safe, thus there was no need for the applicant to deposit security. She contended that the respondent will access the money if stay of execution is not issued and by so doing, the appeal will be rendered nugatory. She submitted that the respondent is not a Kenyan and has not expressed his willingness to pay back the money if the appeal will be successful. She prayed for the application to be allowed.

7. Mr. Masore, Learned Counsel for the respondent submitted that in the case of **John Odongo vs Joyce Irungu Muhatia** [2015] eKLR, the

court laid out the principles upon which orders for stay of execution can be granted against a Judgment issued by a subordinate court. Counsel referred to the provisions of Order 42 rule 6 of the Civil Procedure Rules and stated that the applicant in her supporting affidavit had failed to meet the evidential threshold of Section 118 of the Evidence Act that she will suffer substantial loss. Counsel indicated that it was ascertainable from paragraphs 3 and 4 of the replying affidavit that the respondent deposited the entire sums of money in the joint bank account. He contended that on various occasions the applicant withdrew money from the account as stated in paragraph 5 of her supporting affidavit.

8. Counsel indicated that although the applicant states that the money was intended for a certain project which is not yet completed, she did not disclose the nature of the project. Counsel urged the court not to give any weight to the foregoing deposition by the applicant.

9. Mr. Masore submitted that the respondent is not a man of straw as annexure BBW003 attached to his affidavit indicates that he is the owner of Villa 102 in sub-division 14291 Section I MN (original number MN/I/1344). He asserted that the allegation that the respondent is likely to take off if stay of execution is not granted, is unfounded.

10. He took the position that although the application was filed timeously, its sole aim is to defeat the respondent's enjoyment of his fruits of Judgment. It was argued that the applicant had not provided security for the due performance of the decree or expressed willingness to furnish security.

11. It was further argued that the applicant's submissions are couched on the provisions of rule 5(2)(b) of the Court of Appeal rules which are only applicable to appeals from the High Court to the Court of Appeal. He submitted that the authority the applicant's Counsel relied on, of **HFCK vs Sharok Kher Mohamed Ali Hirji and Another** (supra) which states that the jurisdiction under rule 5(2)(b) of the court of Appeal rules only arises where the applicant has lodged a notice of appeal, does not apply in applications of stay of execution in the High Court. Counsel urged this court not to rely on the said authority.

12. In response to the foregoing, Ms. Mukoya submitted that the rules applicable to the Court of Appeal on applications for stay of execution are also applicable in the High Court. She added that the decision in **HFCK vs Sharok Kher** (supra) is binding on this court.

13. She indicated that the applicant stands to suffer substantial loss if the respondent is allowed to withdraw the cash and that it matters not at this point who deposited the money in the bank account.

14. It was also submitted that the respondent in his affidavit has not stated that he would be ready and willing to pay the money in issue if the appeal was successful.

15. Ms. Mukoya further submitted that the certificate of postal search attached to the respondent's affidavit as annexure BBW003 is an indicator to the fact that he owns property in Kenya and not that he would refund the money in issue. Further, the search certificate issued on 14th June, 2017 indicates that the property at that time was owned by the respondent and Janet Barker.

ANALYSIS AND DETERMINATION

The issue for determination is if orders for stay of execution should be granted in line with order 42 rule 6 of the Civil Procedure Rules.

16. The principles upon which the orders sought can be granted are provided under Order 42 rule 6 of the Civil Procedure Rules. These are that:-

- (i) The applicant has to show that he will suffer substantial loss if the application is not granted;
- (ii) The application has been made without delay; and
- (iii) The applicant has provided security for the due performance of the decree.

17. The application before this court has been filed timeously. The Judgment the subject of the present application was delivered on 26th May, 2017 and the application herein was filed on 29th May, 2017.

18. On the issue of substantial loss, the documents availed by the applicant show that the bank account where the sum of Kshs. 2,041,527/= is held bears the joint names of the applicant and the respondent. The annexure marked as BBW001 shows that the respondent transferred GBP 40,000 into the account on 12th November, 2015. The bank statement attached to the said affidavit and marked as BBW002 shows that the applicant on 17th October, 2015 deposited Kshs. 2 Million in the bank account. She made four (4) cheque deposits of Kshs. 900,000 and another cheque deposit of Kshs. 517,000/= on 27th November, 2015. The bank statement shows that numerous withdrawals were made by the applicant herein.

19. In such a case where there is evidence of cash and cheque deposits by both the applicant and the respondent in their joint bank account, it is difficult for this court to hold that the applicant will not suffer substantial loss if the respondent is allowed to withdraw the balance of Kshs. 2,041,527/= lying in the said bank account.

20. As rightfully argued by the applicant's Counsel, the copy of the sub-lease for villa No. 102 on sub-division No. 14291 Section I MN (Original No. MN/I/1344) was granted to the applicant herein and one Janet Barker. The respondent therefore is not the sole proprietor of the said villa. The joint leasehold of the plot by the respondent and one Janet Barker is not indicative of the fact that the respondent will be in a position to compensate the applicant if her appeal will be successful as such a property cannot be disposed of without the consent of the other

party.

21. The applicant in her affidavit did not offer to deposit security to satisfy the decree. The court notes that the decree herein is in respect to the Kshs. 2,041,527.50 which is held at the KCB Nyali branch in account No. 1175751804. The said cash cannot be withdrawn by either the appellant or the respondent before a court order is issued. The applicant has staked a claim on the said amount since the bank account in which the money is held is in their joint names. This is a rather unique situation as in most cases awards made are for damages but in this instance, the lower court ordered that the Kshs. 2,041,527.50 held in the joint bank account be paid forthwith to the respondent. The foregoing shows that the applicant was not required to pay any money to the respondent other than costs of the suit.

22. Order 42 rule 6(2)(b) of the Civil Procedure Rules states that no order for stay of execution shall be made under sub-rule (1) unless such security as the court orders for due performance of such decree **or order** as may ultimately be binding on an applicant has been given.

23. In this instance, if the applicant loses the appeal, she will be required to pay the costs of the lower court case and of the appeal herein. Considering the circumstances of this case, I hereby grant orders for stay of execution pending the hearing and determination of the appeal, on condition that the applicant deposits a sum of Kshs. 800,000/= in court as security for costs. The said sum will be deposited within 45 days from the date of this ruling.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 11th day of May, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. V. Otieno holding brief for Mr. Shimaka for the appellant/applicant

Mr. Oledi holding brief for Mr. Abdi for the respondent

Mr. Oliver Musundi - Court Assistant