



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 687 OF 2017

LUCY WANJIRU NJOJO.....APPELLANT

VERSUS

NEPHAT KURIA GITHAIGA..... RESPONDENT

RULING

1. This ruling seeks to determine the Application dated 5th April, 2018 filed under the provisions of Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and sections 3A and 63 (e) of the Civil Procedure Act. The Appellant was the Defendant in the lower court where judgment was entered against him on 27th November, 2017 for the total sum of Kshs. 1,618,400/=. Aggrieved by the same, she filed the Appeal herein together with the instant application seeking orders to have the judgment entered in favour of the Respondent stayed pending the hearing of the Application and the Appeal. In the alternative, the Appellant prays that the court be pleased to vary or alter the stay conditions issued by the lower Court on 19th March, 2017 and grant a stay on the condition that the decretal sum which has already been secured in a joint interest earning account opened in the joint names of the two firms on record at Stanbic Bank remain secured in the said account until the determination of this Appeal.

2. The Application is premised on the grounds on the face of the same and on the Supporting Affidavit sworn by the Appellant on 5th April, 2017. The Appellant's grounds in support of the application are that his appeal is both on liability and quantum of damages as the said judgment awarded a substantial amount of money of which there is no guarantee that the Respondent would be in a position to refund if the Appeal succeeds. The Appellant has deponed that she had sought stay orders in the lower court which in the first instance were granted on condition that the Appellant deposits the whole of the decretal amount in a joint interest earning account to be opened in the joint names of the Advocates and she complied with the orders. However, she further depones that upon hearing of the application inter partes, the trial magistrate rendered a ruling granting a stay of execution on condition that the appellant releases one half of the decretal amount already deposited in the joint account and the balance be deposited in a joint interest earning account in the joint names of the Parties' advocates. The Appellant further depones that she was dissatisfied with that condition in that she is appealing against both liability and the finding on damages and that the one half is a substantial amount which she is apprehensive that the Respondent will not be in a position to refund in the event of a successful Appeal. She therefore prays that the stay orders be granted on condition that the decretal amount that has already been secured in a joint interest earning account remains secured until the final determination of the Appeal.

3. The Respondent filed a Replying affidavit dated 16th April, 2018 and opposed the Application on the grounds that the application is not made in good faith, that it is meant to derail him from enjoying the fruits of the judgment and it is an abuse of the Court process. The Respondent also deponed that he suffered serious injuries which rendered him incapable of engaging in any gainful employment and has been relying on hand outs from well-wishers and friends. He therefore urges the court to strike a balance between his right to enjoy fruits of the judgment and the Appellants right to appeal.

4. The Application was canvassed orally in Court on 2nd May, 2018. Miss Juma appearing for the Applicant submitted that the Respondent's means of income are unknown and that he would therefore not be in a position to refund the decretal amount in case the Appeal succeeds. It was therefore submitted that the whole of the decretal amount be retained in the joint account. On the other hand, Mr. Asiyi appearing for the Respondent, submitted that the Respondent has been an employee of the Appellant and she cannot therefore allege that she does not know her means of income. Counsel submitted that justice should be done to all parties and the court should not be obsessed with protecting the interests of the Appellant.

5. I have considered the Application, the Affidavits on record and the rival arguments. A party seeking a stay of execution must establish the grounds laid down in Order 42 Rule 6 of the Civil Procedure Rules. The applicant must establish that the application has been made without unreasonable delay, security for the decree or order has been given, and that substantial loss may result to the Applicant unless the order for stay is made. These conditions were also laid down in the case of **Elena D.Korir vs Kenyatta University (2012) eKLR** where **Justice Nzioki Wamakau** observed thus;

“the application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & another vs Thornton & Turpin Ltd where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that “The High Court’s

discretion to order stay of execution of its order or decree is fettered by three conditions, namely :- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay.”

6. Substantial loss is the corner stone of an application for stay of execution. The Applicant must demonstrate that he will suffer irreparable loss if the orders are not granted. Substantial loss would be occasioned especially where the decree is not a monetary one and if execution is not stayed the subject matter would not be preserved such that if the appeal succeeds it would be rendered nugatory. In cases where the decree involves monetary compensation, then the Applicant is put to task to demonstrate that he would not be able to recover the decretal sum in the event that the orders of stay are not issued and the appeal happens to succeed. In the instance case, the Applicant has well stated that even one half of the decretal sum is such substantial amount of money that the Respondent would not be able to refund given the fact that the Applicant does not know the means of income of the Respondent. The Respondent’s rebuttal that he used to work with the Appellant and therefore that she knows his means of income does not offer a sufficient response to the issue. The Appellant has submitted that the Respondent has since ceased working with her. That being the case, the Respondent was expected to prove that he is a man of means and financially capable of refunding the decretal sum if the appeal succeeds. He failed to do so and in the absence of that, this court finds that the Respondent would not be able to refund the decretal sum in the event that the Appeal succeeds or partially succeeds and the decretal amount is varied.

7. On security for costs, the Appellant has already deposited the whole of the decretal amount in a joint interest earning account operated by the Parties’ Advocates. Therefore, in the event the Appeal fails, the Respondent’s decretal sum is safeguarded and the same can be recovered expeditiously. As to whether the application was filed without unreasonable delay, I find that even though the same was not timely, the delay cannot be said to be unreasonable considering the fact that there had been previous stay of execution orders granted by the lower court.

8. The power to grant an application for stay of execution pending appeal is a discretionary one to be exercised on sufficient cause being shown. In the case of **Antonie Ndiaye V. African Virtual University (2015) Civil Suit No. 422 of 2006** the Court held that, “*the relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judicially upon defined principles of law, not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been seen, the Court should be guided by three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules..*”

9. I find that the Applicant has satisfied the requirements for the grant of the stay orders sought. There is a real fear that if the orders are not granted, the Respondent may not refund the decretal sum in the event of a successful Appeal. In the premises, I grant the orders sought on the condition that the whole of the decretal sum that was deposited in a joint interest earning account remain in the said account until the hearing and determination of the Appeal.

Dated, Signed and Delivered at Nairobi this 7th Day of June, 2018.

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L. NJUGUNA

JUDGE

In the Presence of

..... *For the Applicant*

..... *For the Respondent*