



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 108 OF 2018

SEB ESTATES LTD.....APPLICANT

-VERSUS-

PAULINE GATHIGIA NGUYO.....RESPONDENT

[Being an appeal from the original judgement and decree dated 13th July, 2018

in the Chief Magistrate's court at Nakuru in Civil Suit No.883 of 2016,

Pauline Gathigia Nguyo v. Seb Estates Ltd]

RULING

1. This application was brought under certificate of urgency and under the vacation rules 2 (2) (a), 3 (1) and 3 (2) of the High Court Practice and Procedure Rules, section 3A of the Civil Procedure Act [Cap 21] Laws of Kenya and under section 10 of the Judicature Act [Cap 8] Laws of Kenya. The matter was certified urgent and was heard under the vacation rules.
2. In his application brought by way of notice of motion under Order 42 rule 6 and Order 51 of the Civil Procedure Rules, counsel for the applicant (Seb Estates Ltd) seeks an order of stay of execution of the magisterial judgement and decree that was issued on 13th July, 2018 pending the hearing and determination of this appeal. The application is supported by 13 grounds that are set out on the face of the notice of motion dated 9th September, 2018. The major grounds are as follows. First, the applicant has stated that it has an arguable appeal with a high probability of success and that unless stay of execution is granted, it will suffer irreparable damage.
3. Second, the respondent has issued instructions to Tango Auctioneers, who have given notices to attach the movable property of the applicant. Third, it has stated that the applicant is ready, willing and able to abide with any conditions that this court may order. Fourth, the applicant has stated that substantial loss will result to the applicant unless the orders sought are granted.
4. Fifth, the applicant has also stated that it has filed a memorandum of appeal and that the said appeal has high chances of success. Sixth, the applicant has also stated that the respondent obtained a judgement against it without any proof and supporting documents and that there has not been any delay in filing and prosecuting this application.
5. The applicant through its director filed a nine paragraphs supporting affidavit. In that affidavit he has deponed to the following major matters. First, the applicant has deponed that he is apprehensive that unless an order of stay is granted, the respondent will swiftly proceed to attach and sell his properties. He has also deponed that the applicant was not served with summons and as a result an *ex parte* judgement was entered against it. Additionally, he has also deponed that he has filed a memorandum of appeal in Civil Appeal No. 108 of 2018 in the registry at Nakuru and that any execution will render the appeal nugatory. Finally, he has deponed that he is willing to abide by any conditions that the court may impose.
6. Counsel for the applicant, Mr. Bizimana made a short oral submission in support of the application for a temporary stay of execution of the magisterial decree pending the hearing and determination of this appeal. In support thereof, counsel cited the case of *Butt v. Rent Restriction Tribunal (1979) eKLR*, in which Madan JA in a similar application stated that: "It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v. Church (No 2) 12 Ch D (1879) 454 at p.459.*" He therefore urged this court to grant an order of stay of execution pending the hearing and determination of this appeal in terms of prayer No. 3 of the notice of motion dated 9th September, 2018.
7. The respondent did not participate in these proceedings, notwithstanding that he was served with a hearing notice dated 12th September, 2018. There is an affidavit of service of the same date, which clearly shows that the respondent was served.

8. In the light of the affidavit evidence and the applicable law, I find the following to be the issues for determination.

- 1) Whether or not the applicant has met the requirements for the grant of an order of stay of execution in terms of order 42 Rule 6 of the 2010 Civil Procedure Rules.
- 2) Whether or not the court should impose any conditions to the grant of the said order of stay of execution.
- 3) Who bears the costs of this application?

ISSUE 1

9. It is clear from the affidavit evidence of the applicant that it has filed an appeal in the registry of this court at Nakuru, being Civil Appeal No. 108 of 2018. It is also clear from its affidavit evidence that it is willing to abide by any conditions the court may impose upon it. Furthermore, I find credible evidence that unless stay of execution is not granted the applicant's appeal will be rendered nugatory.

10. In addition to the foregoing, I also find that the applicant has not delayed in filing and prosecuting this application.

ISSUE 2

11. The applicant was ordered to pay to the respondent the decretal amount of money in the sum of Kshs.196,661. I have considered the circumstances of this application and I find that the applicant should deposit a sum of Kshs.90,000 as a condition for the grant of an order of stay pending the hearing and determination of its appeal. The said sum of money should be deposited within 45 days, failing which the stay shall lapse without a further order of this court.

ISSUE 3

12. The costs of this application will be costs in the appeal.

Judgement dated, signed and delivered in open court at Narok this 13th day of September, 2018 in the presence of Mr. Bizimana for the applicant and in the absence of Mr. Mwangi for the respondent.

J. M. BWONWONGA

JUDGE

13/9/2018