



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA. NO. 37 OF 2018

ANWARALI LIMIED.....APPELLANT

-VERSUS-

JOSEPH WAMBUA KANINI (Suing as the Administrator of the

Estate of Kioko Kanini Mulugye.....RESPONDENT

RULING

INTRODUCTION

1. By a Notice of Motion dated 17/07/2018 the Applicant seeks orders of stay of execution of Decree/Judgment of Kilungu SRMCC No. 250 of 2015 pending appeal under Order 46 Rule 6 Civil Procedure Rule 2010.

2. The Application is based on grounds listed below:-

1. **That** judgment herein was delivered on the 20th April 2018, in favor of the Respondent.
2. **That** the Appellant has lodged an appeal No. 37 of 2018 before this court having been dissatisfied with the judgment.
3. **That** the Respondent has now taken out warrants of execution against the Respondent towards satisfaction of the judgment of the lower court.
4. **That** the appeal has been made without any delay and the same is arguable with chances of success.
5. **That** the Appellant is ready and willing to abide by any reasonable conditions that may be set by this Honourable court.
6. **That** substantial loss will result to the Applicant unless the orders sought are granted.
7. **That** unless the stay is granted, the intended appeal shall be rendered nugatory.
8. **That** under the circumstances it is only fair and just that the Appellant be granted leave to defend this suit.

3. The same is supported by affidavit of Gren Jaguga who claims to be Appellant yet Appellant appears to be a limited liability company.

4. She does not disclose her relationship with the Appellant.

5. Otherwise the affidavit reiterate the content of the grounds set out in the face of the notice of motion.

6. The application is opposed and the Respondent has filed a replying affidavit and a preliminary point of law dated 25/07/2018 setting three grounds to it hereunder.

1. The application is incompetent.

2. The same application violates Order 51 Rule 1 Civil Procedure Rule.

3. The supporting affidavit violates Section 11 of Cap 15 (oaths and statutory declaration and Order 19 Civil procedure Rule.

7. The Replying Affidavit reiterates the above grounds set out also adds that the threshold of grant of the stay sought under Order 42 Rule 6 (2) is not established.
8. The parties were to file and exchange written submissions but by the time of writing this ruling no side had filed any written submissions.
9. The Applicant has not annexed a decree or a judgment but just avers that the apportionment of liability at 50%:50% between parties was erroneous and instead Respondent ought to have born liability at 100% blame.
10. The award after being subjected to the rate of liability, remained Kshs.421, 936/= in favor of the Respondent.
11. The Appellant submit that the same may not be recovered should same paid to the Respondent. The Applicant is willing to abide by any reasonable conditions which court would grant for stay as to pertain to security.
12. The Respondent does not indicate his ability to refund the amount should the same be paid and appeal succeeds.
13. However, the Respondent dwells at great length at the P.O raised and avers that same violates provisions of order 51 Rule (1) Civil Procedure Rule and Section II Cap 115 and also order 19 Civil Procedure rule.
14. Order 51 Rule (1) Civil Procedure Rule states that: - ***All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide.***
15. Section II of oaths and statutory declaration Act states that: - ***Penalty for false declaration. If any person knowingly and willfully makes any statement which is false in a material particular in a statutory declaration he shall be guilty of an offence and liable to imprisonment for a term not exceeding two years or to a fine not exceeding two thousand shillings or to both such imprisonment and fine.***
16. Order 19 Civil procedure Rules states that: - Rule 1: **power to order any point to be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable provided that where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit. Rule 2: Power to order attendance of deponent for cross examination 291) Upon any application, evidence may be given by affidavit , but the court may, at the instance of either party, order the attendance for cross examination of the deponent.**
17. (2) **Such attendance shall be in court unless the deponent is exempted from personal appearance in court or the court otherwise directs.**
18. **Rule 3 Matters to which affidavits shall be confined. Affidavits shall be confined to such facts as the deponent is able to his own knowledge to prove: provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.**
19. (2) **The costs of every affidavit which shall unnecessarily set for the matters of hearsay or argumentative matter or copies of or extracts from documents, shall (unless the court otherwise directs) be paid by the party filing the same.**

ISSUES, ANALYSIS AND THE DETERMINATION

20. After going through the application and the rivaling affidavits, I find the issues are;
 - i. **Whether the PO is merited?**
 - ii. **Whether the conditions for grant of stay pending appeal have been established?**
 - iii. **What are the orders as to costs?**
21. On the P O, the motion before court is said to be incompetent as the first ground of attack. No material has been presented to demonstrate incompetence. The absence of demonstration of incompetence the same ground fails.
22. The second ground is that the motion violates order 50(1) CPR. The cited provision provides the form of the application which is directed to be via a notice of motion. Of course the instant application is by way of a notice of motion. The Respondent ought to have demonstrated how the cited provisions are violated.
23. Further provisions of Section II of oaths and statutory declaration Act are said to be violated. The stated provision sets up the penalty for person who makes a false declaration. Nowhere is it demonstrated the portion of the supporting affidavit to be containing false declaration.
24. Finally the Respondent complains of violation of order 19 CPR. The same deals with affidavits and is very wide in content. The ground does not specify the elements of the said cited provisions are violated and how.

25. In sum the P O turns to be baseless and with no merit and same is dismissed.

26. On the second limb of the application, the Applicant seeks orders for stay pending appeal.

27. Under Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant should satisfy the Court that:-

- **Substantial loss may result to him unless the order is made;**
- **That the Application has been made without unreasonable delay; and**
- **That the Applicant has given such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him.**

28. In the case of JASON NGUMBA KAGU & 2 OTHERS –VS- INTRA AFRICA ASSURANCE CO. LIMITED the court held that;

“The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal.

Even though many say that the test in the High court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.”

29. In the case of BUNGOMA HC MISC APPLICATION NO 42 OF 2011 JAMES WANGALWA & ANOTHER –VS- AGNES NALIAKA CHESETO the court held that:

“The Applicant must establish other factors which show that the 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. This is what substantial loss would entail...”

30. The court defined substantial loss as outlined above as factors which show that the execution of the judgement 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.

31. In JAMES WANGALWA & ANOTHER –VS- AGNES NALIAKA CHESETO MISC APPLICATION NO 42 OF 2011 [2012] eKLR (Gikonyo J as he then was) stated that:-

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

32. The Applicant says the application was filed without delay a fact not contested by the Respondent. The substantial loss to be suffered by Applicant is based on the fact that the Respondent does not demonstrate ability to refund the decretal amount in event the appeal succeeds.

33. However it is not demonstrated that at the conclusion of appeal, the Respondent will not get a portion of the award if not the amount awarded by the court.

34. To be fair to both sides of contest, the court finds it fair to strike a balance thus makes the following orders;

- 1. The for stay pending appeal is granted on condition that Kshs. 200,000/= will be paid to the Applicant within 30 days from dates herein.**
- 2. The balance of the decretal amount to be deposited in interest earning account in names of parties advocate within 30 days.**
- 3. In default of the above conditions, the execution to proceed.**
- 4. Costs in the main appeal.**

DATED, DELIVERED, SIGNED THIS 17TH DAY OF OCTOBER, 2018 IN OPEN COURT.

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C. KARIUKI

JUDGE