



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL CASE NO. 93 OF 2013

FRANCIS NJOGU NJEHIA.....APPELLANT/APPLICANT

VERSUS

TITO KIBET MIBEI.....RESPONDENT/RESPONDENT

RULING

This application arises out of the judgment and decree in Eldoret CMCC No. 71 of 2014 in which the Respondent was awarded a sum of 4,372,172.00, exclusive of the costs of the suit on 31st October, 2013. The court granted 30 days stay of execution suo motu of which days lapsed on 9th August, 2018. The applicant filed the present application on 16th August 2018, seeking stay of execution pending the hearing and determination of the appeal. Temporary stay of execution was granted by this court on 16th August 2018 pending hearing and determination of the application interparties.

The applicant submitted that there is a valid pending appeal which meets the pre-requisites of *Order 4* of the *Civil Procedure Rules*. Though the Memorandum of Appeal was not lodged together with certified copies of the decree, such does not invalidate the memorandum which raises arguable grounds. There was a similar application filed in the lower court of which was withdrawn on 16th August 2018 and hence the application before this court is not sub-judice. The applicant contends that the application meets the conditions for granting stay under *Order 42 Rule 6(2)*. He avers that the application was filed without inordinate delay and 4,372,172.00 is colossal sum which can occasion him substantial loss if the application is not allowed, and the appeal succeeds. The Respondent has not shown that he has resources to reimburse the decretal sum incase of such an eventuality. There is no affidavit of means filed. The case of ***National Industrial Credit Bank Limited – vs- Aquinas Francis Wasike and Another (UR) Nairobi Civil Application No. 238 of 2005***, was relied on to buttress the need for such.

The Respondent on his part submitted that the Applicant has not shown that he stands to suffer substantial loss if the orders sought are not granted, as required by *Order 42 Rule 6* of the *Civil Procedure Rules 2010*.

The Respondent alleges that he is a man of means as he is:-

- (1) Employed as an Inspector with Kenya Prison Service and he is based at Naivasha Main Prison.
- (2) He earns a monthly pay of Kshs. 73,490 which translates to Kshs.881,880.00 annually.
- (3) His shares with Magereza Sacco of Kshs. 346,100 is evident from the pay statement and entitles him to a loan of upto Kshs. 1,038,300.
- (4) He owns a land parcel known as Uasin Gishu/Kimumu/6549 measuring 0.4 ha and of which current value is over 1,000,000.

Relying on ***Civil Application No. Nai 15 of 2002 ABN Amro Bank, N. V –vs- Le Mond Foods Limited***, he claims to have discharged the evidential burden of proving that he is in a position to reimburse the decretal amount.

The Respondent further submitted that there was no certified copy of the decree filed with the memorandum of appeal and there was no evidence that he has applied for the same. There is therefore no valid appeal before the court and the court would be acting in vain in granting him the stay. It is as well submitted by the Respondent that notice of withdrawal of the application in the lower court on 16th August 2018, was done after obtaining the High Court Orders. The applicant had therefore not made material disclosure to the court of which warrants dismissal of the application.

Three issues emerges for determination in this application, as follows:-

- (1) Whether the Applicant has a valid appeal.

(2) Whether there was concealment of material facts by the applicant.

(3) Whether the pre-requisites of Order 42 rule 6 have been met by the applicant.

On the first issue the Respondent argued that the absence of a certified copy of the decree renders the filed appeal non-existent.

Order 42 of the Civil Procedure Rules is to the effect that:-

“Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under Section 79B of the Act until such certified copy is filed.”

It is therefore vivid that the absence of a certified copy of the decree or order, does not render the appeal invalid. The applicant or appellant should be allowed time to file it. This is well in line with provision of Article 159 (d) of the Constitution which states that justice shall be administered without undue regard to procedural technicalities.

On the second issue of the alleged non-disclosure of the material facts, the court in the case of *GoTV Kenya Limited –vs- Royal Media Services Limited and 2 others [2015]eKLR*, in which *Brinks-Mat Ltd –vs- Elcombe (1988) 3 ALL ER 188* was relied on, indicated what would amount to non-disclosure of material facts as follows:-

“In considering whether there has been relevant non disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me include the following;

(i) The duty of the applicant is to make full and fair disclosure of material facts.

(ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.

(iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

In this application the applicant withdrew the application in the lower court on the very same day he filed this application as shown by the annexed Notice of withdrawal marked FNN-1. The said notice was filed before the application was heard by this court and therefore there was no need for disclosure.

On whether pre-requisites of *Order 42 rule 6* have been met, I have considered that the application has been made without inordinate delay. The applicant has expressed a reasonable fear that the respondent would not be able to pay back the decretal sum incase the appeal succeeds. The evidential burden therefore shifts to the respondent to show otherwise, since this is a matter which is peculiarly within his knowledge. In an effort to do so, the Respondent has availed evidence that he is an Inspector with the Kenya Prisons Service. Though he claims that he earns 73,490 and provided a payslip showing the amount; it is evident from the said payslip that his take home is a meagre 25,206.90. He needs money for subsistence as it is not shown that he has any other income, and he is therefore a person who would have real difficulties in raising 4,372,172.00. His saving with Magereza sacco of Ksh. 348,100.00 cannot entitle him to a loan of 1,038,100 /- as other factors are considered as the ability to repay and the percentage of what would remain as balance for subsistence. The said land was not valued and the stated value of 1,000,000 is far much below the judgment sum of Kshs. 4,372,172.00. It is evident that the Respondent is not a man of means.

The applicant says he is willing to deposit even the full decretal amount as security. He should do so and have the amount deposited in an interest earning account in the name of the Advocates of both parties. The court so orders and allows the application.

Costs will be in the cause.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 20th day of November 2018.

In the presence of:-

(1) Mr. Kagunza holding brief for Mr. Kigamwa for Respondent

(2) Ms Ann - Court assistant