



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 492 OF 2017

JOSEPH MAINA KIMANI.....APPELLANT

VERSUS

TIMOTHY RAPHAEL CHEGE.....RESPONDENT

RULING

1. What falls for this court's determination is the Notice of Motion dated 20th March 2018. The first two prayers in the motion are already spent and what is pending determination is prayers 3 and 4 in which the appellant/applicant seeks stay of execution of the decree issued on 22nd August 2017 in CMCC No. 3496 of 2014 pending disposal of the appeal. He also prays that costs of the application be provided for.

2. The application is expressed to be brought under *Order 42 rule 6* of the *Civil Procedure Act* and *sections 1 A, 1 B* and *3 A* of the *Civil Procedure Act*. It is premised on the grounds stated on its face and the depositions made in the supporting affidavit sworn by the applicant on 20th March 2018.

3. The applicant contends that he is dissatisfied with the decision of the lower court in which the respondent was awarded a total sum of KShs.573,195 inclusive of costs; that he has already filed an appeal which has high chances of success; that the respondent has already commenced the execution process as goods belonging to his company have already been proclaimed and are likely to be attached and sold to recover the decretal sums if stay is not granted; that he will suffer substantial loss if stay is not granted as the respondent is not possessed of means to refund the decretal amount if his appeal is successful and his appeal will be rendered nugatory.

4. A perusal of the court record reveals that though the hearing date for the application was fixed by consent of the parties, the respondent for undisclosed reasons did not file a response to the application. On the date set for *inter partes* hearing, the respondent did not indicate whether or not he was opposed to the application. Parties only agreed to have the application prosecuted by way of written submissions.

5. Both parties duly filed their written submissions which I have carefully considered. I have noted that the respondent purported to oppose the application through his written submissions filed on 20th September 2018. This in my view is not only irregular but it is unprocedural and inconsequential since submissions are not one of the modes recognized in law through which a party can oppose a motion.

6. *Order 51 rule 14 (1)* of the *Civil Procedure Rules* clearly provides that any respondent who wishes to oppose a motion can only do so by filing either a notice of preliminary objection; a replying affidavit or a statement of grounds of opposition. Submissions are supposed to be founded on the evidence or facts deposed in affidavits or points of law raised either in grounds of opposition or in a preliminary objection and without such a foundation, any facts raised in submissions cannot aid any party as submissions cannot take the place of evidence.

In the premises, as the respondent did not file any of the aforesaid documents, I have come to the conclusion that the instant application is unopposed.

7. Despite having found that the application is unopposed, I am still duty bound to consider whether the applicant has met the legal threshold for grant of stay of execution pending appeal. This threshold is set out in *Order 42 rule 6* of the *Civil Procedure Rules* which stipulates that before such orders are issued, the court must be satisfied that substantial loss will be occasioned to the applicant if stay is not granted and that the application was filed without unreasonable delay. The court must also be satisfied that the applicant has offered such security as the court may ultimately order for the due performance of the decree or order.

8. In this case, the applicant has asserted that if stay is refused, he will suffer substantial loss as the respondent does not have means to refund him the decretal amount if the appeal is successful and that consequently, his appeal will be rendered nugatory. The law is that once an applicant expresses apprehension about the respondent's ability to refund the decretal amount, the evidential burden of proof shifts to the respondent to rebut that presumption by demonstrating that he is in fact a person of means and is capable of refunding the decretal amount

should it become necessary to do so – see *ABN Amro Bank NK V Le Monde Foods Limited, Civil Application No. 15 of 2002 (Nrb)*.

9. In this case, as noted earlier, the respondent did not file a replying affidavit in which he could have controverted the applicant's claim that he is a man of straw and that he would be incapable of refunding the decretal amount if paid and the appeal is successful. It is important to note that the entire decretal amount is KShs.573,195. Considering that the respondent is not a corporate entity, it can be argued that this amount is substantial. Since the respondent failed to counter the applicant's apprehension regarding his financial ability to refund the money if need be, I am persuaded to find that the applicant has demonstrated that he is likely to suffer substantial loss as defined by *Gikonyo J* in *James Wangalwa & Another V Agnes Naliaka Cheseto, [2012] eKLR* if the stay orders are not granted. In this case which was also cited by the respondent in his submissions, the learned judge defined substantial loss as "*what has to be prevented by preserving the status quo because such loss would render the appeal nugatory*".

10. In the written submissions filed on behalf of the applicant, an offer was made for the provision of security as the court may in its discretion order for the due performance of the decree.

11. In applications of this nature, the court must always bear in mind the competing interests of the parties in an appeal. The applicant being aggrieved by the decision of the lower court has a right to exercise his right of appeal and to have that right protected by ensuring that it is not rendered nugatory. The respondent on the other hand being the successful litigant is entitled to enjoy the fruits of his judgment.

12. Having found that the applicant has demonstrated that he will suffer substantial loss and his appeal is likely to be rendered nugatory if stay is not granted and balancing the interests of the parties, I find that the interests of justice will be better served if conditional stay of execution was granted. Consequently, I find merit in the Notice of Motion dated 20th March 2018 and it is hereby allowed on condition that the applicant shall deposit the entire decretal amount in an interest earning bank account to be operated by both counsel on record within the next 30 days in default of which the stay orders shall automatically lapse.

13. Costs of the application shall abide the outcome of the appeal.

It is so ordered.

DATED, DELIVERED and SIGNED at **NAIROBI** this 9th day of November, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Kamau holding brief for Mr. Nduati for the appellant

Ms Mathenge holding brief for Mr. Ambani for the respondent

Mr. Fidel: Court Assistant