



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 88 OF 2018

LAWRENCE KABUBA GITHINJI.....APPELLANT

VERSUS

RICHARD MUIRURI MUREITHI.....1ST RESPONDENT

KENAP EPZ LTD.....2ND RESPONDENT

RULING

1. Lawrence Kabuba Githinji, the Appellant herein, filed the Notice of Motion dated 22nd February, 2018 pursuant to Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules; Section 3A of the Civil Procedure Act, whereof he sought the following orders inter alia:

i. Spent

ii. Spent

iii. There be a stay of execution of the judgment delivered by the Honourable E.A Nyaloti, CM in CMCC No. 734 of 2012, Richard Muiruri Mureithi v Lawrence Kabuba Githinji & Kenap Epz Limited on 26th January, 2018 and any consequent decree thereon pending the hearing and determination of the appeal herein.

iv. Costs of this application be in the cause.

2. The Motion is supported by the affidavit of Lawrence Kabuba Githinji. The respondents filed the replying affidavit of Richard Muiruri Mureithi to oppose the motion. The parties agreed to dispense with the application vide written submissions of which only the Appellant submitted.

3. This application is off shoot of the judgment delivered by Honourable E.A Nyaloti in CMCC No. 734 of 2012 in respect of a compensatory action filed by the 1st respondent for the injuries he sustained as a result of a motor vehicle accident.

4. Judgment was delivered on 26.1.2018 in favour of the 1st Respondent who was awarded Kshs. 5,000,000 as being general damages on 26th January, 2018. The Appellant sought for a stay of execution for 30 days which expired on 25th February, 2018. The Appellant was aggrieved by the judgment and consequently lodged an Appeal dated 20th February, 2018 against the assessment and award of the general damages.

5. I have considered the grounds stated on the face of the motion and the facts deponed in support and against the motion. I have also considered the written submissions. The principles to be considered in determining an application for stay are set out under Order 42 Rule 6 (2) which reads:

i. (2) No order for stay of execution shall be made under sub rule (1) unless—

ii. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

iii. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

6. The Appellant avers that he stands to suffer substantial loss in the event the order for stay of execution is not granted as his property will be sold in execution of the decree thus rendering his appeal nugatory.

7. He argued that the appeal raises arguable issues and has high chances of success based on points of law and fact.
8. He argued that the appeal was filed without any unreasonable delay as judgment was delivered on 26th January, 2018 and a stay of execution was granted lapsing on 25th February, 2018 and subsequently lodged the appeal on 20th February, 2018.
9. He also argued that the appeal was based on points of law and facts to be argued during the determination of the appeal and further stated that he was able and willing to provide security for due performance of the said decree.
10. The 1st Respondent argued that the application was bad in law. He challenged the Appellant's ability to furnish security for due performance of the decree and urged the court to dismiss the application with costs.
11. The Appellant argues that he stands to suffer substantial loss in the event the stay is not granted as his property will be attached in fulfilment of the execution of the decree against him hence rendering his appeal nugatory.
12. The act of attachment in execution of a decree per se does not in itself demonstrate the loss substantial to be suffered or how the same will render the appeal nugatory. The Appellant ought to clearly show the substantial loss he stands to suffer and highlight in what ways his appeal will be rendered nugatory in the event the order for stay is denied.
13. The appellant/applicant has specifically stated that if the decretal sum is paid to the respondent, there is no evidence that the respondent is in a position to make a refund should the appeal turn successful. The respondent did not controvert this assertion. I am convinced this is a valid ground which shows the appellant's appeal may be rendered useless if the order for stay is denied.
14. The second principle to consider is whether the application was made in a timely manner. In this instance, this court finds that the application has been made without unreasonable delay owing to the fact that the judgment from the Subordinate Court was delivered on 26th January, 2018; the appeal was lodged on 20th February, 2018 while this application was filed on 22nd February, 2018, hence, no unreasonable delay on the part of the Appellant.
15. The third principle is the ability to provide security for due performance of the decree. The Appellant stated he was willing to provide the security. He challenged the 1st Respondent's ability to provide security in the event the appeal succeeds. The 1st Respondent also challenged the Appellant's ability to provide security citing his reluctance to provide the same.
16. In the end, the motion dated 22.2.2018 is found to be meritorious. Consequently, the order for stay of execution of the decree is allowed in terms of prayer (iii) of the aforesaid motion and on condition that the appellant deposits the decretal sum of ksh.5,000,000/= in an interest earning account in the joint names of advocates and or firms of advocates within 30 days from the date hereof. In default the motion will be treated as having been dismissed. Costs of the motion to abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 9th day of November, 2018.

J.K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent