



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO. 11 OF 2017

THOMAS MAXWEL OBONDO.....1ST APPELLANT/APPLICANT

OKWARO JOHN.....2ND APPELLANT/APPLICANT

VERSUS

DANIEL KIPRUGUT KORIR.....RESPONDENT

(Being an Appeal from the Judgment and Decree of the Hon. B.Limo RM) in Kericho CMCC No. 234 of 2014 delivered on 3rd May 2017)

RULING

1. The parties to this appeal were the defendants and the plaintiff respectively in **Kericho CMCC 234 of 2014**. On 3rd May 2018, the trial court delivered judgment in favour of the plaintiff/respondent. On 19th July 2017, the trial court granted the appellants a conditional stay of execution pending appeal. The condition was that the appellants pay to the respondent, within 14 days of the said order, three quarters of the decretal sum being Kshs.1,785,901.05, and deposit the balance, being Kshs.595,300.35 in court as security.

2. The appellants were aggrieved by the said order and they therefore filed the application dated 31st July 2017 in which they seek the following orders:

(1) (spent).

(2) THAT pending the hearing and determination of this application inter partes this Honourable court be pleased to grant an order of stay of execution of the judgment/decreed delivered on 3rd May 2017 in Kericho CMCC 234 of 2014 and/or any consequential orders thereto.

(3) THAT pending the hearing and determination of this appeal, being the appeal preferred from the decree in Kericho CMCC 234 of 2014, this Honourable Court be pleased to grant an order of stay of execution of the Judgment/decreed delivered on the 3rd of May 2017 in the said suit and/or any consequential orders thereto.

(4) The costs of this application be provided for.

3. The application is premised on the following grounds:-

(a) That the trial court delivered Judgment on the 3rd day of May 2017 in favour of the Respondent (the Plaintiff herein) in Kericho CMCC 234 of 2014 against which the appellants have preferred this appeal.

(b) That on the 19th July 2017, the Trial Court granted a conditional stay of execution upon terms that the appellants within 14 days of the said order pay three quarters of the decretal sum being Kshs. 1,785,901.05 to the Plaintiff and the balance being Kshs. 595,300.35 be deposited in court as security.

(c) That the ordered payment of the three quarters of the decretal sum to the Respondent without any security for its recovery amounts to substantial satisfaction of the decree which is defeatist of the appeal and the stay of the execution granted by the trial court.

(d) That the payment of the decretal sum as ordered by the trial court would still render the appeal nugatory should it succeed in its entirety and in the event that costs are awarded as expected to the appellants and the award to the respondents reduced

considerably.

(e) That the instant appeal, as the memorandum illustrates, has an overwhelming chance of successes and execution of the subject judgment/decree of the honourable court delivered on the 3rd May 2017 and/or the substantial satisfaction thereof as ordered by the trial court will render the appeal nugatory.

(f) That the appellants/applicants herein shall be exposed to irreparable damage and loss if the said judgment/decree is executed in pendency of this appeal preferred herein.

(g) That in the premises it is fair and just and within the practice of this Honourable court that there be a stay of execution of the subject judgment/decree herein pending the hearing and determination of this appeal and in the interim pending the hearing of this application inter partes.

(h) That the applicants/appellants herein are amenable to furnishing security pending the appeal as may be directed by this honourable court preferably in form of the customary deposit of the entire decretal sum in a joint interest earning account held in the names of the advocates and parties.

4. The application is supported by an affidavit sworn on 31st July 2017 by the 2nd appellant/applicant, Okwaro John. In his affidavit, Mr. Okwaro deposes that appeal raises serious issues of quantum which should be canvassed on appeal. He avers further that the appellants are willing to deposit the entire decretal sum in court, and the respondent will suffer no prejudice as his interest will be secured.

5. The respondent, Daniel Kiprugut Korir, opposed the application by way of an affidavit sworn on August 2017. He deposes that the present application is misconceived frivolous, vexatious and an abuse of the court process. He further contends that the appellants' appeal has no chance of success whatsoever and that the amount awarded in quantum is not high and/or manifestly excessive compared to the injuries sustained which he terms as severe.

6. It is his contention further that he should be allowed to enjoy the fruits of his judgment. In his view, the trial court did not err in finding that he should enjoy three quarter of those fruits.

7. Mr. Kiprugut deposes that he is a man of means and not an impecunious party to pocket and pilfer the decretal sum. Should he be required to, in the event that the appeal is successful, he would be able to reconstitute any portion of the amount ordered to be repaid. In his view, the applicants intend to take him in circles knowing that their appeal is not merited and they are only interested in denying or delaying him from the fruits of his judgment. The applicants have not shown what prejudice they are likely to suffer if they obey the orders of the trial court, and he urged the court to dismiss the application with costs.

8. In their written submissions dated 30th October 2017, Counsel for the applicants identifies the issue for determination as being whether the applicants have satisfied the conditions for grant of stay of execution set out under Order 24 (sic) of the Civil Procedure Rules. The applicants rely on the decision in **Global Tours & Travels Limited Nairobi HC Winding up Cause No 43 of 2000** in which Ringera J stated that grant of orders of stay is a matter of judicial discretion to be exercised in the interest of justice.

9. The applicants submit that such discretion is to be exercised in accordance with Order 42 Rule 6 of the Civil Procedure Rules 2010 which provides the conditions to be satisfied by an applicant. These conditions are that the court must be satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay. Order 42 (6) also requires that such security as the court orders for the due performance of the decree as may be issued ultimately has been given by the applicant.

10. With regard to the condition of substantial loss, the applicants rely on **Mukuma vs Abuoga [1988] KLR 645**. They also cite the case of **Equity Bank Ltd vs Taiga Adams Company Limited** as cited in the case of **Electric (East Africa) Limited and Another vs Mary Mueni Kioko & Another [2015] eKLR** for the proposition that the only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent in the event the appeal succeeds, the respondent would not be in a position to pay or reimburse the decretal sum as he is a person of no means. Counsel submits that no evidence has been tendered to show that the respondent is capable of repaying the decretal amount should the appeal succeed. The appellants would therefore suffer great loss if execution has already been carried out, as is likely, and the appeal succeeds.

11. The applicants argue that the application has been made without unreasonable delay, noting that judgment was issued on 3rd May 2017 and the appeal was preferred on 23rd May 2017.

12. As for the furnishing of security, Counsel for the appellants submit that the same has already been decided in the ruling of Justice Ndungu where the appellants were ordered to pay Kshs. 1,190,601 by way of 2 cheques. It is the appellants submission that it is in the interest of justice that the said orders of stay do issue pending the hearing and determination of their appeal.

13. In submissions dated 7th December 2017, the respondent submits through his Learned Counsel, Mr. Obae, that the issue raised in the appeal is the question of quantum of damages awarded to the respondent by the lower court as demonstrated in the memorandum of appeal. He submits therefore that in dealing with the application, the court should bear in mind that a successful litigant is entitled to the fruits of his judgment. In his view, the applicants have not satisfied the court that they have met the conditions required under Order 42 rule 6. He relies on the case of **Machira T/a Machira & Co. Advocates vs East African Standard** in this regard.

14. Counsel submits that in the event that the court is inclined to allow the application, it should direct that ½ of the decretal sum should be released to the respondent so that he can begin to enjoy the fruits of his judgment.

15. The application before me is fairly straightforward. It requires that the court determines whether or not to grant the applicants stay of execution pending their appeal against the decision of the trial court in favour of the respondent. Order 42 Rule 6 provides in part as follows:-

6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) 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

(b) 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.

(3)...

16. In dealing with an application such as is before me, the court has to consider the competing interests of the parties. The successful party has a right to enjoy the fruits of his judgment, as the respondent in this case has reiterated in his submissions. In this regard, the court should not be concerned with the interests of the appellants, while paying lip service to the interests of the successful litigant-see **Machira T/A Machira & Co Advocates vs East African Standard (No 2) [2002] KLR 63**. However, there is also a need to consider the interests of the losing party, so that an intended appeal is not rendered nugatory by payment of a decretal sum to a party who may not be in a position to repay the amount should the appeal be successful.

17. The need to balance the competing claims was underscored by the Court of Appeal in **Housing Finance Company of Kenya vs Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR**. In allowing the application for stay pending appeal in that case, the court observed as follows:

“16. In seeking to balance the interests of the respective parties, the approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruit of judgment in their favour and their rights are safeguarded. In our view, the balance tilts in favour of the applicant in this application.”

18. In this case, the applicants moved fast in lodging their appeal, and in filing the present application. They have argued that the respondent may not be in a position to repay the amount, and aside from averring that he has the means to repay the decretal amount, no evidence has been placed before the court to support this contention. The applicants have alleged that they complied with an order to deposit half the decretal amount in court.

19. In my view, the applicants are entitled to have the court’s discretion exercised in their favour. Accordingly, I hereby grant the orders of stay pending appeal sought in the application dated 31st July 2017. The orders of stay are, however, conditional upon the applicants depositing the entire decretal amount in court within 21 days of today. The appellants submit that they have already deposited half the decretal amount in court. Proof of this deposit shall be furnished within 7 days of today.

20. The parties shall bear their respective costs of the application.

Dated Delivered and Signed at Kericho this 1st day of November 2018

MUMBI NGUGI

JUDGE