



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 56 OF 2014

BEATRICE MUKULU KANG'UTA and

ZAKAYO MWAKA MUTHOKA (Suing as

Administrators of the Estate of PHILIP

MUSYOKA MUTHOKA).....PLAINTIFFS

VERSUS

SILVERSTONE QUARRY LIMITED.....1ST DEFENDANT

MANJI HIRJI CHHABHANDIYA.....2ND DEFENDANT

RULING

The Application

The application before the court for ruling is a Notice of Motion dated 21st November 2016, filed by the Defendants under the provisions of Order 42 Rule 6(1) and Order 51 of the Civil Procedure Rules. The Defendants are seeking orders that there be a stay of execution of the judgment delivered herein on 29th September, 2016, pending the hearing and determination of the Defendants' appeal at the Court of Appeal, being Civil Appeal No. 250 of 2016.

The Defendant's grounds are set out on the face of the Notice of Motion and in a supporting affidavit sworn on 21st November 2016 by Pravin Ramji Varsani, the 1st Defendant's Director. The main ground is that the Defendants are aggrieved with this Court's judgment, and have preferred an appeal against the said judgment. Further, that they have an arguable appeal. The Defendants allege that the Plaintiffs have obtained a decree and may proceed with execution thereof, and that since the Plaintiffs are of limited financial means, it may not be possible to recover the decretal sum from them if the appeal succeeds. The Defendants stated that they are willing to comply with any terms and conditions the Court deems fit to impose in order to grant the orders sought.

The Plaintiffs opposed the Defendants' application in a Replying Affidavit sworn by the 2nd Plaintiff on 28th November 2016, wherein it was averred that the Defendants' application is frivolous, vexatious and an abuse of the process of court as there was unreasonable delay in filing the application; the Defendants have not demonstrated how they will suffer substantial loss or how their appeal will be rendered nugatory if the orders sought are not granted; and have not offered security for the due performance of the Court's decree in accordance with the provisions of Order 42 Rule 6 of the Civil Procedure Rules. Lastly, the Plaintiffs urged that the Defendants have not tendered any evidence to show that they cannot pay the

decretal sum once the appeal is successful.

The Issues and Determination

I have read and carefully considered the pleadings filed. The parties attempted a consent as to the security to be offered which was not successful, with the Plaintiffs' counsel seeking that half of the decretal sum or Kshs 500,000/= be paid to the Plaintiffs, while the Defendants' counsel was of the view that the entire decretal sum be deposited in a joint interest earning account in both parties' counsels names. The issue that is therefore before the Court for determination is whether the execution of the judgment of this Court should be stayed and if so, on what terms.

Stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provides 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.”

For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:

(a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;

(b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and

(c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment, while at the same time balancing the rights of the parties in terms of the right to enjoyment of a judgment by the successful litigant, and the right to appeal by the unsuccessful litigant.

As regards whether the stay of execution should issue in the instant application, I note that the decision in the lower Court was delivered on 26th September 2016, the appeal in the Court of Appeal was lodged on 11th November 2016, and the application herein was filed on 21st November 2016, after a period of two months. Even though the Defendants did not explain the delay in filing the application, I do not find a delay of two months to be inordinate delay.

On the fulfillment of the second condition, the Defendants need to show what specific loss or prejudice they will suffer if they pay the decretal sum. The Defendants in this respect stated that the Plaintiffs will

not be able to refund the decretal sum of Kshs 1, 345,679/= in the event that their appeal succeeds. This averment in my view is sufficient and specific enough as to the substantial loss that the Defendants will suffer if the application is not granted.

The Plaintiffs urged in this regard that the Defendants ought to have provided cogent evidence that they are not persons of means. I am of the view that this is not a burden that can be placed on the Defendants, as they are not seized of such evidence. I am in this regard guided by the position as stated by the Court of Appeal in **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike, Nrb CA Civil Application No 238 of 2005** where it was held as follows:

“The court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge see for example Section 112 of the Evidence Act Cap 80 Laws of Kenya.”

Lastly, on the third condition, the Defendants did affirm that that they are willing to furnish security by depositing the entire decretal sum in Court. I also note that the Defendants in their appeal are contesting the findings of this Court as to the extent of their liability, and the amounts awarded as loss of dependency from the evidence tendered during trial.

Accordingly, the orders that commend themselves to me arising from the foregoing is that the Defendants’ Notice of Motion dated 21st November 2016 is allowed on the following terms:

1. There shall be a stay of execution of the judgment delivered herein on 29th September, 2016 and all consequential orders arising therefrom, pending the hearing and determination of the Defendants’ appeal filed in the Court of Appeal in Civil Appeal No. 250 of 2016, only on condition that the Defendants shall pay to the Plaintiffs Kshs 500,000/= , and deposit the balance of the decretal sum in an interest earning account in the joint names of the Plaintiffs’ and Defendants’ Advocates on record.
2. The said payment and deposit ordered in Order 1 hereinabove shall be made within 30 days of the date of this ruling, failing which the stay orders herein shall stand vacated.
3. The costs of the Notice of Motion dated 21st November 2016 shall follow the costs of the Appeal.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this **11th day of January, 2017.**

P. NYAMWEYA

JUDGE