



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 35 OF 2014

FAITH SOLOMON alias FAITH MUKUI SOO..... APPELLANT

VERSUS

KATHI NA KAKOKA SUCCESS LIMITED.....RESPONDENT

RULING

The Application

Judgment was delivered against the Appellant on 26th February 2014 for in Makueni PMCC No 33 of 2013, in which her suit was dismissed for want of prosecution with costs to the Respondent. On 15th May 2014, the Appellant filed a Notice of Motion in this Court of the same date seeking orders of stay of execution of the judgment and resultant decree arising from Makueni PMCC No 33 of 2013, pending the hearing and determination of the appeal herein, and for such further orders as may be expedient or in the interests of justice.

The application is supported by an affidavit sworn on the same date by the Appellant, and is premised on the grounds that the Applicant is aggrieved by the judgment of the trial Court, and has lodged an appeal against it through the Memorandum of Appeal filed herein dated 20th March 2014. Further, that the Appellant has arguable grounds of appeal, and that unless the stay is granted, the appeal will be rendered nugatory and the Appellant will suffer substantial loss. It was averred that the Respondent is in the process of taking a decree to levy execution, which draft decree was annexed.

The Appellant's learned counsel, Anne M. Kiusya & Co. Advocates, filed written submissions dated 16th November 2016, and urged that the issue of stay was determined in court on 24th October.2016 when the application came up for hearing, since the same was not contested as per the Respondents' replying affidavit.

On the condition for furnishing security, the Appellant submitted that is ready to comply with any such conditions that this court may deem fit to grant, and is further ready to deposit the security costs in a joint interest earning account in the names of the advocates on record, so as to guarantee the Respondent his judgment and decree if the appeal is unsuccessful.

Reliance was in this regard placed on various judicial authorities on the condition of furnishing security, including the Court of Appeal decision in **Gatirau Peter Munya vs Dickson Mwenda Kithinji & Others**, Nyeri Civil Appeal (Application) No. 38 of 2013.

The Response

The Respondent did not oppose the Appellant's application. The Respondent's advocate, namely Kinyanjui Theuri, filed a replying affidavit he swore on 16th July 2014, wherein he stated that the Appellant's application is legally acceptable as it is provided for under the law, and is not opposed save for the fact that the Appellant deposits the costs in a joint interest earning account before the hearing of the appeal.

The firm of Kinyanjui Njuguna & Co Advocates which is representing the Respondent also filed submissions dated 28th November 2016, and made reference to the case of **Firoze Nurali Hirji V Housing Finance Company of Kenya Limited & Another, (2012) e KLR** in support for argument that stay of execution pending Appeal be allowed as long as costs be deposited in a joint account.

The Issues and Determination

I have read and carefully considered the pleadings and submissions filed. As the order sought of stay of execution of the judgment and resultant decree arising from Makueni PMCC No 33 of 2013 is not contested, the only outstanding issue to be determined upon which conditions of provision of security the stay is to be granted.

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.”

In the present application, the Appellant did affirm that she is willing to furnish security by way of depositing the Respondent's costs in a joint interest earning account as requested by the Respondent, for satisfaction of the decree.

Accordingly, the orders that commend themselves to me arising from the foregoing, is that the Appellant's Notice of Motion dated 24th February 2014 is allowed on the following terms:

1. There shall be a stay of execution of the judgment and resultant decree arising from Makueni PMCC No 33 of 2013 pending the hearing and determination of the Appellant's appeal filed herein, on condition that the Appellant shall deposit the sum of Kshs 39,905/= in an interest earning account in the joint names of the Appellant's and Respondent's Advocate on record within 30 days of the date of this ruling, failing which the stay orders herein shall stand vacated.
2. The Appellant shall meet the costs of the Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 15th day of February 2017.

P. NYAMWEYA

JUDGE