REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. CIVIL APPLICATION NO. 464 OF 2016

MOMBASA COUNTY GOVERNMENT..……..…APPLICANT

VERSUS

PAULINE WANJIKU KAGENI …….....RESPONDENT

RULING

1. The applicant through a Notice of Motion application filed on 15th June, 2016 seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) That there be an order of stay of execution of the judgment delivered in favour of the plaintiff/respondent in CMCC No. 2246 of 2014 between Pauline Wanjiku Kageni and Mombasa County Government on 1st April, 2016, by Hon. J.M. Nang'ea, together with the execution process and/or all orders emanating therefrom pending hearing of the intended appeal; and

(iv) That the costs of the application be in the cause.

2. The application is supported by the affidavit of Jimmy Waliaula and the grounds on the face of it. The respondent's Advocate, Mr. Gikandi Ngibuini swore an affidavit in response to the said application. It was filed in court on 28th June, 2016. The applicant thereafter filed a further affidavit on 14th July, 2016. The respondent filed a further replying affidavit on 26th August, 2016. In turn the applicant filed an affidavit on 9th December, 2016 in response to the respondent's further affidavit.

3. The applicant filed its written submissions dated 13th July, 2016 while the respondent's written submissions were filed on 25th July, 2016. Counsel for the parties highlighted their submissions as hereunder.

APPLICANT'S SUBMISSIONS

Ms. Kisingo, Learned Counsel, held brief for Mr. Kibaara for the applicant. It was her submission that the applicant had satisfied the provisions of Order 42 rule 6 of the Civil Procedure Rules by showing that the applicant will suffer irreparable loss and that the application has been made without unreasonable delay. In Ms. Kisingo's view, security was not necessary in this case. She further argued that the case involves a monetary decree and if stay of execution is not granted, the applicant will suffer monetary loss as the business that was gutted by fire was the respondent's only source of income and it was not revived.

4. Ms. Kisingo submitted that the value of the plots whose title deeds were attached to the respondent's affidavit of 26th August, 2016 is unknown. The respondent therefore failed to show that she could compensate the applicant by way of damages if the appeal by the applicant was successful. Ms. Kisingo added that the respondent is the owner of only one plot and a trustee in the other plot. She submitted that if orders for stay of execution was not granted, the applicant will be forced to pay the respondent Kshs. 6 Million which will render the appeal nugatory.

5. Counsel for the applicant further submitted that under the provisions of Order 42 rule 8, no security is required from the Government and that the applicant is the County Government of Mombasa. It was Ms. Kisingo's contention that there was no inordinate delay in filing the application for stay of execution as the judgment was delivered on 1st April, 2016 and the application was filed on 15th June, 2016. To augument that submission, Counsel relied on the case of **Gahir Engineering Works Ltd. vs Rapid Kate Services Ltd. & Another** [2015] eKLR where the court held that there is no measure of what constitutes unreasonable delay.

6. As regards the respondent's contention that there was an agreement to pay, Counsel submitted that the respondent did not tender any proof of the said agreement. She prayed for the application to be allowed.

RESPONDENT'S SUBMISSIONS

7. On his part, Mr. Gikandi, Counsel for the respondent argued that the applicant should demonstrate with clear evidence that the respondent if called upon to refund the Kshs. 6,326,581.00 in issue, will not be able to refund the said amount. He stated that the applicant had not shown that the respondent is a bad debtor. He referred to the two (2) certificates of title in the respondent's name that were attached to the respondent's further replying affidavit for land which she bought for Kshs. 2 Million in the year 2013. Mr. Gikandi added that the respondent has a house valued at Kshs. 15 Million which is insured for the same value. The house contains moveables for the sum of Kshs. 1 Million. In Mr. Gikandi's view, the respondent is not a woman of straw. She has a judgment in her favour and she is entitled to the fruits of the judgment. He referred the court to the case of **Kenya Shell Limited vs Kibiru & Another** [1986] eKLR where the Court of Appeal held that if there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event.

8. Counsel for the respondent referred the court to paragraph 10 of the affidavit of Jimmy Waliuala where he deposes that the applicant is ready and willing to furnish security. Mr. Gikandi referred to paragraph 3 of the replying affidavit where it is deposed that the applicant's officers made an offer to settle. He asked the court to order the applicant to deposit security in court or in a joint bank account in the names of the Advocates on record.

APPLICANT'S RESPONSE

9. Ms. Kisingo referred the court to the case of **Hare Mkaha vs Pwani Mini Coach & Another** [2014] eKLR to show that the respondent has not discharged the burden as expected of her. According to Ms. Kisingo, the only means of livelihood for the respondent was the business that was gutted down by fire. She added that the agreement mentioned by Counsel for the respondent was not binding as it was negotiated by officers who were not authorized to do so.

ANALYSIS AND DETERMINATION

The issue for determination is if the applicant has satisfied the conditionalities for grant of orders for stay of execution pending appeal.

10. The provisions that address issues of stay of execution are stipulated in Order 42 rule 6 of the Civil Procedure Rules. The provisions are in the following terms:-

> ***"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 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 other 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 an order set aside".

11. The conditions under which an order for stay is granted are provided in Order 42 rule 6 (2) of the Civil Procedure Rules, which states:-

"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 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."

12. The application herein was filed on 15th June, 2016 after the judgment was delivered by the lower court on 1st April, 2016. I am in agreement with Ms. Kisingo that there was no unreasonable delay in filing the present application. In my view the duration of one and half months that elapsed before the said application was filed is not overly long.

13. On the issue of substantial loss, the applicant is of the view that it might be unable to recover the sum of Kshs. 6,326,581.00 from the respondent if stay of execution is not granted. Counsel for the applicant's argument to support that assertion is that the respondent in her further replying affidavit attached only one title deed for property which is in her name. No valuation report was availed to show the value of the said property. The 2nd title deed was for a property which she holds in trust for three (3) persons. The third property is jointly owned with another person. On this issue, Mr. Gikandi informed the court that the respondent purchased the two plots in the year 2013 for the sum of Kshs. 2,000,000/= and the properties are now valued at Kshs. 6,000,000/=.

14. The court notes that the foregoing information is contained in the further replying affidavit of the respondent filed on 26th August, 2016. The said affidavit shows that respondent owns a share in a company known as Charisma Properties Ltd., which owns plot No.1903/I/MN which is insured for Kshs. 15,000,000/=. The respondent attached a copy of the valuation report of the said property to her further replying affidavit. This was aimed at demonstrating that the respondent is not a woman of straw as alleged by the applicant. A perusal of the documents relied upon by the respondent to show the nature of the property she owns indicates that she is a Trustee for LR No. 8307 (original number 1474/19) of section III Mainland North, she can therefore not purport to say that it is her property. As regards LR No. 8306 (original Number 1474/18) of section III Mainland North, no valuation report was availed to substantiate Mr. Gikandi's assertion on the value of the property. The other property on plot No. 1903/I/MN is in the name of a company and is therefore not entirely her property taking into account that companies have their own legal personalities.

15. In the case of **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike and Another** Nairobi Civil Application No. 238 of 2005 (unreported) the Court of Appeal stated thus:-

"This court has stated before and it would bear repeating that while the legal duty is on an applicant to prove that an appeal would be rendered nugatory because an appellant 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 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 show what resources he has since that is a matter which is peculiarly within his knowledge …."

16. The respondent herein would like the applicant to pay her the decretal sum, plus interest and costs of the suit in the lower court, however from my analysis of the documentation she has relied on to show that she is not a woman of straw, the court cannot establish if she is seized of enough assets that are registered in her sole name or if she has a regular income from which the applicant can recoup its money from, if the appeal is successful.

17. Section 112 of the Evidence Act provides that:-

> ***"In Civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."***

18. The respondent seems to playing poker while she holds some cards close to her chest. She has failed to disclose information which would have positively advanced her arguments. The respondent's Counsel in his written submissions states that the applicant should apply the principle of good governance, accountability and transparency by enforcing the judgment of the lower court. In similar manner, it is this court's view that the respondent should have been transparent by laying bare to the court all facts to show her financial muscle so as to benefit from the fruits of the judgment of the lower court.

19. The case cited by Mr. Gikandi of **Kenya Shell Limited vs Kibiru & Another** (supra) is distinguishable from the present case in that the respondent therein satisfied the court that he had a steady income as an employee of Agip Kenya Ltd and that he was a pensionable employee. The Court of Appeal thus allowed him to enjoy the fruits of his judgment. It is my finding that in the instant application, the respondent has not placed sufficient material before this court to prove that she is a woman of means. In this court's view, Kshs. 6,326,581.00 is not a paltry sum and I am satisfied that the applicant has shown that it may suffer substantial loss if orders for stay of execution are not granted. The issue of there having been an agreement to pay is neither here nor there as the said agreement was not availed in court by the respondent's counsel.

20. The last point of argument was on the requirement for the applicant to deposit security in this matter. Counsel for the respondent referred the court to the supporting affidavit of the applicant's deponent, Mr. Jimmy Waliuala in paragraph 10 where he states the applicant is ready and willing to furnish security as shall be directed by the honourable court pending the hearing of this appeal. As such, Mr. Gikandi sought the deposit of the entire decretal amount either in court or in a joint bank account opened in the names of the law firms on record. The provisions of Order 42 rule 8 of the Civil Procedure Rules states:-

> ***"No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to have been done by him in his official capacity."***

21. The above provisions are self-explanatory. Much as Mr. Jimmy Waliuala gave an undertaking in his affidavit for the deposit of security, this court cannot order the applicant to deposit the same in court as that would be issuance of an unlawful order. I therefore make no orders requiring the deposit of security by the applicant.

22. The upshot of the foregoing is that the application filed on 15th June, 2016 is hereby allowed. Costs will abide by the outcome of the appeal.

It is so ordered.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **16th** day of **February, 2017**.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms. Kisingo for the applicant

Ms. Nasimiyu for the respondent

Oliver Musundi - Court Assistant