



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION
CIVIL APPEAL NO. 464 OF 2016

NGINU POWER ENGINEERING LIMITED.....PLAINTIFF

VERSUS

PAUL KABIRU WAINAINA.....RESPONDENT

RULING

1. The application dated 1st August, 2016 seeks orders that the court be pleased to stay execution of the Judgment entered in CMCC No. 5904 of 2014 on 1st July, 2016 pending the hearing of the appeal filed by the Appellant.
2. The application is premised on the grounds stated on the face of the application and is supported by the two affidavits filed by Ngigi Njuru, a director of the Applicant company. It is stated that on 1st July, 2016, the lower court entered judgment in favour of the Respondent for the sum of Ksh.750,000/= general damages and Ksh.2,000/= special damages. The Applicant was dissatisfied with the said judgment and appealed to this court. An application for stay pending appeal was made in the lower court and allowed on condition that half of the decretal sum be paid to the Respondent and the balance deposited in an interest earning account in the names of the counsels for the parties within 21 days.
3. The Applicant is apprehensive that the Respondent who he describes as a man of straw may not be able to refund the money paid to him if the appeal is successful. The Applicant has further averred that it's a reputable company with means to settle the decretal sum but is also ready and willing to deposit the same in a joint interest earning account in the names of the counsels for both parties if so ordered. According to the Applicant, the appeal has high chances of success.
4. The application is opposed. It is deponed that no appeal has been filed against the lower court ruling and therefore the application lacks merits and is an abuse of the court process. The Applicant contended that the allegation by the Applicant that he (the Respondent) is a man of straw is not supported by any evidence. The appeal has been criticized as having no triable issues.
5. Order 42 rule 6 (1) of the Civil Procedure Rules provides as follows:-

"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.”

My understanding of this provision is that this court is seized of the jurisdiction to hear the application at hand notwithstanding the fact that a similar application was heard in the lower court.

6. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

“No order for stay of execution shall be made under sub-rule (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.”

7. Order 22 Rule 22 (1) of the Civil Procedure Rules provides as follows:

“22. (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

8. Sufficient cause is established if the conditions set out in Order 42 rule 6(2) are met. (See for example the following persuasive authorities: **Tabro Transporters Ltd v Absalum Dova [2012] eKLR, Wachira Karani v Bildad Wachira [2016] eKLR**).

In the case at hand, the Applicant has described the Respondent as a driver who by the time of the trial was unemployed and his sources of income unknown.

9. The Respondent has not said anything about his ability to refund the decretal sum. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UR 144/2005) National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another:**

“This 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, Chapter 80 Laws of Kenya.”

10. The Respondent has not discharged the evidential burden to show what resources he has. Prima facie, the Applicants fears that he stands to suffer substantial loss may be justified. As stated by the Court of Appeal in the case of **Kenya Shell Limited vs. Kibiru (1986) KLR:**

“Substantial loss in its various forms, is the cornerstone of the jurisdictions for granting a stay. That is what has to be prevented.”

11. The Applicant has stated that he is ready to give security for the due performance of the decree. The appeal and the application were filed timeously.

12. To balance the interests of both parties herein, I allow the application on condition that the Applicant do deposit the decretal sum in a joint interest earning account of the counsels for both parties herein or in court within 30 days from the date hereof. Costs in cause.

Dated, signed and delivered at Nairobi this 23rd day of Feb, 2017

B. THURANIRA JADEN

JUDGE