



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 715 OF 2016

VINCENT MUGADIA KITAZI.....APPELLANT/APPLICANT

VERSUS

MATHEW MUTONYE.RESPONDENT

RULING

The Appellant/applicant has moved the court by way of a Notice of Motion dated 25th November, 2016 under Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and under Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders: -

1. Spent
2. Pending the hearing and determination of this application this honourable court do order stay of execution of the Decree and judgment delivered by the Honourable Mrs. A. M. Obura (Senior Principal Magistrate) on 17th November, 2016 in the Chief Magistrate's Court of Kenya at Nairobi Milimani Chief Magistrates Court CMCC no. 91 of 2013 Mathew Mutonye Vs Vincent Mugadia Kitazi.
3. Pending the hearing and determination of the filed appeal, this honourable court do order stay of execution of the Decree and judgment delivered by Mrs. A. M. Obura (Senior Principal Magistrate) on 17th November, 2016 in the Chief Magistrate's Court of Kenya at Nairobi Milimani Chief Magistrates Court CMCC No. 91 of 2013 Mathew Mutonye Vs Vincent Mugadia Kitazi.
4. The costs of this application be borne by the Respondent.

The application is based on the grounds set out on the body of the same and is supported by the annexed affidavit of Vincent Mugadia Kitazi.

The facts in support of the application are that, the Judgment being appealed from was delivered on 17th November, 2016 in the Chief Magistrate's Court Case No. 91 of 2013. The applicant avers that the appeal has high chances of success as there is no basis for excessive award of the quantum of damages and grant of exemplary damages and that the Respondent did not proof his case on a balance of probability.

He has further averred that if the orders sought herein are not granted the appeal shall be rendered nugatory and that he will suffer substantial loss.

That he is able and willing to give such security as the court may order for the due performance of the decree or any other order of the court.

On the issue of substantial loss, he avers that should execution proceed, he will be forced to borrow a loan from a bank at commercial rate which he will have to pay over a long period of time and its highly unlikely that the Respondent will be able to refund the money with interest at commercial lending rate.

That he is of limited financial ability and at the same time jobless after the Respondent terminated him from employment. That the Respondent will not suffer any prejudice if the orders sought are issued.

The Respondent filed grounds of objection on the 5th January, 2017 and opposes the application on four grounds; that he is entitled to the fruits of his legally acquired judgment, the appellant has not met the requirements for granting of an order for stay, that the appellant has not demonstrated at all that the Respondent is impecunious so as to make it impossible to recover the decretal amount in the event that the appeal succeeds and lastly that the memorandum of appeal filed by the appellant does not show that the appeal has any chances of success.

Parties made oral submissions in the matter. The submissions by counsel for the applicant basically reiterate the contents of the affidavit in support and in addition, he contended that the Appellant has a good appeal in that the Respondent did not proof the allegations of defamation against him.

On her part, counsel for the Respondent submitted that the application herein is premature in that no decree has been extracted, no certificate of costs and no warrants have been issued.

On substantial loss, it was her contention that the applicant did not proof that he shall suffer any such loss if the orders are not granted. That the only submission that he has made is that he shall suffer inconvenience which is not the same as substantial loss.

On the allegation that the Respondent shall not be able to refund the money in the event that the appeal succeeds, she averred that the Respondent is employed and he is not jobless as alleged by the Appellant.

On security, she submitted that the applicant did not make any case on security for due performance of the decree and in any event, the respondent would be okay if the court were to order that the money be deposited in court.

On the prejudice to be suffered by the Respondent, it is her submission that any party who has a judgment which remains unpaid, suffers enormous prejudice and the Respondent having gone through the trial, is entitled to the decretal sum and any further delay on the part of the Appellant is prejudicial enough.

In reply, Counsel for the appellant submitted that on issues of facts, the supporting affidavit is not contraverted and he generally reiterated the main submissions that he had made.

The court has carefully considered the application and the rival submissions. The principles governing an application for stay of execution pending appeal are well laid down under Order 42 Rule 6 (1) of the Civil Procedure Rules. In an application for stay pending appeal to this court, there is no requirement that the court considers the chances of success of the intended appeal/appeal. This is a requirement where the court of appeal is considering an application under Rule 5 (2) (b) of the Court of Appeal rules.

One of the considerations to be taken into account is whether substantial loss is likely to result to the applicant if the stay is not granted. I have considered the affidavit and the submissions by counsel for the Applicant to the likely consequences of the denial of stay of execution. According to him, the Applicant will be forced to take a bank loan at commercial interest rates and he is apprehensive that should the appeal succeed, the Respondent may not be able to refund the money at the same interest.

In his further submission, counsel for the Appellant/Applicant avers that even if the money is deposited in court, it will not attract interest at commercial rate which to him amounts to substantial loss to the applicant.

In my view, and as rightly submitted by the counsel for the Respondent, the issue of interest that the

money will accrue if the court were to order that it be deposited in court or in an interest earning account, is one of inconvenience and to that extent, I am persuaded that the Applicant has not proved that he will suffer substantial loss.

Apart from proof of substantial loss, the Applicant is enjoined to provide security. On the issue, this court notes that though no specific offer has been made by the applicant, he has deponed in paragraph 8 of his affidavit that he is able and willing to give security as the court may order for the due performance of the decree.

The importance of complying with the said requirement is to be found in the case of **Machira T/a Machira & Co. Advocates Vs East African Standard (No. 2) (2002) KLR 63** where the court held: -

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

It is, therefore, not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In any event, the Respondent herein would wish that the money be deposited in court.

On the issue of delay, it is obvious that the application was filed without delay.

In the premises, I find no merit in the Notice of Motion dated 25th November, 2016 and the same is dismissed with costs to the Respondent.

Dated, signed and delivered at Nairobi this 2nd day of February, 2017.

L NJUGUNA

JUDGE

In the presence of

..... *For the Appellant/Applicant*

..... *For the Respondent*