



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION
HC. CIVIL APPEAL NO. 512OF 2016

HUDUMA SACCO SOCIETY LIMITED.....APPLICANT

VERSUS

JUDITH KAVOSA.....RESPONDENT

RULING

1. The application dated 21st September, 2016 seeks orders that the execution of the judgment of the Co-operative Tribunal delivered on 29th June, 2016 be stayed till hearing and determination of this appeal.
2. It is stated in the affidavit in support that the Applicant has commenced execution proceedings and the auctioneers are claiming Kshs.52,015/= as their fees, which amount is almost half of the decretal sum. It is further stated that the appeal herein has high chances of success
3. The application is opposed. According to the replying affidavit, the Applicant has not met the conditions for the grant of the orders sought. It is asserted that the appeal herein has no chances of success and that the application is meant to delay the Respondent from the enjoyment of the fruits of the litigation.
4. The Applicant filed a supplementary affidavit in response to the matters raised in the replying affidavit. The Applicant reiterated the averments made in the affidavit in support of the application and termed the issues raised by the Respondent as matters of technicalities.
5. The application was canvassed by way of written submissions. I have considered the said submissions.
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**).

9. Turning to the case at hand, it is noted that the application under consideration was filed on 21st September, 2016. The judgment of the Tribunal was delivered on 29th July, 2016. It seems the application was triggered by the proclamation of the Applicants properties by the auctioneers on 15th September, 2016. Be as it may, the delay is not inordinate.

10. Although the Applicant has argued that the appeal has high chances of success, the substantial loss to be suffered has not been demonstrated. As stated by the Court of Appeal in the case of **Kenya 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. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”

11. The Applicant has not made any allegations that the Respondent is not capable of refunding the decretal sum in the event that the appeal is successful. As stated by the Court in the case of **Peter Ondande t/a Spreawett Chemis v Josephine Wangari Karanja [2006] eKLR**:

“For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted.”

12. On whether the appeal raises any triable issues, under Order 42 Rule 6(2) of the Civil Procedure Rules, the Applicant is seeking orders of stay pending appeal from the subordinate court to the High Court. The Applicant is not required to prove that it has an arguable appeal, unlike if it was an application in respect of an appeal to the Court of Appeal seeking stay of execution of decree of the High Court pending appeal to the Court of Appeal. (See for example **Nakuru HCCC 211/98 – Maritha Njeri Wanyoike & 3 others vs Peter Machewa Mwangi & 5 others; Bake ‘N’ Bite (Nrb) Limited v Daniel Mutisya Mwalonzi [2015] eKLR**).

13. The Applicant has not made any offer of security for the due performance of the decree. However if this court was satisfied that the Applicant would suffer substantial loss, conditional stay by deposit of security would have been imposed. However, having found that no substantial loss has been shown will result, I am not inclined to allow the application.

14. 1With the foregoing, I dismiss the application with costs.

Dated, signed and delivered at Nairobi this 16th day of March, 2017

B.THURANIRA JADEN

JUDGE