



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 301 OF 2016

THE KAREN HOSPITAL LTD.....APPLICANT

VERSUS

C N M.....RESPONDENT

RULING

1. The application dated 9th June, 2016 principally seeks orders that a stay of execution of the Judgment and Decree in Nairobi HIV & AIDS Equity Tribunal, Case No. 008 of 2015, C N M –vs- The Karen Hospital Limited, and all consequential orders therefrom, be granted pending hearing and final determination of this Appeal.

2. It is stated in the affidavit in support of the application that judgment was entered against the Applicant by the HIV & AIDS Equity Tribunal, Nairobi Case No. 008 of 2015 on 13th May, 2016 for the sum of Ksh.2,500,00/=. The Applicant was dissatisfied by the said judgment and appealed herein. The Applicant's contention is that the Respondent is not a person of means and will not be in a position to refund the decretal sum in the event that the appeal is successful. The Applicant company is apprehensive that it will suffer substantial loss and the appeal rendered nugatory if the stay orders are not allowed.

3. The application is opposed. The Respondent filed the grounds of opposition dated 30th June 2016. The said grounds are as follows:-

1. The application is incompetent, misconceived and otherwise an abuse of the court process and the Respondent shall at the first instance apply for its dismissal.

2. The application is meant to defeat the overriding objectives of the court as per the provisions of Section 1A & B of the Civil Procedure Act.

3. The affidavit in support of the application by one Mr. Jesse Charaggu Sworn in support of the application is incompetent and oppressive and the Respondent shall at the first instance apply for the same to strike out.

4. The Applicant has not satisfied the conditions set down under Order 42 Rule 6 (2) of the Civil Procedure Rules 2010 and in particular on substantial loss.

5. The conditions set out in the Case of Kenya Shell Limited –vs- Karuga & Another (1982 –

1988) I KAR 1018.

6. The Applicants have not shown how the intended appeal (if any) will be rendered nugatory if the orders of stay are not granted.

7. The Applicant has not shown that their appeal has high chances of success if at all.

8. The Respondent stands to suffer prejudice if this application is granted.

9. That the application is not merited and is made in bad faith and only meant to deny the Respondent the enjoyment of the fruits of the judgment and decree herein.

10. The Respondent is not a man of straw in any event and can repay any amounts if the appeal herein succeeds.

4. During the hearing of the application, the parties opted to file written submissions which I have duly considered.

5. 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.”

6. The Application under consideration was filed on 10th June, 2016. The judgment the subject of the appeal was delivered on 13th May, 2016. The application was filed without unreasonable delay.

7. The Applicant wishes to exercise his undoubted right of appeal. If the stay of execution orders are not granted, execution is imminent and the Applicant stands to suffer substantial loss.

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.”

8. The Applicant’s contention is that the Respondent will not be able to refund the decretal sum is not controverted by any other evidence.

As stated by the Court of Appeal in the case of **Nairobi 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 respondent or the lack of them. One 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.”

9. On whether the appeal has high chances of success, 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 he 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- Martha Njeri Wanyoike & 3 others –vs- Peter Machewa Mwangi & 5 Others; Bake ‘N’ Bite (Nrb) Limited –vs- Daniel Mutisya Mwalonzi [2015] eKLR**).

10. The Applicant has not offered any security for the due performance of the decree. However, the court can exercise its discretion and make orders for the deposit of security.

11. 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 bank account of the counsels for both parties herein or in court within 30 days from the date hereof. Costs in cause

Date, signed and delivered at Nairobi this 14th day of June, 2017

B. THURANIRA JADEN

JUDGE