



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO 91 OF 2016

NICHOLAS KING'OO KITHUKA.....APPELLANT

VERSUS

JAP QUALITY MOTORS LTD.....1ST RESPONDENT

F.K WAMBUA.....2ND RESPONDENT

RULING

The Application

Judgment was delivered against the Appellant on 24th August 2016 in Makueni PMCC 14 of 2013, and he has appealed against the said judgment through a Memorandum of Appeal he filed herein on 15th September 2016 . On 25th November 2016, the Appellant also filed a Notice of Motion in this Court of the same date seeking orders of stay of execution of the judgment delivered on 12th October 2016 in Makueni PMCC No 14 of 2013, and resultant decree and consequential orders pending the hearing and determination of the appeal herein.

The application is supported by an affidavit sworn on the same date by the Appellant, and is premised on the grounds that the Appellant has an arguable appeal with good prospects of succeeding, and that unless the stay is granted, the appeal will be rendered nugatory and the Appellant will suffer substantial loss. It was averred by the Appellant that the Respondent is in the process of taking a decree to levy execution, and that unless stay of execution is granted by this court he stands to suffer irreparably . The Appellant further averred that he is ready and willing to abide by any condition that may be imposed by this Court.

The Appellant's learned counsel, Anne M. Kiusya & Co. Advocates, filed written submissions dated 2nd February 2017, and urged that the Appellant had met the principles governing of stay of execution pending appeal as stated in **Channan Agricultural Contractors (K) Ltd vs Nichodemus Mugara, (2006) e KLR** . It was in this regard stated that the Appellant has already filed an appeal and will suffer substantial loss as his right of appeal will be rendered nugatory if the stay is not granted, as held in **Bethuel Muiruri Benjamin vs Development Bank of Kenya, (2006) e KLR**.

Further, that the decretal amount is substantial as the judgment in question touches on six other suits, and the Appellant may not be able to recover the entire amount paid if the appeal succeeds. Lastly, that the instant application was made without unreasonable delay, and the Appellant is ready and willing to deposit with the Court security for the due realization of the judgment.

The Response

The 2nd Respondent advocates on record, J.M. Mutua and Company Advocates, filed Grounds of Opposition dated 20th February 2017 in response to the Appellant's application. It was stated therein that the application ought to be dismissed as it is incompetent, lacks merit and is only meant to circumvent the wheels of Justice by denying the 2nd Respondent costs of defending PMCC No. 14 of 2013 at Makueni Law Courts.

Further, that the Appellant has not annexed any Decree, Certificate of costs, Proclamation Notice or warrants of attachment or of sale to demonstrate that execution by the 2nd Respondent is imminent. In addition, that the Appellant has not demonstrated in both his application and supporting affidavit that the 2nd Respondent is a man of straw who is not capable of refunding the costs of the lower court suit at Makueni Law Courts in the event that the appeal succeeds.

The Respondent's advocate, namely Mr. Muumbi, who was holding brief for Mr. Kilonzo, wholly relied on the said Grounds of Opposition in oral submissions he made in Court during the hearing of the application on 6th March 2017.

The Issues and Determination

I have read and carefully considered the pleadings and submissions filed. The issue before the Court is whether the judgment and decree delivered in Makueni PMCC No 14 of 2013 should be stayed pending the hearing of the appeal. Stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

“6.(1) 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.

(2) 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 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.”

For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:

(a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;

(b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and

(c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment, while at the same time

balancing the rights of the parties.

In the present application, this Court notes that judgment was delivered in the lower court on 24th August 2016; the Memorandum of Appeal was filed herein on 15th September 2016 while the instant application was filed on 25th November 2016. There was therefore no inordinate delay in filing the application.

On the fulfillment of the second condition, the Appellant needs to show the specific loss or prejudice he will suffer. The Applicant has in this respect stated the judgment by the lower Court involves six other cases and that the Respondent may not be able to refund him the amount paid as costs, in the event that the Appellant's appeal succeeds.

I note in this regard that the judgment of the lower Court dismissed the Appellant's suit against the Respondents and ordered him to pay the costs of the 2nd Respondent. There was no evidence produced by the Appellant of the costs sought by the Respondent to guide this court in its determination as to whether substantial loss will be suffered by the Appellant, and as to the security that he should provide in the circumstances.

The Appellant has therefore not discharged his evidential burden in this respect, even though he did affirm that that he is willing to furnish security by depositing the entire decretal sum in Court. In addition, as there is no evidence of any execution proceedings brought by the 2nd Respondent as regards payment of his costs, the instant application is also premature.

Accordingly, the orders that commend themselves to me arising from the foregoing, is that the Appellant's Notice of Motion dated 25th November 2016 is dismissed, save that the Appellant shall be at liberty to pursue stay proceedings in the event of execution being sought by the 2nd Respondent. The costs of the said Appellant's Notice of Motion shall follow the Appeal.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 13th day of June 2017.

P. NYAMWEYA

JUDGE