



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 66 OF 2016

STEPHEN M. MWANGI 1ST APPELLANT

MOHAMED A. HASSAN 2ND APPELLANT

AHMED & BROTHERS LTD 3RD APPELLANT

VERSUS

ALBERT WESONGA RESPONDENT

RULING

1. In the Notice of Motion dated 17th October, 2016, the appellants (hereinafter the applicants) moved this court seeking the following substantive orders:

- a. That there be stay of execution of the judgement and decree of the subordinate court made on 12th April 2016 pending the hearing and determination of the instant appeal.
- b. That the order of stay of execution granted on 6th September, 2016 be set aside and/or varied.
- c. That costs of the application be provided for.

The application is supported by grounds stated on its face and a supporting affidavit sworn on 17th October, 2016 by *Ahmed Mbarak*, the applicants' manager.

2. On 24th January 2017, by consent of the parties, the court directed that the applications for stay filed in seven other appeals which originated from the same cause of action as this appeal be heard together and the ruling on the instant application should apply to the applications filed in the seven related appeals. These are HCCA No. 78 of 2016; HCCA No. 86 of 2016; HCCA No.90 of 2016; HCCA No. 91 of 2016; HCCA No. 93 of 2016 and HCCA No. 94 of 2016. Upon application by Learned counsel *Mr. Ombima*, the response filed by the respondent in the instant appeal was adopted as the response by the respondents in all the other related appeals.

3. It is the applicant's case that their appeal to the High Court against the entire decision of the trial court had high chances of success; that if the orders sought were not granted, their appeal would be rendered nugatory; that they made a similar application for stay to the trial court and in its ruling of 6th September 2016, the trial court granted stay on condition that half of the decretal amount plus taxed costs was to be paid directly to the respondents and the other half was to be deposited in a joint interest earning account in the names of advocates on record for the parties within 45 days of the ruling date.

4. The applicants were dissatisfied with the orders of stay granted by the trial court and this is what triggered the filing of the current application to this court. The applicants now urge this court to set aside or vary the said orders on grounds that if they were allowed to stand, they will suffer substantial loss if the appeal was successful and the respondents were unable to refund the amounts paid to them considering that their financial ability was unknown.

5. The applicants advanced the view that in order to safeguard the interests of both parties, they should be allowed to deposit the entire decretal amount in a joint interest earning account in the names of both advocates on record pending determination of the appeal.

6. The application is opposed through a replying affidavit sworn by the 1st respondent *Albert Wesonga*. It is the respondent's contention that the applicants have failed to demonstrate sufficient cause to warrant orders of stay; that the application is made in bad faith to delay the respondent's enjoyment of the fruits of their judgment; that the 1st respondent is a man of means and will be able to refund any money paid to him as ordered by the trial court should the applicant's appeal succeed. The respondents urged the court to dismiss the application for lack of merit.

7. The application was canvassed before me on 14th March, 2017. Learned counsel *Mr. Kitiwa* argued the application on behalf of the applicants while learned counsel *Mr. Ombima* represented the respondents. In their submissions, both advocates re-iterated the depositions made in the affidavits filed by the parties and ably buttressed their client's respective positions.

8. I have considered the application, the affidavits on record, the submissions made by counsel for both parties and the persuasive authority cited by the respondent namely ***Antoine Ndiaye V African Virtual University HCC No. 422 of 2006 (NRB)***.

9. As correctly pointed out by *Mr. Kitiwa* in his submissions, the relief of stay of execution pending appeal is discretionary in nature. But needless to say, that discretion must be exercised judiciously in accordance with the law and not capriciously. In order to benefit from an order of stay of execution pending appeal, an applicant must demonstrate that there is sufficient cause to warrant the exercise of the court's discretion in his favour.

10. *Order 42 Rule 6* of the *Civil Procedure Rules* establishes guidelines meant to assist the court in the exercise of its aforesaid discretion. The provision requires an applicant to demonstrate that if stay is not granted, he was likely to suffer substantial loss; that the application was filed timeously and that he was willing and able to give such security as the court may order for the due performance of the decree.

11. Applying the above parameters to the instant application, the court record reveals that the judgment giving rise to the appeal filed herein was delivered on 12th April, 2016; the memorandum of appeal was filed on 26th April, 2016 and an application for stay of execution was filed in the trial court on 9th May, 2016. That application was determined on 6th September, 2016 and on 17th October, 2016 about one and a half months later, the instant application was filed. As the applicants could not have properly filed an application for stay of execution in the High Court while a similar application was pending in the lower court, I am satisfied that the instant application was filed without unreasonable delay.

12. Turning to the claim that the applicants stand to suffer substantial loss if stay sought is not granted, the applicants contend that if they comply with the terms of the conditional stay granted by the trial court or execution issues, they are unlikely to recover their money which is substantial in the event that their appeal succeeds given that the respondents financial ability is unknown.

13. The 1st respondent has countered this claim by asserting that he is a man of means and he will be in a position to pay the decretal sum incase the appeal succeeds and he is required to refund the said amount. He however does not state what he does for a living, his sources of income if any; his occupation or the means at his disposal that would enable him make such a refund.

14. The law is that once an applicant expresses apprehension about a respondent's ability to refund the decretal sum, the evidential burden of proof shifts to the respondent to rebut that apprehension. This position was re-iterated by the Court of Appeal in **ABN Amro Bank N.K V Le Monde Foods Limited Civil Application No. 15 of 2002 (NRB)** where it stated as follows;-

“In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal was to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has –such as land, cash in the bank and so on”.

15. In this case, the replying affidavit was sworn by the 1st Respondent and he is thus the only one who responded to the applicant's fears that the respondents could be persons of straw. The 1st respondent did not however avail any evidence to substantiate his claim that he is a man of means. His financial capacity was not disclosed.

16. As stated earlier, the other respondents did not make any attempt to rebut the appellants claim that they did not have the financial muscle to refund any monies paid to them should it become necessary. In the premises, I am satisfied that the respondents have failed to demonstrate that they have the financial means to refund the decretal amount incase the appeal succeeded.

17. The annexures to the supporting affidavit reveals that the decree sought to be stayed is for a sum of Kshs. 1, 463,454 exclusive of costs and interest. The amount payable as costs and interest has not been disclosed by any of the parties. Taking this into account, the decretal amount cannot be said to be insignificant. And as the respondents have failed to prove that they are capable of refunding the decretal amount should the appeal succeed, I am persuaded to find that the applicants are likely to suffer substantial loss if the orders sought are not granted.

18. With regard to the condition requiring the pledging of security, the applicants have offered a very reasonable security for the performance of the decree. They have offered to deposit the entire decretal amount into a joint interest earning account operated by both counsel on record pending determination of the appeal.

19. It is not lost on me that the respondents being successful litigants are entitled to the fruits of their judgment. But the applicants having been aggrieved by the judgment of the trial court have a right of appeal to the High Court and they are entitled to the exercise of that right. Given the respondent's inability to demonstrate their financial ability, there is a real risk that that right may be rendered meaningless if execution proceeded and they were unable to recover the decretal amount should their appeal be successful.

20. The converse would be the case if stay was granted but on condition that the applicants deposited the decretal amount in an interest earning account. In such a case, both parties were not likely to suffer any prejudice since the decretal amount plus all interest accrued during the pendency of the appeal will be available to the successful party.

21. For the foregoing reasons, I find merit in prayer 3 of the Notice of Motion dated 17th October, 2016. Stay pending appeal is hereby granted on condition that the applicants shall deposit the disclosed decretal amount into a joint interest earning bank account operated by counsel on record for both parties within the next 30 days. In default of compliance with this condition within the specified time, the stay granted shall automatically lapse.

22. Before concluding this ruling, I wish to briefly comment on the applicant's prayer seeking that the stay orders granted by the trial court be set aside or varied. In my view, this prayer is misconceived basically because the court cannot set aside or vary non existent orders. It is not disputed that the stay orders were to remain in force for only 45 days after they were issued on 6th September, 2016 meaning that they have since lapsed by effluxion of time.

23. Secondly, the applicants had a right to approach this court with a fresh application for stay pending appeal under *Order 42 Rule 6(1)* of the *Civil Procedure Rules* irrespective of whether or not they were dissatisfied with the decision of the trial court on a similar application. Finally, as agreed by the parties, this ruling shall apply to all the other related appeals specified in paragraph 2 of this ruling.

24. The costs of the applications shall abide the outcome of the appeal.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 14th day of June 2017

In the presence of:

Mr. Ombima for the respondents

Mr. Lobolia Court Clerk

No appearance for the applicants.