



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 795 OF 2005

GRACE WANGUI NGENYE.....PLAINTIFF/RESPONDENT

VERSUS

TOM SHINDI.....1ST DEFENDANT/APPLICANT

THE STANDARD GROUP LIMITED.....2ND DEFENDANT/APPLICANT

RULING

1. Before this Court is an application dated 20th March, 2017 for stay of execution of the judgment delivered on 24.2.2016, pending the hearing and determination of Appeal. The application is supported by the Affidavits of **CAROLINE CHERUIYOT**, the Legal Officer of the 2nd Defendant and that of **JOHN MAINA NGECHU** Advocate for the Defendants. The application also seeks to have the firm of C.W Githae & Company Advocates come on record for the defendants in place of Makhecha & Gitonga Advocates.

2. The grounds in support of the application are that the judgment was delivered on 24th February, 2016 and Plaintiff's bill of costs taxed on 14.02.2017, that the Defendants filed a Notice of Appeal and they are apprehensive that the decree will be executed as the Plaintiff on 14.3.2017 served a Notice to that effect. The Defendants further state that the decretal sum is substantial and that the chances of recovering the same are uncertain and the appeal would be rendered nugatory were it to succeed.

3. The respondent/plaintiff has opposed the application vide a replying Affidavit sworn on 30th March, 2017 in which she avers that the application lacks merits and its solely calculated at defeating the ends of Justice. She further avers that the decretal sum is not so large as to warrant any further delay in its remittance to herself and that the same should be paid to her forthwith. She has also taken issue with the notice of Appeal and avers that the same is incompetent as it was filed in violation of Rule 75 (2) of the court of Appeal Rules 2010. She has urged the court to dismiss the application.

4. The requirements for granting an order of stay of execution pending Appeal are provided under Order 42 Rule 6 of the Civil Procedure Rules which are;

(a) That the application has been made without unreasonable delay;

(b) That security for costs has been given; and

(c) That substantial loss may result to the Applicant unless the order for stay is made.

5. The above requirements were also enunciated by **Ringera J** (as he then was) in **Global Tours &**

Travels Limited winding up cause No. 43 of 2000.

6. The instant application was filed on 20th March, 2017 whilst judgment was issued on 24th February, 2016. The question of whether there has been unreasonable delay in making an application for stay or otherwise is something for the court in its discretion to determine considering the circumstances of each case. The instant application was brought more than a year after the judgment was issued. Never-the-less the Defendants had earlier on made an application for review of the Judgment which application was dismissed on 31st October, 2016 in which case the instant application was filed almost 4 months after the said ruling was delivered. It is therefore clear that the application was filed after inordinate delay and no explanation has been given for the same.

7. In the Supporting Affidavit of Caroline Cheruiyot, the Defendants states that they are ready to secure the decretal sum and abide by any conditions the Court may impose.

8. Both parties herein have dwelt a lot on the taxation of the Plaintiff's bill of costs and the ruling thereafter. In fact, the Defendants state that the instant application is necessitated by the taxation of the plaintiff's bill of costs and service of the Notice of Entry of the judgment on the Defendants on 14.3.2017. This was the position in the case of **Timsales Limited Vs. Hiram Gichohi Mwangi, Civil Appeal Number 94 of 2008 (2013)** where the court stated that;

“the mere fact that the process of execution has commenced or is likely to commence does not amount to substantial loss for the reason that execution is a legal process and that the Appellant must establish other factors”.

Therefore, the fact that the Defendants are apprehensive that the decree will be executed is not good a ground to be considered by this Court. In the Supporting Affidavit filed before this Court, the Defendants have not demonstrated what substantial loss they are afraid of suffering.

9. For an order of stay of execution to be granted, the court has to be satisfied that the applicant has met the provisions of Order 42 rule 6 (1). This was well emphasized in the case of **Antonie Ndiaye V. African Virtual University (2015) Civil Suit No. 422 of 2006** where the Court held that,

“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judiciously, that is to say, upon defined principles of law, not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown, the Court being guided by three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules...”

10. This court has noted that the defendants have offered to secure the decretal sum and in doing so, they are ready to abide by any conditions that the court may impose. As I have stated elsewhere in this ruling, an order for stay of execution pending Appeal is discretionary but I am also alive to the fact that the discretion should be exercised judiciously and not capriciously or whimsically. In granting such an order, the court has to balance the interest of both parties to the application. Those of the Applicant who has a right of Appeal as well as those of the Respondent who has valid decree and who is entitled to the fruits of his/her judgment. In so doing, I have noted the contents of paragraph 4 of the supporting affidavit by Caroline Cheruiyot wherein the defendants have expressed doubts of recovering the decretal sum should the same be paid to the plaintiff and the Appeal succeeds. I have perused the proceedings herein and there is evidence that the plaintiff herein is a Judge of the High Court and cannot be said to be a woman of straw.

11. In the premises, I find that the application has some merits and the same is allowed but on the following conditions;

(a) That the respondent to be paid a sum of Kshs. 5,000,000 (5 Million) within 30 days.

(b) That the balance of the money to be deposited in a joint account in both names of the advocates on record within 60 days.

(c) Failure to comply with order (a) and/or (b) above, the stay order shall lapse.

(d) There is no order as to costs.

Dated, signed and delivered at Nairobi this 14th day of July, 2017.

.....

L. NJUGUNA

JUDGE

In the presence of

..... *for the Plaintiff.*

..... *For the Defendants.*